AUTHENTICATED
U.S. GOVERNMENT
INFORMATION
GPO

FEDERAL REGISTER

VOLUME 30 • NUMBER 82

Thursday, April 29, 1965 • Washington, D.C.

Pages 5955–6103

Agencies in this issue—

Atomic Energy Commission
Civil Aeronautics Board
Comptroller of the Currency
Consumer and Marketing Service
Defense Department
Education Office
Federal Aviation Agency
Federal Communications Commission
Federal Power Commission
Fish and Wildlife Service
Food and Drug Administration
Foreign Assets Control Office
Indian Affairs Bureau
Internal Revenue Service
Interstate Commerce Commission
Labor Department
Land Management Bureau
Maritime Administration
National Bureau of Standards
Public Health Service
Securities and Exchange Commission

Detailed list of Contents appears inside.

THE NATIONAL ARCHIVES OF THE UNITED STATES • 1934 •

Subscriptions Now Being Accepted

SLIP LAWS

89th Congress, 1st Session
1965

Separate prints of Public Laws, published immediately after enactment, with marginal annotations and legislative history references.

Subscription Price:

$12.00 per Session

Published by Office of the Federal Register, National Archives and Records Service, General Services Administration

Order from Superintendent of Documents, U.S. Government Printing Office, Washington, D.C., 20402

FEDERAL REGISTER

Area Code 202 Phone 963-3261

Published daily, Tuesday through Saturday (no publication on Sundays, Mondays, or on the day after an official Federal holiday), by the Office of the Federal Register, National Archives and Records Service, General Services Administration (mail address National Archives Building, Washington, D.C. 20408), pursuant to the authority contained in the Federal Register Act, approved July 26, 1935 (49 Stat. 500, as amended; 44 U.S.C., ch. 8B), under regulations prescribed by the Administrative Committee of the Federal Register, approved by the President (1 CFR Ch. I). Distribution is made only by the Superintendent of Documents, Government Printing Office, Washington, D.C. 20402.

The FEDERAL REGISTER will be furnished by mail to subscribers, free of postage, for $1.50 per month or $15.00 per year, payable in advance. The charge for individual copies (minimum 15 cents) varies in proportion to the size of the issue. Remit check or money order, made payable to the Superintendent of Documents, Government Printing Office, Washington, D.C. 20402.

The regulatory material appearing herein is keyed to the CODE OF FEDERAL REGULATIONS, which is published, under 50 titles, pursuant to section 11 of the Federal Register Act, as amended. The CODE OF FEDERAL REGULATIONS is sold by the Superintendent of Documents. Prices of books and pocket supplements are listed in the first FEDERAL REGISTER issue of each month.

There are no restrictions on the republication of material appearing in the FEDERAL REGISTER or the CODE OF FEDERAL REGULATIONS.

Contents

AGRICULTURE DEPARTMENT

See Consumer and Marketing Service.

ATOMIC ENERGY COMMISSION

Notices

Commonwealth Edison Co.; application for construction permit and facility license 6092
Rural Cooperative Power Association; proposed issuance of operating authorization regarding Elk River Demonstration Reactor Program Project 6092

CIVIL AERONAUTICS BOARD

Notices

Certain indirect air carriers; temporary relief 6093

COMMERCE DEPARTMENT

See Maritime Administration; National Bureau of Standards.

COMPTROLLER OF THE CURRENCY

Proposed Rule Making

Required notification to nominate bank directors 6074

CONSUMER AND MARKETING SERVICE

Rules and Regulations

Grapefruit:
Import regulation 6065
Shipments limitations 6065
Poultry soups; postponement of effective date of amendments 6064
Southern peas for processing; standards for grades 6063

DEFENSE DEPARTMENT

Rules and Regulations

Miscellaneous amendments to subchapter 5959

EDUCATION OFFICE

Notices

Institutions of higher education; cutoff date for filing applications for Federal capital contributions 6092

FEDERAL AVIATION AGENCY

Rules and Regulations

Airworthiness directives; Boeing Model 707 Series aircraft 6067
Alterations:
Control area 6068
Control zone and transition area 6068
Restricted area (2 documents) 6069
Transition area 6069
Control zone, control area extension and transition area; alteration, designation, and revocation 6069
General operating and flight rules; alternate airports 6070
Transition area; designation (2 documents) 6069
Transport category airplanes; minimum flight crewmember requirements 6066

Proposed Rule Making

Airborne radio navigation and communications equipment for general aviation aircraft 6074
Transition area, control zones and control area extension; designation and revocation 6077
Transition area; designation 6077

FEDERAL COMMUNICATIONS COMMISSION

Rules and Regulations

Domestic public radio services (other than maritime mobile) and industrial radio service; miscellaneous amendments 6038
FM broadcast station; Beaumont and Port Arthur, Tex., table of assignments 6063

Proposed Rule Making

Distribution of television broadcast signals by community antenna television systems 6078

Notices

Hearings, etc.:
Chapman Radio and Television Co. and Anniston Broadcasting Co 6094
KFOX, Inc., et al 6094
Ocean County Radio Broadcasting Co. et al 6094
Parish Broadcasting Co. and Clinton Broadcasting Co 6094
Radio Station WKEU and Telerad, Inc 6095
Waynesboro Broadcasting Corp. and Music Productions Inc 6095
WMEN, Inc., and Tallahassee Appliance Corp 6096
WMOZ, Inc 6096

FEDERAL POWER COMMISSION

Notices

Hearings, etc.:
Signal Oil and Gas Co. et al 6097
United Gas Pipe Line Co. et al 6098

FISH AND WILDLIFE SERVICE

Rules and Regulations

Columbia National Wildlife Refuge, Washington; sport fishing 6073

FOOD AND DRUG ADMINISTRATION

Rules and Regulations

Drugs:
3-nitro-4-hydroxyphenylarsonic acid 6071
Sodium cloxacillin monohydrate and sodium cloxacillin monohydrate capsules 6071
Potassium salt preparations intended for oral ingestion by man; correction 6071

FOREIGN ASSETS CONTROL

Notices

Importation of certain merchandise directly from Taiwan (Formosa); available certification by the Government of the Republic of China 6090

HEALTH, EDUCATION, AND WELFARE DEPARTMENT

See Education Office; Food and Drug Administration; Public Health Service.

INDIAN AFFAIRS BUREAU

Proposed Rule Making

Uintah Indian Irrigation Project, Utah; operation and maintenance charges 6074

INTERIOR DEPARTMENT

See Fish and Wildlife Service; Indian Affairs Bureau; Land Management Bureau.

INTERNAL REVENUE SERVICE

Rules and Regulations

Maritime construction reserve fund; deposits 6030

INTERSTATE COMMERCE COMMISSION

Notices

Fourth section applications for relief 6100
Railroads serving Iowa and Minnesota; diversion or rerouting of traffic 6100

LABOR DEPARTMENT

Notices

Advisory Council on Employee Welfare Pension Benefit Plans; recommendations for appointment 6096

LAND MANAGEMENT BUREAU

Rules and Regulations

Public land orders:
California 6072
South Dakota 6072
Wyoming 6072

Notices

Alaska:
Filing of plat of survey 6090
Small tract classification 6091
Small tract classification orders canceled in their entirety 6090
Proposed withdrawal and reservation of lands:
Colorado 6090
New Mexico 6090

(Continued on next page)

MARITIME ADMINISTRATION

Notices

Delta Steamship Lines, Inc., and Farrell Lines, Inc.; notice of application 6091

NATIONAL BUREAU OF STANDARDS

Notices

Standard frequency and time transmissions 6091

PUBLIC HEALTH SERVICE

Rules and Regulations

Fellowships, internships, training; oath of allegiance 6072

SECURITIES AND EXCHANGE COMMISSION

Notices

Boston Fund, Inc.; notice of application 6099

TREASURY DEPARTMENT

See Comptroller of the Currency; Foreign Assets Control; Internal Revenue Service.

List of CFR Parts Affected

(Codification Guide)

The following numerical guide is a list of the parts of each title of the Code of Federal Regulations affected by documents published in today's issue. A cumulative list of parts affected, covering the current month to date, appears at the end of each issue beginning with the second issue of the month.

A cumulative guide is published separately at the end of each month. The guide lists the parts and sections affected by documents published since January 1, 1965, and specifies how they are affected.

7 CFR

51 6063
81 6064
905 6065
944 6065

12 CFR

PROPOSED RULES:
17 6074

14 CFR

25 6066
39 6067
71 (6 documents) 6068, 6069
73 (2 documents) 6069
91 6070
121 6066
PROPOSED RULES:
1 6074
23 6074
25 6074
27 6074
29 6074
37 6074
61 6074
71 (3 documents) 6074, 6077
75 6074
91 6074
95 6074
97 6074
135 6074

21 CFR

3 6071
144 6071
146a 6071

25 CFR

PROPOSED RULES:
221 6074

26 CFR

2 6030

32 CFR

1 5959
2 5969
3 5971
4 5985
5 5985
6 5986
7 5986
8 5998
9 6003
12 6003
13 6013
15 6013
16 6013
17 6019
18 6019

42 CFR

61 6072
63 6072

43 CFR

PUBLIC LAND ORDERS:
3652 6072
3653 6072
3654 6072

47 CFR

21 6038
73 6063
91 6038
PROPOSED RULES:
21 6078
74 6078
91 6078

50 CFR

33 6073

Rules and Regulations

Title 32—NATIONAL DEFENSE

Chapter I—Office of the Secretary of Defense

SUBCHAPTER A—ARMED SERVICES PROCUREMENT REGULATIONS

MISCELLANEOUS AMENDMENTS TO SUBCHAPTER

The following amendments to this subchapter are issued by direction of the Assistant Secretary of Defense (Installations and Logistics) pursuant to the authority contained in Department of Defense Directive No. 4105.30, dated March 11, 1959 (24 F.R. 2260), as amended, and 10 U.S.C. 2202.

PART 1—GENERAL PROVISIONS

1. Section 1.104 is revised; new paragraph (d) is added to § 1.106–2; §§ 1.107, 1.111–1, and 1.111–2 are revised; and new §§ 1.111–3 and 1.111–4 are added, as follows:

§ 1.104 Content of subchapter.

This subchapter will contain policies and procedures relating to the procurement of supplies and services and is designed to achieve maximum uniformity throughout the Department of Defense. Hence, implementation of this subchapter by and within the Military Departments, the Defense Supply Agency, the Defense Communications Agency and the Defense Atomic Support Agency shall be only in accordance with § 1.108. This subchapter will be amended, from time to time, to set forth improved procedures which reduce contract preparation time, simplify and standardize contract forms within the Department of Defense, and improve the contracting process by standardizing procedures and instructions. In this connection, personnel at all levels, particularly the contracting level are encouraged to submit through appropriate channels suggestions, based on operating experience, to reduce administrative burden, simplify contract forms and procedures, and otherwise accomplish the foregoing objectives.

§ 1.106–2 Defense Procurement Circular.

* * * * *

(d) Statements in Defense Procurement Circulars to the effect that the material published therein is "effective upon receipt" or upon a specified date, or that changes set forth in the Circular are "to be used upon receipt", mean that any new or revised clauses or forms included in the Circular shall be included in invitations for bids and requests for proposals issued thereafter, unless a different meaning is expressed in the Circular. However, unless otherwise provided in the Circular, the new or revised clauses or forms need not be included in solicitations already in process of preparation where their inclusion would cause an undue delay in the solicitation.

§ 1.107 Dissemination and effective date of the subchapter and revisions.

(a) This subchapter, and revisions thereof, will be distributed by the Departments to all interested activities and individuals within the Department of Defense. The Departments shall obtain from the Government Printing Office the number of copies of the subchapter, and revisions thereof, required to make this distribution. Private firms, individuals, and others outside the Department of Defense may obtain copies by purchase from the Superintendent of Documents, U.S. Government Printing Office, Washington, D.C., 20402.

(b) Revisions of the subchapter shall be effective at all applicable echelons 90 days after date of issuance, unless otherwise prescribed in any such revisions. Contract clauses and forms prescribed in such revisions shall be used in all invitations for bids and requests for proposals issued after the effective date thereof, unless otherwise provided in any such revisions.

§ 1.111–1 Reporting procedures.

Reports of suspected criminal conduct, noncompetitive practices, kickbacks, and other procurement irregularities shall be made by each Department in accordance with procedures set forth in Subpart F of this part.

§ 1.111–2 Noncompetitive practices.

(a) Unless bids or proposals are genuinely competitive, contract prices tend to be higher than they should be. If the Secretary concerned or his representative considers that any bid received after formal advertising evidences a violation of the antitrust laws, he is required by 10 U.S.C. 2305(d) to refer such bids to the Attorney General for appropriate action. Similarly, evidence of such violations in negotiated procurements should be referred to the Attorney General. Practices which are designed to eliminate competition or restrain trade and which may evidence possible violations of such laws include collusive bidding, follow-the-leader pricing, rotated low bids, uniform estimating systems, sharing of the business, identical bids, etc.

(b) Reports of identical or equal bids or proposals should not be submitted automatically, but only where there is some reason to believe that those bids or proposals may not have been arrived at independently. Such reports should be accompanied by conformed copies of the bid or proposal, other contract documents, and supporting data. The report should set forth:

(1) The noncompetitive pattern or situation under consideration;

(2) Purchase experience in the same product or service for a reasonable period of time (one or more years) prior to the receipt of the bids or proposals under consideration, including unit and total contract price and abstract of bids;

(3) Community of financial interest among bidders, insofar as is known;

(4) The extent, if any, to which specification requirements or patents restrict competition;

(5) Information which may be available with respect to the pricing system employed in bids or proposals believed to reflect noncompetitive practices; and

(6) Any other information deemed pertinent.

(c) The reports required by this section do not satisfy the reporting requirement contained in § 1.114.

§ 1.111–3 Subcontractor kickbacks.

The Anti-Kickback Act (41 U.S.C. 51) prohibits the payment, directly or indirectly, by or on behalf of a subcontractor in any tier under any Government negotiated contract of any fee, commission, compensation, gift, or gratuity to the prime contractor or any higher tier subcontractor or to any officer, partner, employee, or agent of the prime contractor, of any higher tier subcontractor, as an inducement or acknowledgment for the award of a subcontract or order. The Act further provides that the amount of any such fee, commission, or compensation, or the cost or expense of any such gratuity or gift, whether heretofore or hereafter paid by the subcontractor, shall not be charged, either directly or indirectly, as a part of the contract price charged by the subcontractor to the prime contractor or higher tier subcontractor. It also creates a conclusive presumption that the cost of any such prohibited payment has been included in the price of the subcontract or order and ultimately borne by the Government. The Act provides for the recovery on behalf of the United States of any such payment from either the subcontractor or recipient, by court action, or by set-off of moneys otherwise owing to the subcontractor either by the United States directly or by the prime contractor. The Act imposes criminal penalties on any person who knowingly, makes or receives, directly or indirectly, any such prohibited payment.

§ 1.111–4 Contractor gratuities to Government personnel.

(a) The right of a contractor to proceed under the contract may be terminated if it is found, after notice and hearing, that the contractor, or his agent or other representative, offered or gave any gratuity, such as entertainment or a gift, to an officer, official, or employee of the Government to obtain a contract or favorable treatment in the awarding, amending, or making of determinations concerning the performance, of a contract.

(b) To constitute a violation under the Gratuities clause (§ 7.104–16 of this chapter) three elements must be present:

(1) The contractor must have a contract which contains the Gratuities clause;

(2) The contractor, his agent, or other representative must have offered or given a gratuity to an officer, official, or employee of the Government; and

(3) The gratuity must have been offered or given with the intent to obtain a contract or favorable treatment in the awarding or amending, or the making of determinations concerning the performance, of a contract (in this respect, intent generally must be inferred because an admission is rarely obtainable).

A lack of any of these elements will cause an action taken by the Government pursuant to the Gratuities clause to fail. Procedural requirements for gratuities hearings are set out in § 30.4 of this chapter.

2. Sections 1.113, 1.113–1, 1.113–2(b), 1.115, 1.201–5, 1.201–14, 1.201–15, and 1.201–21 are revised to read as follows:

§ 1.113 Standards of conduct.

§ 1.113–1 Government personnel.

All governmental personnel engaged in procurement and related activities shall conduct business dealing with industry in a manner above reproach in every respect. Transactions relating to expenditure of public funds require the highest degree of public trust to protect the interests of the Government. While many Federal laws and regulations place restrictions on the actions of governmental personnel, the latter's official conduct must, in addition, be such that the individual would have no reticence about making a full public disclosure thereof. See AR 600–50 and CPR C2, for the Army; SECNAV Instr. 5370.2C, revised 1 December 1964, for the Navy; AFR 30–30, for the Air Force; and DSAR 5500.1, for the Defense Supply Agency.

§ 1.113–2 Organizational conflicts of interest.

* * * * *

(b) The Directive describes examples of various organizational conflicts of interest which might come into being and methods for avoidance of such conflicts. It provides that action must be taken to avoid placing a contractor in a position where his judgment might be biased or where he would have an unfair competitive advantage within the scope and intent of the rules. All prospective contractors in such situations will be advised of the extent of the applicability of these rules by a notice in solicitations and by a clause in resulting contracts. Such contract clause shall spell out the specific extent of any future restrictions on the contractor which are imposed by the contract. A standard form of notice for use in solicitations or contract clause is not prescribed in this subchapter since such notices in solicitations and contract clauses must be especially adapted to apply the principle of these rules to the specific facts of each contractual situation. The rules for avoidance of organizational conflict, as such, do not impose any contractual obligation on the contractor; such obligation is imposed only by the contract clause designed to carry out such rules. The contracting officer shall not impose restrictions on any contractor in reliance on these rules in the absence of a specific contractual agreement with that contractor. This, of course, does not require contract awards in circumstances that demonstrate a clear conflict of interests of a kind specifically not within the scope of the rules. The Military Departments and other Department of Defense Agencies will maintain a record of all such clauses incorporated in contracts and notices in solicitations for a period of time.

§ 1.115 Noncollusive bids and proposals.

(a) In order to promote full and free competition for Government contracts, the following certification shall be included in all (1) invitations for bids and (2) requests for proposals or quotations (other than for small purchases made in accordance with Subpart F, Part 3 of this chapter, and other than requests for technical proposals in connection with two-step formal advertising) involving firm fixed-price contracts and fixed-price contracts with escalation. When the solicitation authorizes the submission of oral offers and requires that such offers be confirmed in writing, it shall require that the certification be included with or be expressly incorporated by reference in and thereby made a part of the confirmation.

CERTIFICATE OF INDEPENDENT PRICE DETERMINATION (JUNE 1964)

(a) By submission of this bid or proposal, each bidder or offeror certifies, and in the case of a joint bid or proposal, each party thereto certifies as to its own organization, that in connection with this procurement:

(1) The prices in this bid or proposal have been arrived at independently, without consultation, communication, or agreement, for the purpose of restricting competition, as to any matter relating to such prices with any other bidder or offeror or with any competitor;

(2) unless otherwise required by law, the prices which have been quoted in this bid or proposal have not been knowingly disclosed by the bidder or offeror and will not knowingly be disclosed by the bidder or offeror prior to opening, in the case of a bid, or prior to award, in the case of a proposal, directly or indirectly to any other bidder or offeror or to any competitor; and

(3) no attempt has been made or will be made by the bidder or offeror to induce any other person or firm to submit or not to submit a bid or proposal for the purpose of restricting competition.

(b) Each person signing this bid or proposal certifies that:

(1) He is the person in the bidder's or offeror's organization responsible within that organization for the decision as to the prices being bid or offered herein and that he has not participated, and will not participate, in any action contrary to (a)(1) through (a)(3) above; or

(2) (a) He is not the person in the bidder's or offeror's organization responsible within that organization for the decision as to the prices being bid or offered herein but that he has been authorized in writing to act as agent for the persons responsible for such decision in certifying that such persons have not participated, and will not participate, in any action contrary to (a)(1) through (a)(3) above, and as their agent does hereby so certify; and (b) he has not participated, and will not participate, in any action contrary to (a)(1) through (a)(3) above.

(c) This certification is not applicable to a foreign bidder or offeror submitting a bid or proposal for a contract which requires performance or delivery outside the United States, its possessions, and Puerto Rico.

(d) A bid or proposal will not be considered for award where (a)(1), (a)(3), or (b) above has been deleted or modified. Where (a)(2) above has been deleted or modified, the bid or proposal will not be considered for award unless the bidder or offeror furnishes with the bid or proposal a signed statement which sets forth in detail the circumstances of the disclosure and the Secretary, or his designee, determines that such disclosure was not made for the purpose of restricting competition.

(b) The fact that a firm (1) has published price lists, rates, or tariffs covering items being procured by the Government, (2) has informed prospective customers of proposed or pending publication of new or revised price lists for such items, or (3) has sold the same items to commercial customers at the same prices being offered the Government does not constitute, without more, a disclosure within the meaning of paragraph (a)(2) of the Certificate.

(c) It is not required that a separate written authorization be given to the signer of the bid or proposal for each procurement involved where the signer makes the certification provided in paragraph (b)(2) of the Certificate, provided that with respect to any blanket authorization given, (1) the procurement to which the Certificate applies is clearly within the scope of such authorization, and (2) the person giving such authorization is the person responsible within the bidder's or offeror's organization for the decision as to the prices being bid or offered at the time the Certificate is made in a particular procurement.

(d) After the execution of an initial certificate and the award of a contract in connection therewith, the contractor need not submit additional certificates in connection with proposals submitted on "work orders" or similar ordering instruments issued pursuant to the terms of that contract, where the Government's requirements cannot be met from another source.

(e) The authority to make the determination described in paragraph (d) of the above certification shall not be delegated to an official below the level of the head of a procuring activity.

(f) When a certification is suspected of being false or there is indication of collusion, the matter shall be processed in accordance with § 1.111. For rejection of bids which are suspected of being collusive and for the negotiation of procurements subsequent to such rejection, see §§ 2.404–1(b)(7) and 3.215 of this chapter.

§ 1.201–5 Department and Military Department.

Department and Military Department include the Department of the Army, the Department of the Navy, the Department of the Air Force, the Defense Supply Agency, the Defense Communications Agency, and the Defense Atomic Support Agency.

§ 1.201–14 Procuring activity.

Procuring activity includes, for the Army: U.S. Army Materiel Command and its subordinate Commands; U.S. Continental Army Command and the Zone of Interior Armies; U.S. Army, Alaska; U.S. Forces, Southern Command; U.S. Army Communications Zone, Europe; U.S. Army, Hawaii; U.S. Army, Japan; Military District of Washington, U.S. Army; National Guard Bureau; Office of the Chief of Engineers; Strategic Communications Command; Office of the Chief of Support Services; Office of the Surgeon General; and U.S. Army Security Agency; for the Navy: each Bureau, the Office of Naval Research, the Navy Aviation Supply Office, the Military Sea Transportation Service, and the United States Marine Corps; for the Air Force: the Air Force Logistics Command and the Air Force Systems Command; for the Defense Supply Agency: the Defense Supply Centers and the Defense Traffic Management Service; for the Defense Communications Agency: The Headquarters, Defense Communications Agency, and the Defense Commercial Communications Office; for the Defense Atomic Support Agency: Headquarters, Defense Atomic Support Agency. It also includes any other procuring activity hereafter established. The number and designation of particular procuring activities of any Military Department may be changed by directive of the Secretary.

§ 1.201–15 Secretary.

"Secretary" means the Secretary, the Under Secretary, or any Assistant Secretary of any Military Department. Secretary shall also include the Director and Deputy Director of the Defense Supply Agency, the Director of the Defense Communications Agency, and the Director, Defense Atomic Support Agency, except to the extent that any law or executive order limits the exercise of authority to persons at the Secretarial level. In the latter situation, such authority shall be exercised by the Assistant Secretary of Defense (Installations and Logistics.).

§ 1.201–21 Construction.

See § 18.101–1 of this chapter.

3. Sections 1.308(d), 1.310(a), 1.506, and 1.506–1 are revised; new § 1.506–2 is added; §§ 1.507, 1.507–1, and 1.507–2 are revised; and new § 1.507–3 is added, as follows:

§ 1.308 Records of contract actions.

* * * * *

(d) This section does not apply in the case of small purchases (see § 3.604 of this chapter).

§ 1.310 Liquidated damages.

(a) This section applies to procurement by formal advertising and procurement by negotiation. Liquidated damages provisions normally will not be utilized but may be used where both (1) the time of delivery or performance is such an important factor in the award of the contract that the Government may reasonably expect to suffer damages if the delivery or performance is delinquent, and (2) the extent or amount of such damages would be difficult or impossible of ascertainment or proof. Where a liquidated damages provision is to be used in a supply or service contract, insert the provision set forth in § 7.105–5 of this chapter in accordance with the instructions thereof. Liquidated damages provisions for construction contracts are covered by §§ 18.113, 7.603–39 and 8.709 of this chapter.

* * * * *

§ 1.506 Representation and agreement required from prospective contractors.

§ 1.506–1 General.

Except as provided in § 1.507–3, each Department shall inquire of and secure a written representation from prospective contractors as to whether they have employed or retained any company or person (other than a full-time employee working solely for the prospective contractor) to solicit or secure the contract, and shall secure a written agreement to furnish information relating thereto as required by the contracting officer. Where an invitation for bids is issued, this inquiry shall be made (and written representation and agreement secured) by requiring the bidder (or contractor) to check the appropriate box in the following statement to be included in the invitation or bid form:

Bidder represents: (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 to 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 44, Part 150*). (November 1958.)

In negotiated procurements, the above representation shall be modified by substituting the word "offerer" for "bidder".

§ 1.506–2 Interpretation of the representation.

(a) For the purpose of the representation and agreement required from the prospective contractor, as described in § 1.506–1, the definition of "bona fide employee" is as specified in § 1.503–3.

(b) The fact that the prospective contractor retains a person who does not devote his full time solely to the prospective contractor does not necessarily mean that the relationship involved is in violation of the covenant against contingent fees or that there is any stigma attached to the contractor-agent relationship. It does mean, however, that the prospective contractor must fill out the representation in the affirmative and, as required, furnish information with respect to such employment or retainer.

(c) If the representation would otherwise be answered in the affirmative the fact that the person employed or retained by the bidder or offerer or contractor is an attorney, or a public relations consultant, or has any other special or professional title, does not permit answering in the negative.

§ 1.507 Use of Contractor's Statement of Contingent or Other Fees (Standard Form 119).

§ 1.507–1 General.

Except as provided in § 1.507–3, Contractor's Statement of Contingent or Other Fees (Standard Form 119) shall be used without deviation whenever either part of the inquiry provided for by § 1.506–1 is answered in the affirmative. The form shall also be used without deviation in any other case where a Department desires to obtain such information. When further information is required, it may be obtained in any appropriate manner. Normally, submission of the form shall be required only of successful bidders and offerers, and contractors.

§ 1.507–2 Statement in lieu of form.

Except as provided in § 1.507–3, every solicitation shall contain the following:

If the bidder or offeror, by checking the appropriate box provided therefor, has represented that he has employed or retained a company or person (other than a full-time bona fide employee working solely for the bidder or offeror) to solicit or secure this contract, or that he has paid or agreed to pay any fee, commission, percentage or brokerage fee to any company or person contingent upon or resulting from the award of this contract, he shall furnish, in duplicate, a complete Standard Form 119 (Contractor's Statement of Contingent or Other Fees). If bidder or offeror has previously furnished a completed Standard Form 119 to the office issuing this solicitation he may accompany his bid or offer with a signed statement, (i) indicating when such completed form was previously furnished, (ii) identifying by number the previous solicitation or contract, if any, in connection with which such form was submitted, and (iii) representing that the statement in such form is applicable to this bid or offer.

§ 1.507–3 Exceptions.

The inquiry and agreement specified in § 1.506 need not be made and submission of Standard Form 119 need not be requested in connection with the following:

(a) Any advertised contract in which the aggregate amount involved does not exceed $25,000;

(b) Any negotiated contract in which the aggregate amount involved does not exceed $5,000;

(c) Any negotiated contract for perishable subsistence supplies in which the aggregate amount involved does not exceed $25,000;

(d) Any contract for services which are required to be performed by an individual contractor in person under Government supervision and paid for on a time basis;

(e) Any contract for public utility services furnished by a public utility company where the utility company's rates for the services furnished are subject to regulation by Federal, State, or other regulatory body and the public utility company is the sole source of supply;

(f) Contracts to be made in foreign countries; and

(g) Any other contracts, individually or by class, designated by the Secretary. (Reports of any such exceptions shall be filed promptly with the Administrator of General Services.)

4. Sections 1.508, 1.508–1, and 1.508–2 are revised; new §§ 1.508–3 and 1.508–4 are added; and § 1.509 is revised, as follows:

§ 1.508 Enforcement.

§ 1.508–1 General.

Each Department shall take the necessary steps to assure that the indicated proposed contractor has furnished a representation (negative or affirmative) and agreement described in § 1.506–1.

(a) If the indicated proposed contractor makes such representation in the negative, such representation may be accepted and award made or offer accepted.

(b) If the indicated proposed contractor make such representation in the affirmative, a completed Standard Form 119, in duplicate, shall be requested from him. In the case of formal advertising, the making of an award in accordance with established procedure of the Department concerned need not be delayed pending receipt of the form. In the case of negotiation, if the proposed contractor makes such representation in the affirmative, he shall be required to file a completed Standard Form 119, or the statement in lieu of the form, prior to acceptance of the offer or execution of the contract, unless the head of the procuring activity or his designee considers that the interest of the Government will be prejudiced by the suspension of negotiations pending receipt and consideration of an executed Standard Form 119.

(c) If the indicated proposed contractor fails to furnish the representation and agreement as set forth in § 1.506–1, such failure shall be considered a minor informality and, prior to award, he shall be afforded a further opportunity to furnish such representation and agreement. A refusal or failure to furnish the representation and agreement after such opportunity has been afforded shall require rejection of the bid or offeror.

§ 1.508–2 Failure or refusal to furnish Standard Form 119.

If the successful bidder or offeror or the contractor, upon request, refuses or fails to furnish a completed Standard Form 119, or a statement in lieu thereof, as provided in § 1.507–2 the head of the procuring activity or his designee shall take one or more of the following actions, or other action, as may be appropriate:

(a) If an award has not been made or bid or offer has not been accepted, determine whether the bid or offer should be rejected;

(b) If the contract has been awarded or bid or offer accepted, determine what action shall be taken, such as making an independent investigation or considering the eligibility of the contractor as a future contractor.

§ 1.508–3 Misrepresentations or violations of the covenant against contingent fees.

In case of misrepresentation concerning contingent fees, or violation or breach of the covenant against contingent fees, or some other relevant impropriety, the head of the procuring activity or his designee shall take one or more of the following actions, or other action, as may be appropriate:

(a) If an award has not been made or bid or offer has not been accepted, determine whether the bid or offer should be rejected;

(b) If an award has been made or bid or offer has been accepted, take action to enforce the covenant in accordance with its terms; i.e., as the best interest of the Government may appear, annul the contract without liability or recover the amount of the fee involved;

(c) Consider the bidder's or offeror's future eligibility as a contractor; or

(d) Consider referring the case to the Department of Justice.

§ 1.508–4 Reports.

A report shall be made in accordance with § 1.608 when the head of the procuring activity or his designee recommends referral to the Department of Justice under § 1.508–3(d).

§ 1.509 Preservation of records.

(a) Each Department shall preserve as a permanent record for enforcement or report purposes the original executed copy of any representation and completed Standard Form 119, or statement in lieu of form, together with a record of any other pertinent data, including data as to action taken. There shall be no regular retirement of any Standard Form 119 maintained in this record by any procuring activity. However, in any case where the receipt of a new Standard Form 119 makes previously received information obsolete, the obsolete information may be destroyed.

(b) The second copy of Standard Form 119, or statement in lieu of form, shall be filed with and shall remain a part of the contract file.

5. Sections 1.600, 1.601, 1.601–1, 1.601–2, 1.601–3, and 1.601–4 are revised; new §§ 1.601–5 and 1.601–6 are added; and § 1.602 is revoked, as follows:

§ 1.600 Scope of subpart.

(a) This subpart prescribes policies and procedures relating to the debarment and suspension of bidders, offerors, and contractors, and ineligibility of bidders and offerors under section 1(a) of the Walsh-Healey Public Contracts Act (41 U.S.C. 35(a)).

(b) For the purpose of this subpart, the authorized representatives of the Secretaries are:

(1) In the Army—an Assistant Judge Advocate General;

(2) In the Navy—the Chief of Naval Material;

(3) In the Air Force—the Deputy Chief of Staff, Systems and Logistics;

(4) In the Defense Supply Agency—the Counsel; and

(5) In the Defense Communications Agency—the Counsel.

§ 1.601 Establishment and maintenance of records and lists of firms or individuals debarred, ineligible or suspended.

§ 1.601–1 General.

Each Department shall maintain a record of firms and individuals which it has debarred or suspended, to whom contract awards of any character, including sales, will not be made, and from whom bids or proposals will not be solicited as provided in this subpart.

§ 1.601–2 Information contained in Departmental records.

Each Departmental record shall show as a minimum the following information:

(a) Names and addresses of those firms or individuals debarred, ineligible, or suspended (names will be set forth in alphabetical order with appropriate cross reference where more than one name is involved in a single action);

(b) Basis of authority for each action;

(c) Extent of restrictions imposed; and

(d) Termination date for each debarred listing.

§ 1.601–3 Joint Consolidated List.

The Department of the Army is responsible for the issuance of a Joint Consolidated List (DA Circular 715–1; NAVEXOS P–1205; AF Letter No. 70–23; DSA Regulation 4105.3; DCAI 5104.5) of firms and individuals declared, ineligible or suspended under § 1.603. The Joint Consolidated List containing the information set forth in § 1.601–2, shall be furnished to the Assistant Judge Advocate General of the Army not later than the third day of each month by the authorized representative of the Secretary concerned. Each Department shall be responsible for determining the number of copies of the Joint Consolidated List required and for distributing the list within the Department. The Department of the Army will furnish copies to the Assistant Secretary of Defense (Installations and Logistics).

§ 1.601–4 Protection of lists and records.

The lists and records relating thereto shall be protected to prevent inspection of the contents by personnel who are not required to have access to such information. The lists, reports made pursuant to § 1.608, and all related internal correspondence shall be marked "For Official Use Only" unless the information warrants a security classification.

§ 1.601–5 Limitation.

No firm or individual will be listed on a consolidated list for causes or under conditions other than those set forth in this subpart.

§ 1.601–6 Inquiries from debarred, ineligible, or suspended individuals and firms.

(a) *Debarred and suspended firms and individuals.* All inquiries relating to debarred or suspended firms and individuals shall be referred or forwarded to the authorized representative of the Secretary concerned.

(b) *Ineligible or disqualified firms or individuals.* Inquiries from contractors or individuals listed as ineligible or disqualified by the Comptroller General and the Department of Labor under the Walsh-Healey or Davis-Bacon Acts shall be answered by indicating the nature of the prohibition, as shown on the consolidated list, and requesting that the inquirer communicate with the Wage

and Hour and Public Contracts Division, Department of Labor, 14th Street and Constitution Avenue, NW., Washington, D.C., 20210.

§ 1.602 Limitation. [Revoked]

6. Sections 1.603, 1.604, 1.604–1, 1.604–2(a), 1.604–3, 1.605, 1.605–1, and 1.605–3 are revised, and § 1.605–4 is revoked, as follows:

§ 1.603 Grounds for listing and treatment to be accorded listed concerns.

(a) A firm or individual may be listed for any of several reasons. The particular reason for listing determines the consequences thereof. The various types of listing and the treatment to be accorded each type are set forth below:

(1) Type A includes debarments in any of the following categories:

(i) Those listed by the Comptroller General pursuant to section 3 of the Walsh-Healey Public Contracts Act (41 U.S.C. 37) for violating the requirements of that Act;

(ii) Those listed by the Comptroller General pursuant to section 3 of the Davis-Bacon Act (40 U.S.C. 276a–2(a) for violating the requirements of that Act; and

(iii) Those which the Secretary concerned or his authorized representatives has determined to debar for any of the causes and under all of the conditions set forth in § 1.604.

Contracts shall not be awarded to, nor bids or proposals solicited from, nor invitations for bids or requests for proposals furnished to, concerns which are listed as Type A and which are debarred because of Walsh-Healey or Davis-Bacon violations (categories (i) and (ii) above). The same rules apply with respect to Type A listings within category (iii) above, unless the Secretary concerned or his authorized representative determines it to be in the interest of the Government to make an exception for a particular procurement action, or unless the listing indicates that the debarment is not to apply to sales contracts or to procurement contracts (see § 1.606).

(2) Type B includes concerns which the Secretary of Labor has determined to be ineligible because they do not qualify as "manufacturers" or "regular dealers" within the meaning of section 1(a) of the Walsh-Healey Public Contracts Act (41 U.S.C. 35(a)). Under that Act, procurement contracts in excess of $10,000 shall not be awarded the concerns under Type B listings for those materials, articles, or equipment with respect to which the concern has been found to be ineligible. However, contracts in any amount may be awarded, and bids or proposals may be solicited, for commodities with respect to which the concern has not been declared ineligible. In connection with ineligibility under the Walsh-Healey Act (Type B listing only), the name of an individual may be listed as affiliated with an ineligible firm. This listing is intended only to prevent such individuals from evading ineligibility merely by changing their business names and addresses. It does not prohibit other firms in which such individuals have an interest, and which are qualified manufacturers or regular dealers from receiving contracts subject to the Walsh-Healey Public Contracts Act.

(3) Type C includes concerns which the appropriate Secretary, pursuant to section 3(b) of the Buy American Act (41 U.S.C. 10b(b)), has found to have failed to comply with the "Buy American Act" clause required for construction contracts (see § 6.205 of this chapter). Contracts for the construction, alteration, or repair of public buildings or public works in the United States or elsewhere shall not be awarded to concerns under Type C listings nor shall bids or proposals for such work be solicited from such concerns. However, concerns under Type C listings may be awarded contracts and may be solicited for bids or proposals for other than the construction, alteration, or repair of public buildings or public works, unless listed under Type A.

(4) Type D includes concerns which have been suspended under the conditions set forth in § 1.605. Concerns under Type D listings shall not be awarded contracts or solicited for bids or proposals, except where the Secretary concerned or his authorized representative determines it to be in the best interest of the Government to make an exception for a particular procurement or where the listing indicates that the suspension does not apply to sales contracts or to procurement contracts (see § 1.606).

(5) Type E includes concerns which have been reported by the Secretary of Labor to have violated labor standards provisions of any of the following statutes: Anti-Kickback Act (48 Stat. 948) as amended (40 U.S.C. 276c); Contract Work Hours Standards Act (76 Stat. 357–360); National Housing Act (53 Stat. 804) as amended (12 U.S.C. 1703); Hospital Survey and Construction Act (60 Stat. 1040); Federal Airport Act (60 Stat. 170) as amended (49 U.S.C. 1101); Housing Act of 1949 (63 Stat. 413) (42 U.S.C. 1441); School Survey and Construction Act of 1950 (64 Stat. 967) (20 U.S.C. 251); Federal Civil Defense Act of 1950 (64 Stat. 1245) as amended; Defense Housing and Community Facilities and Services Act of 1951 (65 Stat. 293) as amended (42 U.S.C. 1591); and Area Redevelopment Act of 1961 (75 Stat. 47). Concerns under Type E listings shall not be awarded contracts which are subject to any of the foregoing statutes.

(6) Type F includes concerns which have been debarred by the appropriate Secretary or the Executive Vice Chairman of the President's Committee on Equal Employment Opportunity for noncompliance with the Equal Opportunity clause. Concerns under Type F listings may not be awarded contracts or be solicited for bids.

(b) Administration of current contracts in all phases may be continued, notwithstanding the listing of a contractor, unless otherwise directed by the Secretary concerned or his authorized representative. However, payment of all or part of funds due or to become due may be withheld when such action is determined to be in the best interest of the Government by the Secretary concerned or his authorized representative.

(c) Where a listed concern is proposed as subcontractor, the contracting officer should decline to consent to subcontracting with such concern in any instance in which consent is required of the Government before the subcontract is placed (see § 7.203–8 of this chapter) unless the Secretary or his authorized representative determines such placement to be in the best interest of the Government.

§ 1.604 Administrative debarment of firms or individuals (Type A).

The Secretary of each Department, or his authorized representative (see § 1.600(b)), except as limited below, is authorized to debar in the public interest a firm or an individual for any of the causes and under all of the conditions set forth below. Debarment of a firm or individual shall operate to debar such firm or individual throughout the Department of Defense. Placing the name of an individual or firm on the consolidated list will be for the purpose of protecting the interest of the Government and not for punishment.

§ 1.604–1 Causes for debarment.

The following are causes for debarment:

(a) Conviction by or a judgment obtained in a court of competent jurisdiction for—

(1) Commission of fraud or a criminal offense as an incident to obtaining, attempting to obtain, or in the performance of a public contract;

(2) Violation of the Federal antitrust statutes arising out of submission of bids or proposals; or

(3) Commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, receiving stolen property, or any other offense indicating a lack of business integrity or business honesty which seriously and directly affects the question of present responsibility as a Government contractor.

If the conviction or judgment is reversed on appeal, the debarment shall be removed upon receipt of notification thereof. The foregoing does not necessarily require that a firm or individual be debarred. The decision to debar is discretionary; the seriousness of the offense and all mitigating factors should be considered in making the decision to debar.

(b) Clear and convincing evidence of violation of contract provisions, as set forth below, when the violation is of a character so serious as to justify debarment action—

(1) Willful failure to perform in accordance with the specifications or delivery requirements in a contract (including violation of the Buy American Act with respect to other than construction contracts);

(2) A history of failure to perform, or of unsatisfactory performance, in accordance with the terms of one or more contracts; *Provided*, That such failure or unsatisfactory performance is within a reasonable period of time preceding the

determination to debar. (Failure to perform or unsatisfactory performance caused by acts beyond the control of the contractor shall not be considered as a basis for debarment.);

(3) Violation of the contractual provision against contingent fees; or

(4) Violation of the Gratuities clause, as determined by the Secretary in accordance with the provisions of the clause.

(c) For other cause of such serious and compelling nature, affecting responsibility as a Government contractor, as may be determined by the Secretary of the Department concerned to justify debarment; or

(d) Debarment for any of the above causes by some other executive agency of the Government. (Such debarment may be based entirely upon the record of facts obtained by the original debarring agency, or upon a combination of additional facts with the record of facts obtained by the original debarring agency.)

§ 1.604–2 Period and scope of debarment.

(a) *Period of debarment.* All debarments shall be for a reasonable specified period of time, commensurate with the seriousness of the cause therefor. As a general rule, a period of debarment shall not exceed three years. In the event debarment is preceded by suspension, consideration shall be given to such period of suspension in determining the period of debarment. Prior to the expiration of the debarment period, the Department or Agency which imposed the debarment should review all the facts and circumstances relating to the debarment. The debarment shall be removed at the expiration of the specified period unless it is determined that debarment for an additional period is required in order to protect the Government's interest. However, a debarment shall not be extended for an additional period solely on the basis of the facts and circumstances on which the initial debarment action was based. When debarment for an additional period is considered necessary, notice of the proposed debarment shall be furnished to the individual or firm concerned in accordance with § 1.604–3. The debarment of an individual or firm may be modified by reducing the period thereof when the circumstances justify such action. With respect to debarment for violation of the Equal Opportunity clause (Type F), the debarment shall be removed prior to the expiration of the debarment period by the Secretary who imposed the debarment upon receipt of satisfactory evidence that corrective action has been taken.

* * * * *

§ 1.604–3 Notice of debarment.

(a)(1) The firm or individual and its known affiliates concerned shall be furnished with a written notice of the proposed debarment, stating as a minimum:

(i) The fact that debarment is being considered;

(ii) The reasons for the proposed debarment; and

(iii) The period of time to be afforded to present information for consideration.

(2) Information in opposition to a proposed debarment may be presented in person, in writing, or through representation. The period of time to be afforded to present information for consideration shall be limited to 30 days unless the subject of the proposed debarment requests additional time. When no additional time is requested, the debarment determination, including notice to the firm or individual and known affiliates involved, shall be completed within 90 days. If the subject of the proposed debarment requests additional time to present information, the 90-day period shall be extended commensurately. When no suspension is in effect under § 1.605, the notice of proposed debarment shall state that no contracts will be awarded pending the debarment determination. If debarment is effected, the firm or individual shall be notified in writing within 10 days after determination of debarment has been made. This notice shall:

(i) Reference the earlier notice of proposed debarment;

(ii) Specify the reasons for debarment;

(iii) State the period of debarment, including effective dates; and

(iv) Advise that the debarment is effective throughout the Department of Defense.

(3) If, following the notice of proposed debarment, a determination is made that debarment will not be effected, the firm or individual shall be notified in writing accordingly.

(b) Copies of the notice of debarment and of any removals from debarment prior to termination of the specified period shall be furnished to the General Services Administration.

§ 1.605 Suspension of firm or individual.

Suspension of a contractor, bidder or offeror is a drastic action which must be based upon adequate evidence rather than mere accusation. In assessing adequate evidence, consideration should be given to how much credible information is available, its reasonableness in view of surrounding circumstances, corroboration or lack thereof as to important allegations, and inferences which may be drawn from the existence or absence of affirmative facts. This assessment should include an examination of basic documents, such as contracts, inspection reports, and correspondence. Placing the name of an individual or firm on the consolidated list will be for the purpose of protecting the interest of the Government and not for punishment. Suspension is an administrative determination which may be modified when determined to be in the interest of the Government.

§ 1.605–1 Causes for suspension.

The Secretary or his authorized representative (see § 1.600(b)) may, in the interest of the Government, suspend a firm or individual:

(a) Suspected, upon adequate evidence, of—

(1) Commission of fraud or a criminal offense as an incident to obtaining, attempting to obtain, or in the performance of a public contract;

(2) Violation of the Federal antitrust statutes arising out of the submission of bids and proposals; or

(3) Commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, receiving stolen property, or any other offense indicating a lack of business integrity or business honesty, which seriously and directly affects the question of present responsibility as a Government contractor; or

(b) For other cause of such serious and compelling nature, affecting responsibility as a Government contractor, as may be determined by the Secretary of the Department concerned to justify suspension.

Suspension of a firm or individual by the Secretary or his authorized representative shall operate to suspend such firm or individual throughout the Department of Defense.

§ 1.605–3 Notice of suspension.

The firm or individual concerned shall be furnished a written notice of the suspension by the Secretary concerned or his authorized representative, within 10 days after the effective date of the suspension. The notice of suspension shall state that:

(a) The suspension is based on information that the firm or individual has committed irregularities of a serious nature in business dealings with the Government, or that the suspension is based on irregularities which seriously reflect on the propriety of further dealings of the firm or individual with the Government, together with a description of the nature of those irregularities, in general terms, without disclosing the Government's evidence;

(b) The suspension is for a temporary period pending the completion of an investigation and such legal proceedings as may ensue;

(c) Bids and proposals will not be solicited from the firm or individual and if received will not be considered, and awards of contracts may not be made unless it is determined to be in the best interest of the Government by the Secretary or his authorized representative to do so; and

(d) The suspension is effective throughout the Department of Defense.

In case of inquiry (see § 1.601–6), the Department shall not give further information to the contractor or his representatives concerning the reasons for suspension beyond that stated in the notice of suspension set forth above until the Department of Justice has been advised of the inquiry. If the Department of Justice objects to the release of the information requested, it shall be withheld until clearance from the Department of Justice has been obtained.

§ 1.605–4 Notice of suspension. [Revoked]

7. Sections 1.606 and 1.607 are revised; and new §§ 1.608, 1.608–1, 1.608–2, and 1.608–3 are added, to read as follows:

§ 1.606 Limited debarment or suspension.

Where it is determined to debar or suspend a concern pursuant to § 1.604–1

or § 1.605–1, the Secretary or his authorized representative shall decide whether the debarment or suspension should extend to procurement contracts or to sales contracts, or both. If the debarment or suspension is limited to procurement contracts or to sales contracts, the listing should so indicate.

§ 1.607 Interchange of debarment information.

(a) The General Services Administration (see GSA Regulation 1–II–207.07) compiles a combined list of debarments, including the basis therefor, from the notifications of debarments furnished by the Military Departments and executive agencies. A copy of the list is distributed to all executive agencies, including the Military Departments. This list is for information only, and does not replace or supplement the lists maintained by the various agencies.

(b) Each Department shall notify the General Services Administration of the name and address of its central office where debarment information should be sent.

(c) Each Department shall check the list of debarred bidders furnished by the General Services Administration and consider firms or individuals listed thereon for inclusion upon their own lists, in accordance with the provisions of this subpart.

(d) The General Services Administration has agreed to furnish to the Military Departments upon specific request, a copy of the notice reflecting the basis for debarment action taken by another agency for causes contained in § 1.604–1 (subsection 207.05a of GSA Regulation 1–II) or under the Buy American Act. If desired, direct inquiry concerning any debarment case may be made to the agency which originated the action.

§ 1.608 Reporting.

§ 1.608–1 Situations where reports are required.

A report incorporating the information required by § 1.608–2 shall be prepared when:

(a) A contractor has committed, or is suspected of having committed, any of the acts described in §§ 1.604–1 and 1.605–1;

(b) A report is required by § 1.111–1 (this does not concern reports required to be submitted to the Department of Justice on identical bids under Executive Order 10936, dated 24 April 1961 (see § 1.114));

(c) A report is required by § 1.508–4 (contingent fees);

(d) A report is required by § 8.206 of this chapter (termination settlements);

(e) Buy American Act violations are suspected (see § 6.205 of this chapter); or

(f) An individual or firm is suspected of attempting to evade the prohibitions or debarments or suspensions imposed under this subchapter by changes of address, multiple addresses, formation of new companies, or by other devices.

§ 1.608–2 Contents of reports.

Each report prepared pursuant to § 1.608 shall include substantially the following information, where available:

(a) Name and address of the bidder or offeror, contractor, or subcontractor;

(b) Names of the principal officers, partners, owners, or managers;

(c) All known affiliates, subsidiaries, or parent firms, and the nature of the affiliation;

(d) Description of the contract or contracts concerned, including the contract number, and all office identifying numbers or symbols, the amount of each contract, the degree of completion, the amount paid the contractor and the amount still due, and the percentage of work to be completed;

(e) The status of vouchers;

(f) Whether the contract has been assigned pursuant to the Assignment of Claims Act, and if so assigned, the name and address of the assignee and a copy of the assignment;

(g) Whether any other contracts are outstanding with the contractor or any of his affiliates, and if so, the amount of such contracts, whether they are assigned pursuant to the Assignment of Claims Act, and the amounts paid or due on such contracts;

(h) A complete summary of all pertinent evidence;

(i) A recommendation as to the administration of all current contracts with a full explanation of the reason for such recommendation, or if no recommendation is made, the reason therefor;

(j) An estimate of damages, if any, sustained by the Government as a result of the action of the contractor, including an explanation of the method used in making the estimate;

(k) The comments and recommendations of the contracting officer and of each successive echelon as to (1) whether the contractor should be suspended or debarred, (2) whether any limitations should be applied to such action, and (3) the period of any debarment; and

(l) As an inclosure, a copy of the contract (or contracts) or pertinent excerpts therefrom, appropriate exhibits, testimony or statements of witnesses, copies of assignments, and other relevant documentation.

§ 1.608–3 Addresses and copies of reports.

Reports shall be submitted in three complete copies, including inclosures, to the authorized representatives of the Secretaries concerned (see § 1.600(b)). Additional copies without inclosures may be required by Departmental procedures for other addressees.

8. Sections 1.609, 1.609–1, 1.609–2, 1.609–3, and 1.609–4 are revised; new § 1.609–5 is added; and §§ 1.609–6, 1.609–7, 1.609–8, 1.609–9, and 1.610 are revised, as follows:

§ 1.609 Procurement outside United States.

§ 1.609–1 General.

The foregoing provisions of this subpart shall be applied by overseas commanders to procurement outside the United States and its possessions, whenever possible, and as modified by the following provisions, with due consideration to laws or customs of the foreign countries concerned.

§ 1.609–2 Responsibilities and area coverage.

The Commander in Chief, United States European Command (CINCEUR), the Commander in Chief, Pacific (CINCPAC) and the Commander in Chief, Southern Command (USCINCSO), or the Commanders of a component command which each of these unified commanders may designate, shall establish and maintain a consolidated list of offshore suppliers to whom contracts will not be awarded and from whom bids or proposals will not be solicited. The CINCEUR consolidated list will include names in the North Atlantic and Mediterranean areas, including all of Europe, North Africa, and the Middle East. The CINCPAC consolidated list will include names in the Far East and Pacific Ocean areas, excluding the United States and its possessions. The USCINCSO consolidated list will include names in Central and South America, excluding possessions. All other overseas commanders shall utilize and contribute to such list as appropriate to their geographical location or areas in which they award contracts. Lists shall not be established or maintained except as provided above.

§ 1.609–3 Information contained on oversea lists.

The list shall show as a minimum the following information:

(a) Names and addresses of those firms or individuals to whom contracts shall not be awarded and from whom bids or proposals shall not be solicited. (Names will be set forth alphabetically with appropriate cross reference where more than one name is involved in a single action or where a parent firm or individual in one country is known to control subsidiaries, branches, or agencies in the same or other countries.);

(b) Basis or authority for each action;

(c) Extent of restrictions imposed;

(d) Termination date for each debarred listing; and

(e) Originating activity, component, or agency.

§ 1.609–4 Protection of oversea lists and records.

See § 1.601–4.

§ 1.609–5 Maintenance and distribution of lists.

The lists shall be kept current by issuance of notices of additions or deletions and by periodic reprinting. Copies of the lists shall be distributed to contracting officers as the unified commanders and their component commanders direct. CINCEUR, CINCPAC, and CINCSOUTH shall exchange lists directly. Copies shall also be furnished the Assistant Secretary of Defense (Installations and Logistics), the Assistant Secretary of Defense (International Security Affairs), and the authorized representative of the Secretaries (see § 1.600(b)).

§ 1.609–6 Basis of addition of firms and individuals to lists.

In addition to the names of offshore firms or individuals which may be in-

cluded on the lists as falling into the categories outlined in § 1.603, the names of firms or individuals abroad shall be included on the list in the following additional categories:

(a) Those who are "designated nationals" under the Foreign Assets Control Regulations;

(b) Those found by the Assistant Secretary of Defense (International Security Affairs) or his authorized representative to have engaged in improper East-West trade activity;

(c) Those found by the Assistant Secretary of Defense (International Security Affairs) or his authorized representative to be ineligible because they do not meet the political or security criteria;

(d) Those found by a United States Diplomatic Mission or a Country Team (consisting of members of the United States Diplomatic Mission in the country or countries in which the firms or individuals are located) to be ineligible because they do not meet the labor-political criteria; and

(e) Those who for other causes of a serious and compelling nature are so designated by the unified commander.

§ 1.609–7 Treatment to be accorded firms or individuals in debarred or ineligible status.

The provisions of § 1.603 shall be complied with, if applicable. In addition, contracts shall not be awarded to, nor shall bids or proposals be solicited from or furnished to firms or individuals abroad which come within the categories in § 1.609–6. With respect to § 1.609–6 (a), an exception may be made only by the Secretary of the Treasury. With respect to § 1.609–6 (b), (c), and (d), an exception may be made by the Assistant Secretary of Defense (International Security Affairs) or his authorized representative.

§ 1.609–8 Causes and conditions for which unified commanders may place names on the consolidated list.

CINCEUR, CINCPAC, and CINCSOUTH, or their designated component commanders are authorized to place on the list names of firms or individuals doing business within the areas for which they are responsible, for any of the causes and under the conditions set forth in §§ 1.609–6 and 1.609–7. Oversea commanders or unified commanders overseas other than CINCEUR, CINCPAC, and CINCSOUTH are similarly authorized to designate firms or individuals in their command areas and shall promptly notify CINCEUR, CINCPAC, or CINCSOUTH, as appropriate, of such action, furnishing the information required by § 1.609–3. CINCEUR, CINCPAC, or CINCSOUTH shall add the names to his consolidated list. The listing shall operate to deny contracts to such firms or individuals throughout the Department of Defense. Unified commanders shall be notified of the action based on causes and under conditions set forth in §§ 1.609–6 and 1.609–7 through the "Economic Defense List," transmitted by the Department of Commerce through State Department channels, which contains the names of firms and individuals affected or by direct communication from the Office of the Assistant Secretary of Defense (International Security Affairs).

§ 1.609–9 Liaison with United States diplomatic missions.

The Chief of the United States Diplomatic Mission, or such attaché or other officer as he directs, in the country where the firm or individual concerned is located, shall be notified of actions contemplated under the foregoing sections which may have important political significance. In cases of contemplated action against a branch or subsidiary firm or agency in one or more countries, the Chief of the United States Diplomatic Mission in each country, including that in which the parent or principal is located, will be notified.

§ 1.610 Use of lists.

(a) Due to the length of the lists, the numerous revisions, and the distances involved, as well as the infrequent contracting by offices with suppliers outside their respective areas, the United States, CINCEUR, CINCPAC, and CINCSOUTH consolidated lists of ineligible, debarred, and suspended bidders shall not be distributed to contracting officers outside the area covered by the respective lists. However, no contracts shall be awarded by contracting officers to suppliers without ascertaining that the names of the firms or individuals involved do not appear on the consolidated list for the geographical area in which the contractor is located. All lists shall be held for reference in each of the Departments, and in offices designated by CINCEUR, CINCPAC, and CINCSOUTH, and shall be utilized in accordance with procedures established by them.

(b) When a contracting officer becomes aware that a prospective contractor proposes to furnish products of a concern that has been placed on an overseas list in accordance with § 1.609–6 (a), (c), or (e), the matter shall be referred to the authorized representatives of the Secretaries concerned.

9. Sections 1.701–1(d), 1.703, and 1.704–3(b)(3) are revised to read as follows:

§ 1.701–1 Small business concerns.

* * * * *

(d) *Service industries.* For services not elsewhere defined in this part, the average annual sales or receipts of the concern and its affiliates for the preceding three fiscal years must not exceed $1 million ($1,250,000 if located in Alaska). Any concern bidding on a contract for engineering services, naval architectural services, motion picture production or motion picture services is classified as small if its average annual sales or receipts for its preceding three fiscal years do not exceed $5 million ($6,250,000 if located in Alaska).

* * * * *

§ 1.703 Determination of status as small business concern.

(a) Except as provided in paragraph (b) of this section, the contracting officer shall accept at face value for the particular procurement involved, a representation by the bidder or offeror that it is a small business concern (see § 1.701–1).

(b) Representation by a bidder or offeror that it is a small business concern shall be effective, even though questioned in accordance with the terms of this paragraph, unless the SBA, in response to such question and pursuant to the procedures in subparagraph (3) of this paragraph, determines that the bidder or offeror in question is not a small business concern. The controlling point in time for a determination concerning the size status of a questioned bidder or offeror shall be the date of award, except that no bidder or offeror shall be eligible for award as a small business concern unless he has in good faith represented himself as small business prior to the opening of bids or closing date for submission of offers (see § 2.405(b) of this chapter with respect to minor informalities and irregularities in bids).

(1) Any bidder or offeror may, prior to award of a contract involving small business set-asides, question the small business status of any apparently successful bidder or offeror by sending a written protest to the contracting officer responsible for the particular procurement. The protest shall contain the basis for the protest together with specific detailed evidence supporting the protestant's claim that such bidder or offeror is not a small business. Such protest must be received by the contracting officer prior to the close of business on the 5th working day after bid opening date or closing date for the receipt of proposals. A protest received after such time shall be considered timely, if in the case of mailed protests, such protest is sent by registered or certified mail and the postmark thereon indicates that the protest would have been delivered within this time limit but for delays beyond the control of the protestant or, in the case of telegraphed protests, the telegram date and time line indicates that the protest would have been delivered within this time limit but for delays beyond the control of the protestant. A protest received after award of a contract, even though timely will not be considered a "protest" and will be returned to the sender with an explanation of why it could not be acted upon. Any contracting officer who receives a timely protest shall forward such protest record to the Small Business Administration regional office serving the area in which the protested concern is located. The Small Business Administration will promptly notify the contracting officer of the date of its receipt of any such protest and will advise the questioned bidder or offeror that his small business status is under review.

(2) A contracting officer may, any time prior to award, question the small business status of the apparently successful bidder or offeror by sending a written notice to the SBA regional office of the region in which the bidder or offeror has his principal place of business. Such notice shall contain a statement of the basis for the question together with available supporting facts. SBA will advise the bidder or offeror in question that his small business status is under review.

(3) The SBA Regional Director will determine the small business status of the questioned bidder or offeror and notify the contracting officer and the bidder or offeror of his determination, and award may be made on the basis of that determination. Such decision is final unless appeal in accordance with subparagraph (4) of this paragraph and the procuring activity is notified of the appeal prior to award. If an award was made prior to the time the contracting officer receives notice of the appeal, the contract shall be presumed to be valid and any determination rendered shall be considered in future procurements. If the SBA Regional Director's determination is not received by the contracting officer within 10 working days after SBA's receipt of the protest or notice questioning small business status, it shall be presumed that the questioned bidder or offeror is a small business concern. This presumption will not be used as a basis for making an award to the questioned bidder or offeror without first ascertaining when a size determination can be expected from SBA, and where practicable, waiting for such determination, unless further delay in award would be disadvantageous to the Government. Pending SBA determination or expiration of the 10-day period, whichever is earlier, procurement action shall be suspended provided that such 10-day suspension period shall not apply to any urgent procurement action which, as determined by the contracting officer, must, in order to protect the public interest, be awarded without delay and as to which he inserts in the contract file a statement signed by him justifying this determination.

(4) An appeal from a size determination made by an SBA Regional Director may be taken before the close of business on the 5th working day after the receipt of such decision. Unless such written notice of appeal is received by the SBA Size Appeals Board, Washington, D.C., within this time and the contracting officer has been notified of such appeal prior to award, the appellant will be deemed to have waived its rights of appeal insofar as the pending procurement is concerned.

(5) The determination of the appropriate classification of a product establishing the small business definition to be used in a specific procurement shall be made by the contracting officer and his determination shall be final unless appealed in accordance with subparagraph (6) of this paragraph.

(6) An appeal from product classification determination establishing the size definition used in a specific procurement made by a contracting officer may be taken not less than 10 days before bid opening date or closing date for submission of proposals where in the bid opening or closing date is more than 30 days after the issuance of the IFB or RFP, or not less than 5 working days before the bid opening date or closing date for submission of proposals in cases wherein the bid opening date or closing date for submission of proposals is 30 days or less after the issuance of an IFB or an RFP. Such appeals shall be directed to the SBA Size Appeals Board, Washington, D.C.

§ 1.704–3 Small business specialists.

* * * * *

(b) * * *

(3) Prior to issuance of solicitations or contract modifications for additional supplies or services in excess of $2,500, he shall determine that small business concerns will receive adequate consideration including initiation of set-asides § 1.706. This determination may be made jointly with the contracting officer or may be in the form of a recommendation to him. Disagreements between the small business specialist and the contracting officer shall be resolved by the appointing authority or his designee, whose decision shall be final. (See § 1.706–3 as to resolution of disagreements with SBA recommendations. See § 1.308(b)(4) as to the required record of contract actions.)

* * * * *

10. The introductory text of § 1.705–4 (b) is revised; the introductory text of § 1.706–5(c) is revised; and the introductory text of § 1.706–6(c) is revised, as follows:

§ 1.705–4 Certificates of competency.

* * * * *

(b) If a bid or proposal of a small business concern is to be rejected solely because the contracting officer has found the concern to be nonresponsible as to capacity or credit, SBA shall be notified of the circumstances. If a partial set-aside is involved and the bid of a small business concern on the unreserved portion is to be rejected for lack of capacity or credit and the same small business concern is entitled to consideration on the reserved portion of the set-aside if a certificate of competency is issued by the SBA, the entire quantity of the procurement (reserved and unreserved) for which that small business concern may be entitled, if competent, shall be referred to SBA and the referral papers so noted, in which event SBA may certify the small business concern for the maximum quantity for which it is eligible under the procurement. The award shall be withheld until SBA action concerning issuance of a certificate of competency or until 15 working days after SBA is so notified, whichever is earlier, subject to the following:

* * * * *

§ 1.706–5 Total set-asides.

* * * * *

(c) In procurements involving total set-asides for small business, each invitation for bids or requests for proposals shall contain substantially the following notice. The applicable size standard shall be set forth in the Schedule.

* * * * *

§ 1.706–6 Partial set-asides.

* * * * *

(c) In advertised procurements involving partial set-asides for small business, each invitation for bids shall contain either substantially the following notice or the notice set forth in paragraph (d) of this section. The applicable size standard shall be set forth in the Schedule. In negotiated procurements whichever notice is used will be appropriately modified for use with request for proposals.

* * * * *

11. Sections 1.1002–1, 1.1107–1, 1.1107–2, 1.1108, 1.1109, 1.1201(b), and 1.1203 are revised; new §§ 1.1203–1, 1.1203–2, and 1.1203–3 are added; and §§ 1.1204 and 1.1208 (a) and (d) are revised, as follows:

§ 1.1002–1 Availability of invitations for bids and requests for proposals at the contracting office.

A reasonable number of copies of invitations for bids and requests for proposals, which are required to be publicized in the Commerce Business Daily, including specifications and other pertinent information, shall be maintained at the contracting office. Upon request, prospective contractors not initially solicited may be mailed or otherwise provided copies of such invitations for bids or requests for proposals to the extent they are available. Where a solicitation for proposals has been limited as a result of a determination that only a specified firm or firms possess the capability to meet the requirements of a procurement, requests for proposals shall be mailed or otherwise provided upon request to firms not solicited, but only after advice has been given to the firm making the request as to the reasons for the limited solicitation and the unlikelihood of any other firm being able to qualify for a contract award under the circumstances; but see § 4.205–2 of this chapter. In addition, to the extent that invitations for bids or requests for proposals are available, they shall be provided on a "first come-first served" basis, for pick up at the contracting office, to publishers, trade associations, procurement information services, and other members of the public having a legitimate interest therein; otherwise, the contracting office may limit the availability of such information to perusal at the contracting office (for construction, see § 18.205(c) of this chapter). In determining the "reasonable number" of copies to be maintained, the contracting officer shall consider, among other things, the extent of initial solicitation, reproduction costs, the nature of the procurement, whether access to classified matter is involved, the anticipated requests for copies based upon responses to synopses and other means of publication in previous similar situations, and the fact that publishers and others who disseminate information regarding proposed procurements normally do not require voluminous specifications or drawings. With regard to classified procurements, the foregoing instructions apply to the extent consistent with Departmental security instructions and procedures.

§ 1.1107–1 General.

(a) Whenever qualified products are to be procured by the Government as end items, only bids or proposals offering products which have been qualified prior to the opening of bids or award of negotiated contracts shall be considered in making award.

(b) Whenever a qualified product is to be procured by a prime contractor as

a component of an end item, the prime contractor shall be required to furnish a component which has been tested and qualified for inclusion in the applicable Qualified Products List by the time of award of the subcontract. Delay resulting from the prime contractor awaiting qualification approval by the Government of a component shall not constitute excusable delay when a previously qualified component could have been procured in time to meet the end item delivery schedule.

(c) Procurements involving qualified products shall be governed by subparagraphs (1) through (4) of this paragraph.

(1) Synopses of proposed procurements shall be published by purchasing activities, in accordance with § 1.1003, promptly upon receipt of purchase requests.

(2) The maximum time consistent with delivery requirements shall be allowed between issuance of the solicitation and the opening of bids or the award of a negotiated contract. As a minimum, however, contracting officers shall allow 30 calendar days between the dates of issuance and opening (award, in the case of negotiated contracts), *Provided*, That periods of less than 30 days may be set in cases of urgency when the justification for a shorter period is set forth in writing and made a part of the procurement file. In appropriate cases, advance notice of procurement involving qualified products may be given suppliers through the use of preinvitation notices. Such notices shall identify the specification requiring qualification.

(3) In procuring qualified products by formal advertising, invitations for bids will be distributed to suppliers in the same manner as if a qualified product were not involved, and will not be restricted to suppliers whose products have been qualified.

(4) Contracting officers shall forward requests from suppliers concerning qualification of products to the specification preparing activity.

§ 1.1107–2 Contract provisions.

(a) When qualified end products are to be procured by the Government, insert the following provision in the solicitation:

NOTICE—QUALIFIED END PRODUCTS
(JANUARY 1965)

Awards for any end items which are required to be qualified products will be made only when such items have been tested and have qualified for inclusion in a Qualified Products List identified below (whether or not actually included in the List) before the time set for opening of bids, or the time of award in the case of negotiated contracts. Offerors should contact the office designated below to arrange to have the products which they intend to offer tested for qualification.

The offeror shall insert the item name and the test number (if known) of each qualified product in the blank spaces below.

Item name_____
Test No._____

Offerors offering products which have been tested and qualified, but which are not yet listed, are requested to submit evidence of such qualification with their bids or proposals, so that they may be given consideration. If this is a formally advertised procurement, any bid which does not identify the qualified product being offered, either above or elsewhere in the bid, will be rejected.

Contracting officer shall identify, following the above notice, each Qualified Products List involved and give the name and address of the office, as identified in the specification, with which manufacturers should communicate.

(b) When qualified products are to be procured as components of end items, insert the following provision in the solicitation:

QUALIFIED PRODUCTS—COMPONENTS
(JANUARY 1965)

When any of the end items which are to be supplied to the Government by the Contractor will contain one or more components which are required to be Qualified Products, such components shall have been tested and have qualified for inclusion in a Qualified Products List identified below (whether or not actually included in the List) before the award of any subcontract by the Contractor for such components, or, in the event the Contractor plans to manufacture such components himself, shall have been so tested and have so qualified before the Contractor begins to manufacture such components for performance of this Contract (not before manufacture of the prototype, preproduction model, or first article, for qualification testing). Unless required for interchangeability or compatibility, the Contractor shall not cite brand names from any Qualified Products List in any subcontract solicitation, but shall refer to the pertinent military specification so that optimum competition may be obtained. Delay resulting from the Contractor awaiting qualification approval by the Government of a component shall not constitute excusable delay when a previously qualified component could have been procured in time to meet the end item delivery schedule. Contracting Officers shall, following the above provision, identify each Qualified Products List involved and give the name and address of the office, as identified in the specification, with which manufacturers should communicate.

§ 1.1108 Waiver of qualification requirement.

When procuring a product under a specification which includes qualification requirements either for the end item or for components of the end item, such qualification requirements can be waived only by the activity that prepared the specification. In appropriate cases, when requested by the contracting officer, the preparing activity may waive qualification requirements. A notice, issued by the preparing activity, directing a waiver of the qualification requirement, constitutes adequate authorization for waiver of product qualification requirements. Where waivers have been granted, solicitations shall specifically indicate that the qualification requirement is inapplicable. Such information shall also be included in any Synopsis of the procurement.

§ 1.1109 Inadequate competition.

(a) *Pre-solicitation.* In connection with procurement of a qualified product as an end item, the contracting officer shall review the applicable Qualified Products List prior to solicitation to ascertain whether the number of sources is adequate for competition. If, in the opinion of the contracting officer, the number of sources is inadequate, action shall be taken as prescribed below unless he already has the necessary information.

(1) The contracting officer shall request the activity that prepared the specification to provide information concerning the status of tests on additional products, including the anticipated dates when such tests will be completed so that opening of bids or submission of proposals may be so scheduled as to allow completion of the tests.

(2) If no tests are being conducted or contemplated, the contracting officer shall further request the preparing activity to advise whether a means of quality assurance other than qualification approval may be substituted in the procurement.

(b) *Post-solicitation.* The contracting officer shall advise the specification preparing activity of the name and address of any concern which requested copies of the solicitation but was not included on the Qualified Products List. The specification preparing activity may then attempt to interest such concerns in becoming qualified.

§ 1.1201 General.

* * * * *

(b) Many specifications cover several grades or types, and provide for several options in methods of inspection, etc. When such specifications are used, the solicitation shall state specifically the grade, type, or method of inspection, etc., on which bids or offers are to be based.

§ 1.1203 Availability of specifications, standards, plans, and drawings.

§ 1.1203–1 General.

Each solicitation shall be accompanied by the applicable specifications, standards, plans, drawings, and other pertinent documents, or shall state where such documents may be obtained or examined, in accordance with §§ 1.1203—1.1203–3.

§ 1.1203–2 Specifications and standards listed in the Department of Defense Index of Specifications and Standards (DODISS).

(a) A Department of Defense Single Stock Point (DODSSP) has been established at the Naval Supply Depot at Philadelphia for unclassified Federal, Military, and other specifications and standards (including commercial) listed in the Department of Defense Index of Specifications and Standards (DODISS). Except as provided in paragraph (b) of this section, such specifications and standard normally will not be furnished with the solicitation, but the solicitation shall contain a provision substantially as set forth below. Only that portion of the provision applicable to the particular solicitation should be used (see also F–200.1425 [1]).

AVAILABILITY OF SPECIFICATIONS AND STANDARDS

Specifications and standards cited in this Invitation for Bids/Request for Proposals are available as indicated below:

[1] Appendix F has been filed with the Office of the Federal Register; copies of forms may be obtained through the contracting officer in any of the military departments.

(a) *Unclassified Federal, military, and other specifications and standards (excluding commercial).* Submit request on DD Form 1425 (Specifications and Standards Requisition) to:

Commanding Officer,
U.S. Naval Supply Depot,
5801 Tabor Avenue,
Philadelphia, Pa., 19120.

DD Form 1425 shall be completed to indicate the specification title, number, date, and any applicable amendment thereto by number and date. An initial request, where the prospective Contractor does not have DD Form 1425, may be submitted in letter form, giving the same information required on DD Form 1425.

(b) *Commercial specifications and standards.* These specifications and standards are not available from Government sources. They may be obtained from the publishers.

(b) Specifications and standards listed in the DODISS (excluding commercial) may be furnished with the solicitation where:

(1) The nature and complexity of the item are such that furnishing with the solicitation is necessary to enable prospective contractors to make a competent initial evaluation of the solicitation;

(2) In the judgment of the contracting officer, it would be impracticable for prospective contractors to obtain the specifications and standards from the DODSSP in time to submit a bid or proposal, e.g., urgency of the procurement, isolated geographical area, or other cogent reason; or

(3) A prospective contractor who has not previously bid on the item requests a copy of the solicitation.

(c) Purchasing activities may obtain copies of all unclassified specifications and standards (including commercial) listed in the DODISS by sending DD Form 1425 to the DODSSP.

§ 1.1203–3 Specifications and standards not listed in DODISS, and plans, drawings, and other pertinent documents.

Specifications and standards not listed in the DODISS, and plans, drawings, and other pertinent documents (including new or revised Federal or Military specifications and standards not yet listed in the DODISS) normally shall be furnished with the solicitation. Where this is not feasible because of the bulk of the documents, the limited number of copies available, or for some other good reason, the solicitation shall include a provision substantially similar to (a) or (b) below, as appropriate.

(a) *Availability of specifications, standards, plans, drawings, and other pertinent documents.* The specifications, standards, plans, drawings, and other pertinent documents cited in this Invitation for Bids/Request for Proposals may be obtained by submitting a request to:

(Activity)

(Complete address)

Requests should give the number of the Invitation for Bids/Request for Proposal, and the title and number of the specification, standard, plan, drawing or other pertinent document requested, exactly as cited in this Invitation/Request.

(b) *Availability of specifications, standards, plans, drawings, and other pertinent documents.* The specifications, standards, plans, drawings, and other pertinent documents cited in this Invitation for Bids/Request for Proposals may be examined at the following locations:

(Insert complete addresses)

§ 1.1204 Packaging requirements.

(a) Appropriate preservation, packaging, packing, and marking requirements will be included in contracts as applicable. The services of packaging technicians shall be used to the maximum extent practicable, for example, for the following purposes:

(1) Development or establishment of preservation, packaging, packing, and marking requirements for individual procurements; and

(2) Assistance in evaluating the reasonableness of contractors' packaging, packing, and marking cost estimates or charges.

(b) Unrealistic preservation, packaging, packing, and marking requirements should be reported an changes recommended to the activity originating the requirement and to the contracting officer.

§ 1.1208 Procurement of used and reconditioned material and former Government surplus property.

(a) Generally, all supplies or components thereof, including former Government property, purchased by the Military Departments shall be new (not used or reconditioned, and not of such age or so deteriorated as to impair their usefulness or safety). However, the needs of the Government may sometimes be met, and economies effected, through the purchase of items which are not new. Solicitations and the resulting contracts shall include a clause, substantially as set forth below, except when the clause would serve no useful purpose. This clause is appropriate for use not only in supply contracts, but also in service contracts which may involve an incidental furnishing of parts, such as contracts for overhaul, maintenance or repair.

NEW MATERIAL (JANUARY 1965)

Except as to any supplies and components which the Specification or Schedule specifically provides need not be new, the Contractor represents that the supplies and components including any former Government property identified pursuant to the "Government Surplus" clause of this contract to be provided under this contract are new (not used or reconditioned, and not of such age or so deteriorated as to impair their usefulness or safety). If at any time during the performance of this contract, the Contractor believes that the furnishing of supplies or components which are not new is necessary or desirable, he shall notify the Contracting Officer immediately, in writing, including the reasons therefor and proposing any consideration which will flow to the Government if authorization to use such supplies is granted.

* * * * *

(d) The solicitations and resulting contracts shall include a clause substantially as set forth below except when the clause would serve no useful purpose.

GOVERNMENT SURPLUS (JANUARY 1965)

(a) In the event the bid or proposal is based on furnishing items or components which are former Government surplus property or residual inventory resulting from terminated Government contracts, a complete description of the items or components, quantity to be used, name of Government agency from which acquired, and date of acquisition shall be set forth on a separate sheet to be attached to bid or proposal. Notwithstanding any information provided in accordance with this provision, items furnished by the Contractor must comply in all respects with the specifications contained herein.

(b) Except as disclosed by the Contractor in (a) above, no property of the type described herein shall be furnished under this contract unless approved in writing by the Contracting Officer.

PART 2—PROCUREMENT BY FORMAL ADVERTISING

12. In § 2.201, paragraph (a) (15), (20), and (25) is revised; paragraph (a) (28) is added; paragraph (a) (31), (33), and (35) is revised; paragraphs (b) (6) and (c) are revised as follows:

§ 2.201 Preparation of invitation for bids.

* * * * *

(a) * * *

(15) When considered necessary by the contracting officer, a requirement that all bids must allow a period for acceptance by the Government of not less than a minimum period stipulated in the invitation for bids, and that bids offering less than the minimum stipulated acceptance period will be rejected. The minimum period so stipulated should be no more than reasonably required for evaluation of bids and other pre-award processing. To accomplish the foregoing, a paragraph substantially as follows may be included in the Schedule or other appropriate place in the Invitation for Bids:

BID ACCEPTANCE PERIOD (APRIL 1960)

Bids offering less than ------ days for acceptance by the Government from the date set for opening of bids will be considered nonresponsive and will be rejected.

In construction contracts, a 30-day bid acceptance period is normal, but may be less, and in unusual circumstances a period of 60 days may be specified.

* * * * *

(20) A statement of the exact basis upon which bids will be evaluated and award made, to include any Government costs or expenditures (other than bid prices) to be added or deducted, or any provision for escalation as factors for evaluation.

* * * * *

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

LATE BIDS AND MODIFICATIONS OR WITHDRAWALS (JANUARY 1965)

(a) 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:

(i) they are received before award is made; and either

(ii) they are sent by registered mail, or by certified mail for which an official dated post office stamp (postmarked) on the original Receipt for Certified Mail has been obtained, or by telegraph if authorized, and it is determined by the Government that the late receipt was due solely to delay in the mails, or delay by the telegraph company, for which the bidder was not responsible; or

(iii) if submitted by mail (or by telegram if authorized), it is determined by the Government that the late receipt was due solely to mishandling by the Government after receipt at the Government installation; *Provided*, That timely receipt at such installation is established upon examination of an appropriate date or time stamp (if any) of such installation, or of other documentary evidence of receipt (if readily available) within the control of such installation or of the post office serving it.

However, a modification which makes the terms of the otherwise successful bid more favorable to the Government will be considered at any time it is received and may thereafter be accepted.

(b) Bidders using certified mail are cautioned to obtain a Receipt for Certified Mail showing a legible, dated postmark and to retain such receipt against the chance that it will be required as evidence that a late bid was timely mailed.

(c) The time of mailing of late bids submitted by registered or certified mail shall be deemed to be the last minute of the date shown in the postmark on the registered mail receipt or registered mail wrapper or on the Receipt for Certified Mail unless the bidder furnishes evidence from the post office station of mailing which establishes an earlier time. In the case of certified mail, the only acceptable evidence is as follows: (i) where the Receipt for Certified Mail identifies the post office station of mailing, evidence furnished by the bidder which establishes that the business day of that station ended at an earlier time, in which case the time of mailing shall be deemed to be the last minute of the business day of that station; or (ii) an entry in ink on the Receipt for Certified Mail showing the time of mailing and the initials of the postal employee receiving the item and making the entry, with appropriate written verification of such entry from the post office station of mailing, in which case the time of mailing shall be the time shown in the entry. If the postmark on the original Receipt for Certified Mail does not show a date, the bid shall not be considered.

* * * * *

(28) Information regarding bidding material which shall include Instructions to Bidders, the Bid Form, the Contract Form, the General Provisions, any conditions, the specifications and drawings (see § 1.1203 of this chapter).

* * * * *

(31) If the contract is to involve construction work (subject to the Davis-Bacon Act) at Cape Kennedy, Patrick Air Force Base, or Merritt Island Launch Area, the Employee Compensation clause and Table of Employee Compensation (see § 12.403–5 of this chapter);

* * * * *

(33) The Certificate of Independent Price Determination as required by § 1.115 of this chapter;

* * * * *

(35) Pending revision of Standard Forms 30 and 33, the following definition of small business shall be substituted for the currently cited definitions therein:

DEFINITION OF SMALL BUSINESS

A small business concern for the purpose of Government procurement is a concern, including its affiliates, which is independently owned and operated, is not dominant in the field of operation in which it is bidding on Government contracts and can further qualify under the criteria concerning number of employees, average annual receipts, or other criteria, as prescribed by the Small Business Administration. (See Code of Federal Regulations, Title 13, Part 121, as amended, which contains detailed industry definitions and related procedures.)

* * * * *

(b) * * *

(6) Preservation, packaging, packing, and marking requirements, if any (see § 1.1204 of this chapter).

* * * * *

(c) For construction contracts, the invitation for bids shall contain the following in addition to the information required by paragraph (a) of this section if applicable to the procurement involved.

(1) Statutory cost limitation provisions (see § 18.110 of this chapter).

(2) If a construction contract is estimated to exceed $1,000,000, or in appropriate contracts under $1,000,000, the clause set forth in § 7.603–15 of this chapter and a statement that the successful bidder must furnish the contracting officer within (number) days after award the items of work which he will perform with his own forces and the estimated cost of those items unless he has submitted those items with his bid.

(3) The estimated magnitude of the proposed construction indicated by § 18.109 of this chapter.

(4) Special provision relating to the Buy American Act (see § 6.204–4 of this chapter).

(5) Statement of arrangements to be made for inspecting the site, including designation of the person or persons, if any, with whom such arrangements may be made and who will answer questions or furnish information.

(6) Information which may affect performance of the work such as boring samples, original boring logs, etc.

(7) Information concerning the furnishing of utilities during construction.

(8) Information concerning pre-bid conference.

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

(10) Modifications Prior to Date Set for Opening Bids. The right is reserved, as the interest of the Government may require, to revise or amend the specifications or drawings or both prior to the date set for opening bids. Such revisions and amendments, if any, will be announced by an amendment or amendments to this Invitation for Bids. If the revisions and amendments are of a nature which requires material changes in quantities or prices bid or both, the date set for opening bids may be postponed by such number of days as in the opinion of the issuing officer will enable bidders to revise their bids. In such cases, the amendment will include an announcement of the new date for opening bids.

(11) Government's Privilege in Making Awards. The Government further reserves the right to make award of any or all schedules of any bid, unless the bidder qualifies such bid by specific limitation; also to make award to the bidder whose aggregate bid on any combination of bid schedules is low. For the purpose of this Invitation for Bids, the word "item" as used in paragraph 10(c) of Standard Form 22 shall be considered to mean "schedule."

13. Sections 2.202–1, 2.202–5(g), 2.210(a), 2.407–(a)(2), and 2.408–1 are revised to read as follows:

§ 2.202–1 Bidding time.

Consistent with the needs of the Government for obtaining the supplies or services, all invitations for bids shall allow sufficient bidding time (i.e., the period of time between the date of distribution of an invitation for bids and the date set for opening of bids) to allow bidders an adequate opportunity to prepare and submit their bids. As a general rule, bidding time shall be not less than 15 calendar days when procuring standard commercial articles and services and not less than 30 calendar days when procuring other than standard commercial articles or services. This rule need not be observed in special circumstances, or where the urgency for the supplies or services does not permit such delay. For items on Qualified Products Lists, see § 1.1105 of this chapter; and for construction contracts, see § 18.202(b) of this chapter.

§ 2.202–5 Descriptive literature.

* * * * *

(g) See § 2.404–4 for requirements with respect to restrictions on the public disclosure of descriptive literature submitted by a bidder.

§ 2.210 Release of procurement information.

(a) *Prior to synopsis or solicitation.* Information concerning proposed procurements shall not be released outside the Government prior to solicitation except when pre-invitation notices have been used in accordance with § 2.205–6 or § 18.205(c) of this chapter. Within the Government, such information shall be restricted to those having a legitimate interest therein. Such information shall be released to all potential contractors at the same time, as nearly as possible, so that one potential contractor shall not be given unfair advantage over another.

* * * * *

§ 2.407–7 Statement and certificate of award.

(a) * * *

(2) Violation of covenant against contingent fees (see § 1.508–1(c) of this chapter).

* * * * *

§ 2.408–1 Unclassified awards.

In the case of all unclassified formally advertised contracts, the purchasing office shall as a minimum (subject to any restrictions in Subpart F, Part 1 of this chapter), (a) notify unsuccessful bidders promptly of the fact that their bids were not accepted, and (b) extend the appreciation of the purchasing office for the interest the unsuccessful bidder has shown in submitting a bid. Notification to unsuccessful bidders may be either orally or in writing through the use of a form postal card or other appropriate means. Should additional information be requested, the purchasing office shall provide the unsuccessful bidders with the name and address of the successful bidder, together with the contract price, and should also inform the inquirers as to the location where a copy of the abstract of bids is available for inspection. However, when multiple awards have been made and furnishing the names, addresses, and contract prices of the successful bidders would require so large an amount of work as to interfere with normal operations of the purchasing office, only information concerning location of the abstract of bids need be given. In addition, when an inquiry is made by an unsuccessful bidder who is lower in price than the successful bidder, sufficient information shall be furnished in the reply to the unsuccessful bidder to fully explain the basis for award. Where request is received concerning an unclassified invitation for bids from an inquirer who is neither a bidder nor a representative of a bidder, the purchasing office should make every effort to furnish the names of successful bidders and, if requested, the prices at which awards were made. However, where such requests require so large amount of work as to interfere with the normal operations of the purchasing office, the inquirer will be advised where a copy of the abstract of bids may be seen.

PART 3—PROCUREMENT BY NEGOTIATION

14. Sections 3.101(h), 3.108(a), and 3.200 are revised; the introductory text of § 3.202–2 is revised; §§ 3.203–2, 3.212–3, and 3.216–2(c) are revised; and §§ 3.218, 3.218–1, 3.218–2, and 3.218–3 are revoked, as follows:

§ 3.101 Negotiation as distinguished from formal advertising.

* * * * *

(h) Consideration of the nature and effectiveness of the prospective contractor's cost reduction program;

* * * * *

§ 3.108 Negotiation of initial production contracts for technical or specialized military supplies.

(a) The production of important new technical or specialized military supplies generally involves development, evaluation, and initial production phases. Examples of such supplies are tanks, radar, guided missiles, aircraft, rockets, and equipment of similar complexity; major components of such equipment as the foregoing; and any items of technical or specialized nature necessary for the use, maintenance or operation of such equipment. Contracting officers shall avoid, wherever practicable, awarding initial production contracts for supplies until completion of the development and evaluation phases. At the time of placing the initial production contract, it is essential that the Government be completely free to select the contractor as the best interest of the Government may dictate. In the placement and administration of research or development contracts, no commitments shall be made to contractors with respect to obtaining subsequent production contracts. Procurements for initial production quantity of an item shall not be initiated until the item has been approved for service use unless prior approval has been obtained. Where justified by special circumstances, procurements of production quantities in advance of approval for service use may be authorized for the Departments of the Army and Air Force by Heads of the Procuring Activity, and for the Department of the Navy by the appropriate authority set forth in SECNAV Instruction 3900.30 and 3960.2.

* * * * *

§ 3.200 General.

Subject to the limitations set forth in Subpart A of this part and pursuant to the authority of 10 U.S.C. 2304(a), procurement may be effected by negotiation under any one of the exceptions ((1) through (17) of 10 U.S.C. 2304(a)) set forth in this subpart, subject, in the case of construction contracts, to the further restrictions of 10 U.S.C 2304(c) as set forth in § 18.301 of this chapter. Each negotiated contract shall contain a reference to the authority under which it was negotiated.

§ 3.202–2 Application.

In order for the authority of §§ 3.202—3.202–3 to be used, the need must be compelling and of unusual urgency, as when the Government would be seriously injured, financially or otherwise, if the supplies or services were not furnished by a certain date, and when they could not be procured by that date by means of formal advertising. When negotiating under this authority, competition to the maximum extent practicable, within the time allowed, shall be obtained. The following are illustrative of circumstances with respect to which this authority may be used:

* * * * *

§ 3.203–2 Application.

Purchaser or contracts aggregating not more than $2,500 shall be made in accordance with Subpart F of this part, and § 18.302 of this chapter in the case of certain construction contracts.

§ 3.212–3 Limitation.

In order for the authority of §§ 3.212—3.212–3 to be used, the required determination must be made in accordance with the requirements of Subpart C of this part. The authority of §§ 3.212—3.212–3 shall not be used when negotiation is authorized by any other authority set forth in §§ 3.201 through 3.217, except as otherwise provided in § 3.204–3.

§ 3.216–2 Application.

* * * * *

(c) When procurement by negotiation is necessary to maintain properly balanced sources of supply for meeting the requirements of procurement programs in the interest of industrial mobilization. (When the quantity required is substantially larger than the quantity which must be awarded in order to meet the objectives of this authority, that portion not required to meet such objectives will ordinarily be procured by formal advertising or by negotiation under another appropriate negotiation exception.)

§ 3.218 Construction work. [Revoked]

§ 3.218–1 Application. [Revoked]

§ 3.218–2 Limitation on authority to negotiate contracts. [Revoked]

§ 3.218–3 Citation of authority to negotiate. [Revoked]

15. Sections 3.408(c) and 3.409 (b)(1) and (c)(1) are revised; in § 3.410–1, paragraph (a) is revised and subparagraphs (5), (6), (7), (8), (9), and (10) are added to paragraph (b); and in § 3.501(b), subparagraphs (14), (28), (36), (37), and (38) are revised and subparagraph (49) is revoked, as follows:

§ 3.408 Letter contract.

* * * * *

(c) *Limitations.* (1) A letter contract shall be used only after a written determination that no other type of contract is suitable.

(2) A letter contract shall not be entered into without competition when competition is practicable. Where a letter contract award is based on price competition, an overall price ceiling shall be included in the letter contract.

(3) A letter contract shall be superseded by a definitive contract at the earliest practicable date. The letter contract shall reflect an agreement between the Government and the contractor as to the date by which definitization is expected to be completed and a definitization schedule, as required by § 7.802–4 of this chapter. This date shall be prior to:

(i) The expiration of 180 days from the date of the letter contract; or

(ii) Forty percent (40 percent) of the production of the supplies, or the performance of the work, called for under the contract, whichever occurs first.

In extreme cases, an additional period may be authorized.

(4) The maximum liability of the Government stated in the letter contract will be the amount estimated to be necessary to cover the contractor's requirements for funds prior to definitization, but this amount shall not exceed fifty percent (50 percent) of the total estimated cost of the procurement unless advance approval is obtained from the official authorizing the letter contract.

(5) The total estimated cost shall not exceed the funds available for obligation and commitment in the appropriate allotment account. Therefore, the letter contract shall not describe, refer to, or otherwise commit the Government to a definitive contract in excess of the funds available for obligation and commitment

at the time the letter contract is executed.

(6) Amendments to letter contracts to accomplish new procurement may be used only if the new procurement is inseparable from the procurement covered by the existing letter contract. Such amendments are subject to the same limitations as new letter contracts.

* * * * *

§ 3.409 Indefinite delivery type contracts.

* * * * *

(b) *Requirements contract*—(1) *Description.* This type of contract provides for filling all actual purchase requirements of specific supplies or services of designated activities during a specified contract period with deliveries to be scheduled by the timely placement of orders upon the contractor by activities designated either specifically or by class. Depending on the situation, the contract may provide for (i) firm fixed prices, (ii) price escalation, or (iii) price redetermination. An estimated total quantity is stated for the information of prospective contractors, which estimate should be as realistic as possible. The estimate may be obtained from the records of previous requirements and consumption, or by other means. Care should be used in writing and administering this type of contract to avoid imposition of an impossible burden on the contractor. Therefore, the contract shall state, where feasible, the maximum limit of the contractor's obligation to deliver and, in such event, shall also contain appropriate provision limiting the Government's obligation to order. When large individual orders or orders from more than one activity are anticipated, the contract may specify the maximum quantities which may be ordered under each individual order or during a specified period of time. Similarly, when small orders are anticipated, the contract may specify the minimum quantities to be ordered. Funds are obligated by each order and not by the contract itself.

* * * * *

(c) *Indefinite quantity contract*—(1) *Description.* This type of contract provides for the furnishing of an indefinite quantity, within stated limits, of specific supplies or services, during a specified contract period, with deliveries to be scheduled by the timely placement of orders upon the contractor by activities designated either specifically or by class. Depending on the situation, the contract may provide for (i) firm fixed prices; (ii) price escalation; or (iii) price redetermination. The contract shall provide that during the contract period the Government shall order a stated minimum quantity of the supplies or services and that the contractor shall furnish such stated minimum and, if and as ordered, any additional quantities not exceeding a stated maximum which should be as realistic as possible. The maximum may be obtained from the records of previous requirements and consumption, or by other means. When large individual orders or orders from more than one activity are anticipated, the contract may specify the maximum quantities which may be orderd under each individual order or during a specified period of time. Similarly, when small orders are anticipated, the contract may specify the minimum quantities to be ordered. Funds for other than the stated minimum quantity are obligated by each order and not by the contract itself.

* * * * *

§ 3.410–1 Basic agreement.

(a) *Description.* A basic agreement is a written instrument of understanding executed between a Department or procuring activity and a contractor which sets forth the negotiated contract clauses which shall be applicable to future procurements entered into between the parties during the term of the basic agreement. The use of the basic agreement contemplates the coverage of a particular procurement by the execution of a formal contractual document which will provide for the scope of the work price, delivery, and additional matters peculiar to the requirements of the specific procurement involved, and shall incorporate by reference or append the contract clauses agreed upon in the basic agreement as required or applicable. Basic agreements may be used with fixed-price or cost-reimbursement type contracts.

(b) *Applicability.* * * *

(5) A basic agreement shall be used to cover all subsequent procurements which fall within its scope. Provisions of the basic agreement, including supplements thereto, shall be incorporated into the formal contractual document covering the particular procurement by referring therein to the number of the basic agreement and each of its supplements. The reference "Basic Agreement No. _____, as amended," shall not be used.

(6) Except as provided below when an existing contract is amended to effect new procurement, the supplemental agreement shall:

(i) Incorporate the most recent basic agreement, including supplements thereto, to apply only to the work added by the supplemental agreement; or

(ii) If it is in the interest of the Government, incorporate the most recent basic agreement, including supplements thereto, to apply to the entire contract as of the date of the supplemental agreement.

An existing contract may be amended by a supplemental agreement effecting new procurement without incorporating the most recent basic agreement only if all clauses then required by statute, Executive Order, and this subchapter are included in the contract or the proposed supplemental agreement.

(7) Supplemental agreements negotiated pursuant to the terms of an existing contract and not involving new procurement may, if determined to be in the interest of the Government, amend the existing contract to conform to a subsequently executed or supplemental basic agreement.

(8) Clauses pertaining to subjects not covered in a basic agreement but applicable to the contract being negotiated shall be included in the contract as if no basic agreement existed.

(9) Where a clause which was included in the basic agreement pursuant to a deviation must be replaced by a revised clause, the revised clause may deviate to the same extent as the original clause if the revision is not related to the deviation, and if the deviation has not expired or been rescinded.

(10) If a letter contract has been entered into under a basic agreement which thereafter was superseded by a new basic agreement, or amended by supplemental agreement, the contractual instrument which definitizes such letter contract shall incorporate the superseding basic agreement or supplemental agreement, as applicable. If the basic agreement has been terminated without being superseded, or has expired, the definitive contract which supersedes the letter contract shall incorporate the clauses required by statute, Executive order, or this subchapter.

* * * * *

§ 3.501 Preparation of request for proposals or request for quotations.

* * * * *

(b) * * *

(14) Consistent with § 3.805–1(a)(5), notice to all offerors of the possibility that award may be made without discussion of proposals. (All requests for proposals for construction shall contain a provision that in the event several proposals are received and the contracting officer is satisfied that the offerors understand the work and are responsible prospective contractors and that the low proposal is reasonable and does not differ unreasonably from the Government estimate, if any, award may be made to the firm whose proposal is low, without further negotiation.)

* * * * *

(28) Preservation, packaging, packing, and marking requirements (see § 1.1204 of this chapter);

* * * * *

(36) Statutory cost limitations (for construction, see § 18.110 of this chapter);

(37) For construction, provisions for performance of work by contractor, see §§ 2.201(c)(2) and 18.104 of this chapter;

(38) Estimated magnitude of the proposed construction, see § 13.109 of this chapter.

* * * * *

(49) [Revoked]

* * * * *

16. Subpart F is revised; §§ 3.807–2, 3.807–3, 3.807–4, 3.808–1, 3.808–2, 3.808–3, 3.808–4, 3.808–5, and 3.808–6 are revised, and § 3.808–7 is revoked, as follows:

Subpart F—Small Purchase and Other Simplified Purchase Procedures

Sec.

3.600 Scope of subpart.
3.601 Purpose.
3.602 Definitions.
3.603 Policy.
3.603–1 General.
3.604 Competition in small purchases.
3.604–1 Purchases not in excess of $250.
3.604–2 Purchases in excess of $250.

Sec.
3.605 Blanket Purchase Agreement (BPA).
3.605-1 General.
3.605-2 Limitation on use.
3.605-3 Establishment of blanket purchase agreements.
3.605-4 Competition under blanket purchase agreements.
3.605-5 Calls against blanket purchase agreements.
3.605-6 Receipt of material.
3.605-7 Review procedures.
3.606 Fast payment procedure.
3.606-1 General.
3.606-2 Conditions for use.
3.606-3 Preparation and execution of orders.
3.606-4 Responsibility for collection of debts.
3.607 Imprest fund method.
3.607-1 General.
3.607-2 Establishment of imprest funds.
3.607-3 Conditions for use.
3.607-4 Procedures.
3.608 Purchase orders.
3.608-1 General.
3.608-2 Order for supplies or services (DD Forms 1155, 1155r, 1155c, 1155c-1, and 1155s).
3.608-3 Unpriced purchase order.
3.608-4 Use of DD Form 1155s with the DD Form 1155.
3.608-5 Termination of purchase order.
3.608-6 Use of DD Form 1155 as a delivery order.
3.608-7 Use of DD Form 1155 as a public voucher.
3.608-8 Order-invoice-voucher method.

AUTHORITY: The provisions of this Subpart F issued under sec. 2202, 70A Stat. 120; 10 U.S.C. 2202. Interpret or apply secs. 2301-2314, 70A Stat. 127-133; 10 U.S.C. 2301-2314.

Subpart F—Small Purchase and Other Simplified Purchase Procedures

§ 3.600 Scope of subpart.

This subpart sets forth simplified procedures for the procurement of (a) supplies and nonpersonal services the aggregate amount of which does not exceed $2,500, and (b) construction, the aggregate amount of which does not exceed $2,000, both of which are referred to in this subpart as "small purchases." It also applies to certain other supplies and services. This subpart does not preclude the use of a negotiated two-party formal contract for procurements not in excess of $2,500; for example, where the procurement is classified or requires specific contract provision relating to technical inspection or test, specification changes, Government-furnished property, insurance, patents, price adjustments, or the like. When the total cost of services to repair Government equipment does not exceed $2,500, such services may be obtained by purchase order or other appropriate small purchase method, regardless of the value of the Government equipment being repaired (see § 3.608-26(b)(1)(viii)). Procurements of supplies and services or construction initially estimated to exceed $2,500 or $2,000, respectively, shall not be made by the small purchase method, even though resulting awards do not exceed such amounts.

§ 3.601 Purpose.

The objective of the simplified purchase methods prescribed herein is to reduce administrative costs.

§ 3.602 Definitions.

As used in this subpart, the following terms have the meanings set forth below.

(a) "Bulk funding concept" means a system whereby a contracting officer receives authorization from a fiscal and accounting officer to obligate funds on purchase documents against a specified lump sum of funds reserved for the purpose for a specified period of time rather than obtaining individual obligational authority on each purchase document.

(b) "Local purchase" means the authorized purchase of materials, supplies, and services by an installation for its own use or the use of an installation or activity logistically supported by it. Local purchase is not limited to the immediate geographical area in which the purchasing installation is located.

(c) "Mail indicia" means the official printed markings substituted for stamps, i.e., "Postage and Fees Paid" and appropriate department. This includes such markings on envelopes, cards, labels, wrappers, or tags.

(d) "Local delivery" means the movement of supplies or commodities wholly within a recognized metropolitan area in which both the point of pickup and the point of delivery are located.

§ 3.603 Policy.

§ 3.603-1 General.

(a) All purchases covered by this subpart shall be accomplished by negotiation and shall cite the appropriate subparagraph of 10 U.S.C. 2304(a) in accordance with Subpart B of this part. Such purchases shall be made only when requirements cannot be satisfied by procurement in accordance with Part 5 of this chapter. The contracting officer shall use the purchase method covered by this subpart which he determines to be most suitable to the immediate requirement and most efficient and economical. Simplified procedures may be used in procurements from Government established sources, if authorized by the basic contract or concurred in by the source. These procedures shall not be used for inserting paid advertisements in newspapers or magazines (see § 1.1002-6 of this chapter).

(b) Requirements aggregating more than $2,500 shall not be broken down into several purchases which are less than $2,500 merely for the purpose of permitting negotiation under the small purchase procedures authorized by this subpart. Related items (such as small hardware items or spare parts for vehicles) may be included in one solicitation, and the award made on "all or none" basis. In such cases, suppliers shall be advised of this award procedure when quotations are requested.

(c) The "bulk funding" concept shall be used to the maximum extent practicable to reduce processing delays, double handling, and documentation. Bulk funding is particularly appropriate when numerous purchases using the same type of funds are to be made during a given period.

(d) Installation or activity transportation facilities may be used for delivery from local suppliers to the purchasing installation only after consideration of the following methods:

(1) Supplier delivery;
(2) Common carrier;
(3) Parcel post; and
(4) Mail indicia.

(e) Inspection procedures for small purchases shall be in accordance with § 14.106 of this chapter. See also § 14.204 of this chapter.

§ 3.604 Competition in small purchases.

§ 3.604-1 Purchases not in excess of $250.

Small purchases not exceeding $250 may be accomplished without securing competitive quotations where the prices are considered to be reasonable, but such purchases shall be distributed equitably among qualified suppliers. Records of purchases of $250 or less need not include justification for soliciting only a single source or a justification explaining how prices were determined to be reasonable.

§ 3.604-2 Purchases in excess of $250 but not in excess of $2,500.

Reasonable solicitation of quotations from qualified sources of supply shall be made to assure that the procurement is to the advantage of the Government, price and other factors considered, including the administrative cost of the purchase. Generally, solicitation shall be limited to three suppliers and, to the maximum extent possible, shall be restricted to the local trade area. When prices are solicited from three suppliers dealing in the general category of items required and only one quotation is received, it is not necessary to solicit additional quotations if the price received is considered fair and reasonable. Quotations shall generally be solicited orally. Written solicitations shall be used only where (a) the suppliers are located outside the local area, (b) special specifications are involved, (c) a large number of items are included in a single proposed procurement, or (d) obtaining oral quotations is not considered economical. Reasonableness of proposed prices may be established by comparison with previous purchases, current price lists, catalogs, advertisements, or by any other appropriate method. Where these informational media are not available, reasonableness of price may be based on a comparison with similar items in a related industry or the contracting officer's personal knowledge of the item being procured. Although the contracting officer must determine that prices are fair and reasonable, written justification explaining how prices were determined to be fair and reasonable is not required. Written records of solicitation may be limited to notes or abstracts to show the vendor or vendors contacted, prices, delivery, and other informal historical data. When only one source is solicited, a brief written notation must be made a part of the file to explain the absence of competition. Notification to unsuccessful suppliers shall be given only if requested.

§ 3.605 Blanket Purchase Agreement (BPA).

§ 3.605–1 General.

A blanket purchase agreement is a simplified method of filling anticipated repetitive needs for small quantities of supplies or services by establishing "charge accounts" with qualified sources of supply. Blanket purchase agreements are designed to reduce administrative costs in accomplishing small purchases by eliminating the need for issuing individual purchase documents.

§ 3.605–2 Limitation on use.

Blanket purchase agreements may be used only within the following limitations:

(a) No single call issued against a blanket purchase agreement may exceed $2,500, except for subsistence items, in which case the Examination of Records clause in § 7.104–15 of this chapter shall be included in the agreement; and

(b) The maximum period of time covered by the agreement shall not exceed one year.

§ 3.605–3 Establishment of blanket purchase agreements.

(a) *Alternate sources.* To the extent practicable, blanket purchase agreements for items of the same type should be placed concurrently with more than one supplier. All competitive sources should be given an equal opportunity to furnish supplies or services under such agreements.

(b) *Form.* (1) Except as provided in subparagraph (2) of this paragraph, blanket purchase agreements shall be prepared and issued on DD Form 1155 (Order for Supplies or Services). The "General Provisions of Purchase Order" either on the DD Form 1155r or on the reverse of the DD Form 1155 shall be used. Other applicable provisions of the blanket purchase agreement shall be set forth on the DD Form 1155c (Schedule/Continuation Sheet).

(2) Blanket purchase agreements issued by the Defense Subsistence Supply Center may be prepared on its form "Order for Subsistence."

(c) *Numbering.* A basic number in the informal numbering series of the purchasing office shall be assigned to each blanket purchase agreement for the entire effective period. Each call against a blanket purchase agreement shall be appropriately identified.

(d) *Accounting data.* Blanket purchase agreements need not cite any accounting data so that purchases utilizing different appropriation data may be made under the same agreement.

(e) *Negotiation authority.* The Schedule of each agreement shall be annotated as follows:

> The issuance of individual requests against this blanket purchase agreement will be made under the authority of 10 U.S.C. 2304(a)(3), 10 U.S.C. 2304(a)(6), or in the case of subsistence 10 U.S.C. 2304(a)(3), 10 U.S.C. 2304(a)(6), or 10 U.S.C. 2304(a)(9).

This annotation shall not be duplicated on forms used to document individual calls, although the specific authority for the call may be cited therein.

(f) *Terms and conditions.* Blanket purchase agreements shall contain the following provisions:

(1) Description of agreement—a statement that the supplier shall furnish supplies or services, described therein in general terms, if and when requested by the contracting officer or his authorized representative during a specified period and within a stipulated aggregate amount, if any. Blanket purchase agreements may be limited to specific items or commodity groups or the scope of the agreement may encompass all items that the supplier is in a position to furnish.

(2) Extent of obligation—a statement that the Government is obligated only to the extent of authorized calls actually placed against the blanket purchase agreement.

(3) Pricing—a statement that the prices to the Government shall be as low as, or lower than those charged the supplier's most favored customer, in addition to any discounts for prompt payment.

(4) Call limitation—a statement that no individual call under the agreement shall exceed 2,500 (except for subsistence).

(5) Notice of individuals authorized to place calls and dollar limitations—a provision that a list of names of individuals authorized to place calls under the agreement, identified by organizational component, and the dollar limitation per call for each individual shall be furnished the supplier by the contracting officer.

(6) Delivery tickets—a requirement that all shipments under the agreement shall be accompanied by delivery tickets or sales slips which shall contain the following minimum information—

(i) Name of supplier;

(ii) Blanket purchase agreement number;

(iii) Date of call;

(iv) Call number;

(v) Identification of individual placing call;

(vi) Itemized list of supplies or services furnished;

(vii) Quantity, unit price, and extension of each item less applicable discounts; and

(viii) Date of delivery or shipment.

(7) Invoices—one of the following statements:

(i) A summary invoice shall be submitted at least monthly or upon expiration of the blanket purchase agreement, whichever occurs first, for all deliveries made during a billing period, identifying the delivery tickets covered therein, stating their total dollar value, and supported by receipted copies of the delivery tickets; or

(ii) An itemized invoice shall be submitted at least monthly or upon expiration of the blanket purchase agreement, whichever first occurs, for all deliveries made during a billing period and for which payment has not been received. Such invoices need not be supported by copies of delivery tickets; or

(iii) When billing procedures provide for an individual invoice for each delivery, these invoices shall be accumulated provided that:

(*a*) A consolidated payment will be made for each specified period; and

(*b*) The period of any discounts will commence on the final date of billing period or on the date of receipt of invoices for all deliveries accepted during the billing period, whichever is later.

The provision in subdivision (iii) of this subparagraph should not be used if the accumulation of the individual invoices by the Government materially increases the administrative costs of this purchase method.

(8) The special data required by § 3.606–3(b) when it is desired to use the fast pay procedure.

§ 3.605–4 Competition under blanket purchase agreement.

Calls against blanket purchase agreements shall be placed only after compliance with § 3.604. When concurrent agreements for similar items are in effect, calls not in excess of $250 shall be equitably distributed. In those instances where there are an insufficient number of BPAs for any given class of supplies or services to assure adequate competition, the individual placing the order shall solicit quotations from other sources.

§ 3.605–5 Calls against blanket purchase agreements.

Calls against blanket purchase agreements generally will be made orally, except that informal correspondence may be used when ordering against agreements outside the local trade area. Documentation of calls shall be limited to essential information.

§ 3.605–6 Receipt of material.

Acceptance of supplies or services shall be indicated by signature and date on the sales slip or delivery ticket after quantities have been verified and any exceptions noted. Material Inspection and Receiving Report (DD Form 250) may be used for this purpose. For blanket purchase agreements incorporating the fast pay procedure, acceptance shall be predicated on the supplier's certification in accordance with paragraph (c) of the clause in § 3.606–3(b)(4). Suppliers' invoices shall be processed for payment at the end of each billing period.

§ 3.605–7 Review procedures.

The contracting officer or his designated representative shall review the blanket purchase agreement files at least semiannually to assure that authorized procedures are being followed. When an activity ordering against a blanket purchase agreement does not come under the jurisdiction of the command of the contracting officer issuing the agreement, the command utilizing the blanket purchase agreement shall conduct the necessary review.

§ 3.606 Fast payment procedure.

§ 3.606–1 General.

The fast payment procedure is designed to reduce lead time to consignees and to improve supplier relations by expediting payment for small purchases. The procedure provides for payment for supplies based on the contractor's certification on the invoice that the supplies have been delivered to a post office, common carrier or point of first receipt by

the Government, and that the contractor agrees to replace, repair, or correct supplies not received at destination, damaged in transit, or not conforming to purchase agreements.

§ 3.606–2 Conditions for use.

The fast payment procedure is authorized for use only when:

(a) Individual purchase orders do not exceed $2,500;

(b) Title to the supplies will vest in the Government (1) upon delivery to a post office or common carrier for mailing or shipment to destination, or (2) upon receipt by the Government when the shipment is by means other than the post office or common carrier;

(c) Supplier agrees to replace, repair, or correct supplies not received at destination, damaged in transit, or not conforming to purchase requirements; and

(d) Supplier will execute a certificate of mailing or shipment, or a certificate of delivery to the point of first receipt by the Government.

§ 3.606–3 Preparation and execution of orders.

(a) Orders shall be issued on Order for Supplies or Services (DD Form 1155), except that calls against blanket purchase agreements shall be issued in accordance with § 3.605–5. Orders may be either priced or unpriced.

(b) Special data to be included on purchase orders or in blanket purchase agreements using fast pay procedures are:

(1) A requirement for the supplies to be shipped transportation or postage prepaid;

(2) A requirement that invoices be submitted direct to the finance or other office designated in the order, or in the case of unpriced purchased orders, to the contracting officer (see § 3.608–3(c)). (In the case of multiple deliveries, invoices will not be processed for payment until the order is completed.);

(3) The following statement or consignee's copy:

Consignee's notification to purchasing activity of nonreceipt, damage, or nonconformance. The consignee shall notify the purchasing activity promptly after specified date of delivery in the purchase order, of supplies not received, damaged in transit, or not conforming to specifications of the purchase order. Under extenuating circumstances such notification should be made not later than 60 days after specified date of delivery.

(4) The following clause:

FAST PAYMENT PROCEDURE (NOVEMBER 1964)

(a) *General.* This is a fast payment order. Invoices will be paid on the basis of the Contractor's certification thereon that articles listed in the order were delivered on a specified date to a post office, common carrier, or, in shipment by other means, to the point of first receipt by the Government. Only one payment will be made.

(b) *Responsibility for supplies.* Title to the supplies shall vest in the Government upon delivery to a post office or common carrier for shipment to the specified destination. If shipment is by means other than post office or common carrier, title to the supplies shall vest in the Government upon delivery to the point of first receipt by the Government. Notwithstanding any other provision of the purchase order, the Contractor shall assume all responsibility and risk of loss for supplies (i) not received at destination, (ii) damaged in transit, or (iii) not conforming to purchase requirements. The Contractor shall either replace, repair, or correct such supplies promptly at his expense, provided, instructions to do so are furnished by the Contracting Officer within ninety (90) days from the date these supplies were delivered by the Contractor to a post office or common carrier. For supplies delivered by means other than post office or common carrier, such ninety (90) day period shall commence from the date these supplies were delivered to the point of first receipt by the Government.

(c) *Preparation of Invoice.* (1) Upon delivery of supplies to a post office, common carrier, or in shipments by other means, the point of first receipt by the Government, the Contractor shall prepare an invoice in accordance with Clause 3 of the General Provisions of Purchase Order, except that invoices under a blanket purchase agreement shall be prepared in accordance with the provisions of the agreement. In shipments by either post office or common carrier, the Contractor shall either (A) cite on his invoice the date of shipment, name and address of post office or carrier, bill of lading number or other shipment document number, or (B) attach copies of such documents to his invoices as evidence of shipment. In the case of delivery by other than post office or common carrier, a receipted copy of the Contractor's delivery document shall be attached to the invoice as evidence of delivery. Regardless of delivery method the invoice shall include the following signed certification:

I hereby certify that I did ship on _____,
(Date)
via the _____
(Method of shipment)
or deliver on _____
(Date)
in accordance with shipping instructions issued by the ordering officer, supplies in the quantities shown hereon and that such supplies are in the quantity and of the quality designated by the cited purchase order. This statement is furnished to support payment of invoice.

(2) If the purchase price excludes the cost of transportation, the Contractor shall enter the prepaid shipping cost on the invoice as a separate item. The cost of parcel post insurance will not be paid by the Government.

(5) A requirement that outer shipping containers shall be marked "Fast Pay".

§ 3.606–4 Responsibility for collection of debts.

The contracting officer shall be primarily responsible for collecting debts resulting from failures of contractors to properly replace, repair, or correct supplies lost, damaged, or not conforming to purchase requirements (see §§ 163.100 and 163.101 of this chapter).

§ 3.607 Imprest fund method.

§ 3.607–1 General.

An imprest fund is a cash fund of a fixed amount established through an advance of funds, without appropriation charge, to an authorized imprest fund cashier to effect immediate cash payments of relatively small amounts for authorized purchases of supplies and nonpersonal services.

§ 3.607–2 Establishment of imprest funds.

(a) *Authority.* Commanders of installations and of activities with purchasing authority are authorized to approve the establishment of imprest funds. The number of imprest funds at an installation shall be kept to a minimum and one imprest fund should be sufficient in most instances. Exceptions to this general rule may be justified for isolated activities when the location of the established fund is not readily accessible.

(b) *Amount of imprest funds.* The amount of each fund shall be established on the basis of the estimated monthly payments therefrom and the need for replenishment without undue administrative burden, but shall not exceed $5,000. A review shall be made at least quarterly to insure that the fund is not in excess of actual needs, and necessary adjustments shall be made.

(c) *Imprest fund cashiers.* (1) Imprest fund cashiers must be appointed by the head of an installation or activity to make authorized cash payments for materials and nonpersonal services, maintain custody of funds, and file periodic vouchers to account for and replenish the imprest fund. Disbursing officers and others responsible for originating, approving, processing and receiving requirements are not eligible for appointment as imprest fund cashiers. Exceptions to this rule may be granted by the major headquarters exercising control over the installation or activity. In no event shall an imprest fund cashier have access to or control of more than one imprest fund. Imprest fund cashiers shall be covered by appropriate position schedule bonds.

(2) Each appointment and termination of appointment shall be approved by the head of the installation or activity. After approval, administrative orders signed by the appropriate authority shall be issued. Appointment orders shall contain the following:

(i) Name of individual and duty station;

(ii) Identification of disbursing station for which the cashier will act, including the accounting number assigned thereto;

(iii) Specific duties to be performed;

(iv) Effective date; and

(v) Amount and location of fund.

An alternate cashier may be appointed (see subparagraph 3 of this paragraph) on the same order as the principal. Two copies of the orders shall be furnished to cashiers, and one copy each to the disbursing office and the installation or activity purchasing office.

(3) An alternate imprest fund cashier may be appointed to provide service during the absence of the principal cashier. Appointment and surety bond requirements for principal cashiers shall apply to alternate cashiers. In planned absences of the principal cashier, cash may be advanced by the principal to the alternate in any amount up to the limit of the fund. The principal shall obtain a signed cash receipt from the alternate. Upon resumption of his duties, the principal cashier shall return the cash re-

ceipt to the alternate after obtaining paid receipts, subvouchers (see § 3.607–4(f)(2)) and residual cash. In the unforeseen absence of the principal cashier, funds may be advanced to the alternate in the normal manner by the disbursing officer. These funds shall be in addition to the amount currently advanced to the principal cashier under the established fund, but shall not exceed the amount of the fund. Upon return of the principal cashier, the alternate shall return paid receipts, subvouchers, and residual cash, to the disbursing officer.

§ 3.607–3 Conditions for use.

(a) Imprest funds may be used in accomplishing small purchases when all of the following conditions are present:

(1) The transaction is not in excess of $100 ($250 under emergency conditions);

(2) The supplies or services are available for delivery within 30 days, whether at the supplier's place of business or at destination; and

(3) The purchase does not require detailed technical specifications or technical inspection.

(b) Imprest funds may also be used for payment of:

(1) Parcel post charges (including c.o.d. postal charge), and

(2) Local delivery charges,

for supplies ordered for payment from imprest funds, when the vendor is requested to arrange for delivery, and

(3) C.O.D. charges for supplies ordered for payment from imprest funds except as limited by paragraph (c)(2) of this section.

(c) Imprest funds shall not be used for:

(1) Payments of salaries and wages;

(2) Payment of transportation charges (i.e., line-haul or intercity charges for transportation services paid directly to a common carrier providing such services, as distinguished from transportation charges included as an integral part of the vendor's price);

(3) Advances, other than those authorized in § 3.607–4(d); or

(4) Cashing of checks or other negotiable instruments.

§ 3.607–4 Procedures.

(a) *Procurement.* Purchases from the imprest fund shall be based upon an authorized purchase request and shall be made only by the personnel authorized by the contracting officer. Orders may be placed orally without soliciting competition when prices are considered to be reasonable, but shall be distributed equitably among qualified suppliers. Prompt payment discounts shall be solicited, and a sales document shall be obtained to support the cash payment. An authorized purchase order form endorsed "Payment to be made from Imprest Fund" may be used when required by supplier for granting Government discounts, or tax exemptions. (Since purchases through the use of imprest funds are of relatively small value, Government tax exemption certificates generally will not be required.) When the proposed purchase price will exceed any stated monetary restrictions on the purchase request, additional authorization shall be obtained prior to making the purchase. Copies of the purchase request document shall be marked to show:

(1) That an imprest fund purchase has been made,

(2) The unit prices and extensions,

(3) The supplier's name and address, and

(4) Anticipated date of delivery or pickup.

(b) *Sales document.* A sales document is a term applied to a supplier's invoice, sales ticket, packing slip, or any other sales instrument containing the following minimum information:

(1) Supplier's name and address;

(2) List of items;

(3) Quantity;

(4) Unit price and extension; and

(5) Cash discount, if any.

(c) *Receipt of material.* (1) All material purchased through the imprest fund shall be delivered to a designated receiving activity. The receiver shall examine the material to ascertain that the quantities and items described on the purchase request document and the supplier's sales document are present and in satisfactory condition. If the material is acceptable, the receiver shall stamp the supplier's sales document "Received and Accepted", date and sign the document, and pass it to the imprest fund cashier for payment. In the absence of a supplier's sales document, a receipted Standard Form 1165 (Receipt for Cash-Subvoucher) or DD Form 1155 (Order for Supplies or Services) may be used to record the receipt of purchases made from the imprest fund and shall be processed in the same manner.

(2) When it is not practicable to obtain delivery of material at destination on a c.o.d. basis, advance arrangement may be made for the material to be picked up. The imprest fund cashier may then advance cash to an authorized individual to pick up and pay for the material. Necessary certifications of receipt and acceptance of material shall be obtained on one of the documents as indicated in subparagraph (1) of this paragraph. Receipt for cash payment (see paragraph (e) of this section) shall be made on the same document, which will serve as the imprest fund receipt.

(3) When prior arrangements for pick up of material are not practicable, the imprest fund cashier may advance cash to an authorized individual to make a proposed purchase.

(d) *Advance of funds.* Individuals receiving a cash advance from the imprest fund cashier shall be required to sign the "Interim Receipt for Cash" portion of Standard Form 1165, or an equivalent receipt form. After the purchase has been made, the individual will return any unused cash to the imprest fund cashier with the necessary certifications of receipt, acceptance, and cash payment, at which time the imprest fund cashier shall "void" the interim receipt for cash. Cash so advanced should be accounted for daily, but under unusual circumstances cash may be advanced for longer periods. The requirement that the position of imprest fund cashier be covered under a position schedule bond does not extend to individuals to whom funds are advanced for making cash purchases.

(e) *Certification of cash payment.* The original receipt document (or a copy tendered as the original) presented to the imprest fund cashier for payment shall be stamped with a certification containing the following information:

(1) Statement that cash payment was received in full,

(2) Amount paid,

(3) Date of payment, and

(4) Signature and title of supplier or his agent receiving the cash payment.

Alterations or corrections to documents tendered for payment shall be initialed by the person making the change. Changes in the amount paid shall be initialed by the individual receiving payment.

(f) *Responsibilities of imprest fund cashier.* (1) Pending receipt of material, the imprest fund cashier shall keep a file of purchase request documents covering imprest fund purchases. Prior to payment, or acceptance of the document tendered for settlement of an advance, the cashier shall verify the necessary certification of receipt and the supplier's billed price or the price paid. If the supplier's receipt for cash payment is not obtained for purchases of $15 or less, the imprest fund cashier shall sign the cash receipt document. Receipt for U.S. parcel post c.o.d. charges should be obtained on Standard Form 1165. When receipt cannot be obtained for c.o.d. purchases, imprest fund cashiers located in foreign countries are authorized to certify on the receipt document, "Delivered by (name of post office or carrier) no receipt given." The c.o.d. label shall be removed from the parcel and affixed to the receipt document in support of the reimbursement voucher. Imprest fund cashiers at any location may accept a signed c.o.d. receipt to support the subvoucher if the carrier refuses to sign a Government form.

(2) After completion of settlement transaction, each subvoucher shall be numbered consecutively and this number placed on the original of the paid receipt documents. These subvouchers will support the cashier's claim for reimbursement of the imprest fund. The imprest fund cashier will not request duplicate receipt documents, nor retain such documents if provided.

(3) When total charges stated on the sales document are paid, without deduction of discounts offered and earned, or without correction of minor billing errors, action will be taken to obtain a refund from the supplier. Collection action may be waived for refunds of one dollar or less.

(g) *Payments*—(1) *C.O.D.* Upon presentation of an authorized document with the necessary certification of receipt for supplies or services, the imprest fund cashier or other authorized individual shall pay the supplier or his agent and obtain the certification of cash payment as set forth in § 3.607–4(e).

(2) *Group receipt.* When considerable quantities of c.o.d. shipments are received or picked up from a common carrier or post office, the certification of cash payment may be accomplished on

a list of the packages provided by the post office or common carrier. Such group receipt will be supported by copies of the applicable sales documents if available.

(3) *Periodic payments.* When a blanket purchase agreement is not suitable and it is administratively convenient and agreeable to the supplier, periodic payments from the imprest fund may be made for supplies delivered on a repetitive basis, provided that the accumulated amount of the deliveries for the specified period does not exceed the dollar limitation imposed on the imprest fund method by § 3.607–3.

(4) *Failure to ship C.O.D.* When material is ordered c.o.d. but is shipped by the supplier subject to payment by check, Standard Form 1034 (Public Voucher for Purchases and Services Other than Personal), may be used to make payment. Under these circumstances, the receiver shall prepare the necessary certification of receipt and forward the receipted document through the imprest fund cashier, for attachment of the supporting documents which authorized the shipment and submission to the disbursing officer for payment.

(h) *Reimbursement of imprest funds.* (1) The imprest fund shall be reimbursed by use of Standard Form 1129 (Reimbursement Voucher) supported by cashier's subvouchers. The imprest fund cashier shall prepare and submit Standard Form 1129 in triplicate to the disbursing officer as frequently as necessary, but not less than monthly. At the close of the fiscal year, a reimbursement voucher covering all remaining subvouchers through 30 June shall be submitted before the closing of the allotment accounts for the month. When required, subvouchers shall be summarized by account to complete the accounting classification block of Standard Form 1129. The subvouchers shall be attached to the original of Standard Form 1129 and submitted to the disbursing officer for reimbursement of the imprest fund. One copy of Standard Form 1129 shall be retained by the imprest fund cashier pending the return of the "paid" copy of the form with the reimbursement checks or currency in the amounts requested by the cashier.

(2) When a supplier refunds cash prior to the submission of Standard Form 1129 covering such payment, the imprest fund cashier shall accept the refund, return the money to the imprest fund, and enter the amount of the refund on the original of the supplier's receipt. When the refund is made subsequent to the submission of the applicable Standard Form 1129, the imprest fund cashier shall enter the amount of the refund on the retained copy of the reimbursement voucher, promptly submit the refund to the disbursing officer, and obtain a receipt.

(i) *Accounting.* Record keeping for the imprest fund shall be as simple as possible consistent with the maintenance of adequate controls. A file of suppliers' receipts for amounts paid and not yet vouchered for reimbursement, and copies of paid reimbursement vouchers ordinarily will suffice for the records of the imprest fund cashier.

(j) *Review.* The imprest fund cashier shall be required to account for the established fund at any time, by cash on hand, paid suppliers' receipts, unpaid reimbursement vouchers, and interim receipts for cash. Unannounced inspections, including cash counts, shall be made of each imprest fund at least quarterly. The commanding officer or head of the purchasing activity shall designate one or more individuals, excluding the disbursing officer advancing the funds and subordinates of the imprest fund cashier, to perform this verification. Upon completion of each verification, a report shall be submitted promptly to the commanding officer or the head of the purchasing activity and a copy furnished the disbursing officer providing the imprest funds.

§ 3.608 Purchase orders.

§ 3.608–1 General.

Negotiated purchases of material and nonpersonal services not in excess of $2,500, except as provided in 3–608.2(b)(2), may be effected by using DD Form 1155 (Order for Supplies or Services) and its ancillary forms, or Standard Form 44 (Purchase Order—Invoice—Voucher) (see 3–608.8). The DD Form 1155 may also be used for construction not in excess of $2,000. Pending revision of the 1 April 1964 edition of DD Form 1155r and the reverse side of DD Form 1155, delete clauses 8 and 9 thereof and the asterisked statement "applicable only to construction contracts for $2,000 or less for work within the United States".

§ 3.608–2 Order for Supplies or Services (DD Forms 1155, 1155r, 1155c, 1155c–1, and 1155s).

(a) *Forms.* The following forms may be used to issue purchase orders:

(1) DD Form 1155 (Order for Supplies or Services) including its reverse side, 1155r, provides in one document—

(i) A purchase order, a blanket purchase agreement, delivery order under a contract, or delivery order on Government agencies outside the Department of Defense (see Part 5 of this chapter);

(ii) A receiving and inspection report;

(iii) A property voucher;

(iv) A public voucher;

(v) An imprest fund receipt; and

(vi) An invoice, if desired by the supplier.

(2) DD Form 1155c (Continuation Sheet) provides additional space (Standard Form 36 (Continuation Sheet) may be used in lieu of DD Form 1155c);

(3) DD Form 1155c–1 (Commissary Continuation Sheet) (for use on optional basis), provides columns suited for commissary procurements; and

(4) DD Form 1155s (Additional General Provisions, Modification, and Acceptance) used with the DD Form 1155 (see § 3.608–4).

(b) *Conditions for Use.*—(1) *Use as a purchase order of not more than $2,500.* DD Form 1155 is authorized for negotiated purchases of not more than $2,500 ($2,000 in the case of construction), *Provided:*

(i) The procurement is unclassified.

(ii) No clause covering the subject matter of any clause set forth in this subchapter, other than clauses set forth on the back of DD Form 1155 and clauses referred to in § 3.606–3(b)(4), in subdivisions (iii) through (xi) of this subparagraph, in paragraph (d) of this section, and in §§ 3.608–3 and 3.608–4, are to be used.

(iii) Where the contract specifies the delivery of data, one of the clauses set forth in §§ 9.203 through 9.206 of this chapter shall be added as appropriate in accordance with the instructions contained in Subpart B, Part 9 of this chapter.

(iv) When required by Subpart D, Part 6 of this chapter, the clause set forth in § 6.403 of this chapter shall be added.

(v) The Priorities, Allocations, and Allotments clause (see § 7.104–18 of this chapter) may be inserted in the Schedule where required.

(vi) When required by Subpart F, Part 4 of this chapter, Humane Slaughter of Livestock, the procedures set forth in § 4.604 of this chapter shall be followed.

(vii) Where inspection and acceptance are at origin, where contract administration is performed at origin, where delivery at multiple destinations is required, or where otherwise appropriate the Material Inspection and Receiving Report clause (see § 7.105–7 of this chapter) may be inserted in the Schedule.

(viii) Where Government property having an acquisition cost in excess of $25,000 is to be furnished (for use in performance of contract or for repair), the Government Property (Fixed Price) clause in § 13.702 of this chapter shall be inserted in the Schedule. Where Government property having an acquisition cost not in excess of $25,000 is to be furnished for use in performance of the contract or for repair, the Government-Furnished Property (Short Form) clause in § 13.710 of this chapter shall be inserted in the Schedule; provided that use of the clause shall be optional where the acquisition cost of property furnished for repair is not in excess of $2,500. Where a Government Property clause is inserted in the Schedule the contractor's signature shall be obtained by using DD Form 1155s.

(ix) Where the contract is for Military Assistance Program items, the "United States Products (Military Assistance Program)" certificate and clause (see §§ 6.703–3 and 6.703–4 of this chapter) shall be inserted in the Schedule, and clause 6 of the General Provisions (Foreign Supplies) deleted.

(x) The Commercial Warranty clause in § 1.324–2(c) of this chapter may be used in accordance with the provisions of that section.

(xi) The clauses set forth in § 1.1208 of this chapter may be used in accordance with the provisions of that section.

(2) *Use as a purchase order in excess of $2,500 by deployed units.* DD Form 1155, in conjunction with DD Form 1155s when appropriate, is authorized for purchases in excess of $2,500 but not more than $10,000 where negotiation is authorized by Subpart B of this part, *Provided:*

(i) The procurement is unclassified.

(ii) The procurement is accomplished by units which are deployed to remote

areas away from established Department of Defense installations with procurement functions.

(iii) The mission involving the deployment action is directed by authority above the unit to be deployed.

(iv) The commander of the deployed unit determines the supplies and nonpersonal services to be procured are required for mission accomplishment and time does not permit requirements being satisfied through normal channels.

(v) The supplies or services are immediately available.

(vi) When required by § 7.104–15 of this chapter, the Examination of Records clause shall be added.

(vii) When required by Subpart D, Part 11 of this chapter, one of the clauses set forth in § 11.403 of this chapter shall be added.

(viii) Authority will be used only from time of initial deployment or mission commencement of a unit until such time as normal channels of support for the unit are established.

(ix) One payment shall be made regardless of the number of deliveries or destinations.

(c) *Solicitation and evaluation of quotations*—(1) *General.* In using the purchase order method, competition shall be solicited in accordance with § 3.604, and every effort shall be made to obtain prompt payment discounts. Written quotations may be solicited by Standard Form 18 (Request for Quotation), approved automated format, or teletype.

(2) *Evaluation of quotations.* Quotations shall be evaluated inclusive of transportation charges from the shipping point of the supplier to the delivery destination. For orders exceeding $250, oral quotations shall be recorded directly on the purchase request, on an abstract sheet, or other appropriate work sheet. Except as provided under the unpriced purchase order method, quotations that are indefinite as to price or based on price escalation or redetermination shall not be considered for award by the purchase order method.

(d) *Preparation and issuance of priced purchase orders.* All applicable blocks and spaces shall be completed with the required data, including the following:

(1) The full business name and address of the supplier shall be stated. When the supplier is an individual doing business under a trade name, both the supplier's name and the trade name shall be shown.

(2) A local series of numbers shall be used in numbering purchase orders.

(3) Supplies to be purchased will be identified in accordance with Subpart L, Part 1 of this chapter.

(4) The quantity of supplies or services shall be specified. For bulk quantity items and those subject to shrinkage, evaporation, miscount, weight or footage variance, etc., a maximum allowable variation (normally not in excess of 10 percent) shall be specified in the order so that shipments in excess of the order quantity may be accepted if the reason for such excess comes within the Variation in Quantity clause of the order and the aggregate amount of the order does not exceed authorized limitations.

(5) Purchase orders shall be issued on a fixed-price basis, except as otherwise provided under § 3.608–3 and shall include any trade discounts and offered prompt payment discounts.

(6) Inspection of small purchases shall be in accordance with § 14.106 of this chapter. Orders generally will provide that inspection and acceptance will be at destination and source inspection should be specified only when required by § 14.105–2 of this chapter. When inspection and acceptance are to be performed at destination, advance copies of the purchase order shall be furnished to consignee(s) for material receipt purposes. Receiving reports shall be accomplished immediately upon receipt and acceptance of material to assure expeditious payment of orders and to obtain prompt payment discounts, except where the fast payment procedure is authorized. Normally, inspection at origin with acceptance at destination shall not be specified.

(7) F.O.B. destination shall be specified for supplies to be delivered within the United States, except Alaska and Hawaii, unless there are valid reasons to the contrary.

(8) The block "Deliver to F.O.B. Point on or Before" shall contain a definite date by which delivery of supplies or performance of services is required, or the delivery date may be stipulated as a certain number of days after date of order.

(9) All purchase orders shall contain the typewritten name of the contracting or ordering officer and the original thereof shall be manually signed; when reproducible masters are used, only the masters need be manually signed; where interleaved carbon forms are utilized, manual signature on the original shall suffice. Facsimile signatures may be used in the production of purchase orders by automated methods, provided specific authority for such use is obtained from the Director of Procurement, Office of the Assistant Secretary of the Army (Installations and Logistics) in the Army; Deputy Chief of Naval Material (Material and Facilities) in the Navy; the Director of Procurement Policy, Office of the Deputy Chief of Staff (Systems and Logistics) in the Air Force; and the Executive Director, Procurement and Production, in the Defense Supply Agency.

(10) Distribution of copies of purchase orders and related forms shall be limited to those copies required for essential administration and transmission of contractual information.

(11) Purchase orders for subscriptions shall contain a statement substantially as follows to assure that subscriptions have become effective prior to payment of invoices:

Contractor's invoice must be submitted on or before _____. Contractor will be paid on the basis of his invoice which must state (1) the starting and ending dates of subscriptions, and (2) that subscriptions have been placed in effect for the addressees required.

§ 3.608–3 Unpriced purchase order.

(a) An unpriced purchase order is an order for supplies or services the price of which is not established at the time of issuance of the order. Contracting officers shall assure that suppliers receiving unpriced purchase orders are carefully selected.

(b) An unpriced purchase order may be used only when all of the following conditions are present:

(1) The transaction will not exceed $2,500;

(2) It is impractical to obtain pricing in advance of issuance of the purchase order; and

(3) The procurement is for—

(i) Repairs to equipment requiring disassembly to determine the nature and extent of such repairs;

(ii) Sole source material for which cost cannot be readily established; or

(iii) Supplies or services where prices are known to be competitive but exact prices are not known.

(c) DD Form 1155 shall be used to issue unpriced purchase orders. A realistic monetary limitation shall be placed on the unpriced purchase order which shall be an obligation subject to adjustment when the firm price is established. Orders shall not contain an estimated target unit price. Each unpriced purchase order shall contain the following clause:

NOTICE TO SUPPLIER (AUGUST 1963)

This is a firm order if the total price is $____ or less. Make delivery or perform in accordance with the delivery provisions of this order and submit invoice to the Contracting Officer of the purchase office named herein.

If total price of this order will exceed the above amount or if you cannot furnish material or services in exact accordance with the description and delivery schedules set forth herein, notify the undersigned Contracting Officer immediately, giving your quotation or proposed substitution or changes, and withhold performance pending reply.

The contracting officer or his designated representative shall certify that the invoiced price is fair and reasonable and process the invoice for payment. Suitable local records and controls of outstanding unpriced purchase orders shall be maintained to assure regular follow-up with suppliers until the order is priced. These records should include any information available to support the fairness and reasonableness of the proposed monetary limitation.

§ 3.608–4 Use of DD Form 1155s with the DD Form 1155.

(a) DD Form 1155s (Additional General Provisions, Modification, and Acceptance) used with the DD Form 1155 in negotiated procurement provides:

(1) Additional general provisions;

(2) A block for modifications;

(3) A block for the contracting officer to mark if the contractor's written acceptance is requested; and

(4) A space for the contractor's signature when a written acceptance is requested.

(b) DD Form 1155s is authorized for use in conjunction with DD Form 1155 when it is desired to:

(1) Consummate a binding contract between the parties before the contractor undertakes performance, in which case the contracting officer shall mark the block requiring acceptance by the contractor and shall attach the DD Form 1155s to the DD Form 1155;

(2) Modify the purchase order by action authorized under the Changes clause, in which case the contracting officer shall mark the block requiring acceptance by the contractor; that block need not be marked, however, if the contractor has previously executed such an acceptance on a DD Form 1155s issued under that purchase order;

(3) Modify the purchase order by making administrative changes such as the correction of typographical errors, changes in the paying office and changes in the accounting and appropriation data, in which case acceptance by the contractor is not required; or

(4) Otherwise modify the purchase order, in which case the contracting officer shall mark the block requiring acceptance by the contractor.

No additional clauses are authorized except as provided in § 3.608–2(b)(1)(ii). A superseding DD Form 1155 shall not be used to issue a change to an outstanding purchase order.

§ 3.608–5 Termination of purchase order.

A purchase order which has not been accepted in writing by the contractor may be withdrawn or canceled by the contracting officer any time prior to the supplier's initiation of performance. Notice of withdrawal should be in writing and should request the contractor's acknowledgment thereof. If the contractor has begun performance on such a purchase order however, or if the contractor has accepted the purchase order in writing other than by a DD Form 1155s, and it subsequently becomes necessary to terminate the purchase order, the contractor should be asked to agree to cancellation of the order without cost or liability to either party, and if he agrees, the cancellation shall be effected by a DD Form 1155s, signed by the contracting officer and the contractor. If the contractor does not agree to a no-cost settlement, the case will be referred to the legal office serving the installation and action will be withheld pending receipt of advice from that office. Termination of a purchase order which the contractor has accepted in writing by means of DD Form 1155s will be processed in accordance with the guidance set forth in Part 8 of this chapter.

§ 3.608–6 Use of DD Form 1155 as a delivery order.

(a) Except as to specialized procurements for which other instructions are given by this subchapter (as for example, where utility purchases are procured under General Services Administration area contracts, as provided in Subpart H, Part 5 of this chapter), DD Form 1155 shall be used without monetary limitation as a delivery order for ordering supplies and services:

(1) Under indefinite delivery type contracts (see § 3.409) including such contracts made by Government agencies outside the Department of Defense: *Provided*, (i) the order is issued in accordance with, and subject to the terms and conditions of such contract, and (ii) the order refers to the particular contract involved;

(2) From Government agencies outside the Department of Defense; and

(3) From designated Agencies for the Blind in accordance with § 5.504–2 of this chapter.

(b) All delivery orders shall contain the typewritten name of the contracting officer or ordering officer and the original thereof shall be manually signed; when reproducible masters are used, only the masters need be manually signed; when interleaved carbon forms are used, manual signature on the original shall suffice. Facsimile signatures may be used in the production of delivery orders by automated methods, provided, specific authority for such use is obtained from the Director of Procurement, Office of the Assistant Secretary of the Army (Installations and Logistics) in the Army; Deputy Chief of Naval Material (Material and Facilities) in the Navy; the Director of Procurement Policy, Office of the Deputy Chief of Staff (Systems and Logistics) in the Air Force and the Executive Director, Procurement and Production, in the Defense Supply Agency.

§ 3.608–7 Use of DD Form 1155 as a public voucher.

DD Form 1155 is authorized for use as a public voucher (a) up to $2,500 when the form is used as a purchase order under § 3.608–2(b)(1), (b) up to $10,000 when the form is used as a purchase order by deployed units under conditions enumerated in § 3.608–2(b)(2), (c) without monetary limitation when the form is used as a delivery order, and (d) without monetary limitation as the basis for payment of an invoice against blanket purchase agreements.

§ 3.608–8 Order-invoice-voucher method.

(a) Standard Form 44 (Purchase Order-Invoice-Voucher) is designed primarily for over-the-counter purchases by authorized individuals while away from the purchasing office or at isolated activities. It is a multipurpose form which can be used as a purchase order, receiving report, supplier's invoice and public voucher.

(b) Since there are no written terms and conditions included thereon, Standard Form 44 is authorized for use only when no other small purchase method is considered more suitable and all of the following conditions are satisfied:

(1) The transaction is not in excess of $2,500.

(2) Supplies or services are immediately available, and

(3) One delivery and one payment will be made.

(c) Instructions for completion of Standard Form 44 contained on the form may be supplemented in accordance with Departmental needs to satisfy internal procedural requirements. Negotiation authority need not be cited. In view of the negotiable character of the Standard Form 44, installations will maintain adequate safeguards to assure proper usage and availability of funds.

(d) DD Form 1155 may also be used for over-the-counter purchases as an order-invoice-voucher.

§ 3.807–2 Requirement for price or cost analysis.

(a) *General.* Some form of price or cost analysis is required in connection with every negotiated procurement action. The method and degree of analysis, however, is dependent on the facts surrounding the particular procurement and pricing situation. Cost analysis shall be performed in accordance with paragraph (c) of this section when cost or pricing data is required to be submitted under the conditions described in § 3.807–3; however, the extent of the cost analysis should be that necessary to assure reasonableness of the pricing result, taking into consideration the amount of the proposed contract and the cost and time needed to accumulate the necessary data for analysis. Price analysis shall be used in all other instances to determine the reasonableness of the proposed contract price. Price analysis may also be useful in corroborating the overall reasonableness of a proposed price where the determination of reasonableness was developed through cost analysis.

(b) *Price analysis.* (1) Price analysis is the process of examining and evaluating a prospective price without evaluation of the separate cost elements and proposed profit of the individual prospective supplier whose price is being evaluated. Price analysis may be accomplished in various ways including the following:

(i) The comparison of the price quotations submitted;

(ii) The comparison of prior quotations and contract prices with current quotations for the same or similar end items (to provide a suitable basis for comparison, appropriate allowances must be made for differences in such factors as specifications, quantities ordered, time for delivery, Government-furnished materials, and experienced trends of improvement in production efficiency; it must also be recognized that such comparison may not detect an unreasonable current quotation unless the reasonableness of the prior prices was established and unless changes in the general level of business and prices have been considered);

(iii) The use of rough yardsticks (such as dollars per pound, per horsepower, or other units) to point up apparent gross inconsistencies which should be subjected to greater pricing inquiry;

(iv) The comparison of prices set forth in published price lists issued on a competitive basis, published market prices of commodities and similar indicia, together with discount or rebate arrangements; and

(v) The comparison of proposed prices with estimates of cost independently developed by personnel within the purchasing activity.

(2) Price analysis techniques should be used to support or supplement cost analysis wherever appropriate.

(c) *Cost analysis.* (1) Cost analysis is the review and evaluation of a contractor's cost or pricing data (see § 3.807–3) and of the judgmental factors applied in projecting from the data to the estimated costs, in order to form an opinion on the degree to which the contractor's proposed costs represent what performance of the contract should cost, assuming reasonable economy and efficiency. It includes the appropriate verification of cost data, the evaluation of specific elements of costs, and the projection of these data to determine the effect on prices of such factors as:

(i) The necessity for certain costs,

(ii) The reasonableness of amounts estimated for the necessary costs,

(iii) Allowances for contingencies,

(iv) The basis used for allocation of overhead costs; and

(v) The appropriateness of allocations of particular overhead costs to the proposed contract.

(2) Appropriate consideration should be given to Part 15 of this chapter, which contains general cost principles and procedures for the determination and allowance of costs in connection with the negotiation of cost-reimbursement type contracts, as well as guidelines for use, where appropriate, in the evaluation of costs in connection with negotiated fixed-price type contracts.

(3) Among the evaluations that should be made where the necessary data are available, are comparisons of a contractor's or offeror's current estimated costs with:

(i) Actual costs previously incurred by the contractor or offeror;

(ii) His last prior cost estimate for the same or similar item or a series of prior estimates;

(iii) Current cost estimates from other possible sources; and

(iv) Prior estimates or historical costs of other contractors manufacturing the same or similar items.

(4) Forecasting future trends in costs from historical cost experience is of primary importance. In periods of either rising or declining costs, an adequate cost analysis must include some evaluation of the trends. In cases involving production of recently developed, complex equipment, even in periods of relative price stability, trend analysis of basic labor and materials costs should be undertaken.

§ 3.807–3 Cost or pricing data.

(a) The contracting officer shall require the contractor to submit in writing cost or pricing data and to certify, by use of the certificate set forth in § 3.807–4, that, to the best of his knowledge and belief, the cost or pricing data he submitted was accurate, complete, and current prior to:

(1) The award of any cost-reimbursement type, time and material, labor-hour, incentive, or price redeterminable contract regardless of dollar amount; except that certification of the data shall not be required in connection with cost and cost-sharing contracts, the estimated cost of which does not exceed $100,000, and under which the contractor receives no fee;

(2) The award of any firm fixed-price or fixed-price with escalation negotiated contract expected to exceed $100,000 in amount;

(3) Any contract modification expected to exceed $100,000 in amount to any formally advertised or negotiated contract whether or not cost or pricing data was required in connection with the initial pricing of the contract;

(4) The award of any negotiated contract not expected to exceed $100,000 in amount or any contract modification not expected to exceed $100,000 in amount to any formally advertised or negotiated contract whether or not cost or pricing data was required in connection with the initial pricing of the contract, provided the contracting officer considers that the circumstances warrant such action in accordance with paragraph (d) of this section;

unless, in the case of subparagraphs (2), (3), or (4) of this paragraph, the price negotiated is based on adequate price competition, established catalog or market prices of commercial items sold in substantial quantities to the general public, or prices set by law or regulation. The requirements under subparagraphs (1), (2), and (3) of this paragraph, may be waived in exceptional cases where the Secretary (or, in the case of a contract with a foreign government or agency thereof, the head of a procuring activity) authorizes such waiver and states in writing his reasons for such determination. Whenever a Certificate of Current Cost or Pricing Data is required, the applicable clause in § 7.104–29 of this chapter shall be included in the contract, and the appropriate clauses in §§ 7.104–41 and 7.104–42 of this chapter shall be used if required in accordance with those sections.

(b) Any contractor who has been required to submit and certify cost or pricing data in accordance with paragraph (a) of this section shall also be required to obtain cost or pricing data from his subcontractors under the circumstances set forth in the appropriate clause in § 7.104–42 of this chapter.

(c) When there is adequate price competition, cost or pricing data shall not be requested regardless of the dollar amount involved. As a general rule, cost or pricing data should not be requested when it has been determined that proposed prices are, or are based on, established catalog or market prices of commercial items sold in substantial quantities to the general public. Where, however, despite the willingness of a number of commercial purchasers to buy an item at such a catalog or market price, the purchaser(e.g.,) the contracting officer) finds that that price is not reasonable and supports such finding by an enumeration of the facts upon which it is based, cost or pricing data may be requested if necessary to establish a reasonable price; provided, that such finding is approved at a level above the contracting officer. In addition, cost or pricing data may be requested, if necessary, where there is such a disparity between the quantity being procured and the quantity for which there is such a catalog or market price that pricing cannot reasonably be accomplished by comparing the two. Where an item is substantially similar to a commercial item for which there is an established catalog or market price at which substantial quantities are sold to the general public, but the offered price of the former is not considered to be "based on" the price of the latter in accordance with § 3.807–1 (b)(2), any requirement for cost or pricing data should be limited to that pertaining to the differences between the items if this limitation is consistent with assuring reasonableness of pricing result.

(d) The provisions of this paragraph do not apply to awards covered by paragraph (a)(1) of this section. Cost or pricing data shall not be requested prior to the award of any contract anticipated to be for $2,500 or less and generally should not be requested for modifications in those amounts. In procurements where it is anticipated that the contract award or modification will be between $2,500 and $10,000, cost or pricing data generally should not be requested. In almost all awards between $2,500 and $10,000 and modifications of $10,000 or less, the administrative costs will outweigh the pricing benefits which might otherwise accrue and some form of price analysis is almost always adequate in these situations. With respect to procurements where the amount of the award or modification is anticipated to be between $10,000 and $100,000, cost analysis and the obtaining of cost or pricing data from contractors shall be limited to cases where no satisfactory method of price analysis can be found.

(e) "Cost or pricing data" as used in this subpart refers to that portion of the contractor's submission which is factual. The requirement for "cost or pricing data" subject to certification is satisfied when all facts reasonably available to the contractor up to the time of agreement on price and which might reasonably be expected to affect the price negotiations are accurately disclosed to the contracting officer or his representative. The definition of cost or pricing data embraces more than historical accounting data; it also includes, where applicable, such factors as vendor quotations, nonrecurring costs, changes in production methods and production or procurement volume, unit cost trends such as those associated with labor efficiency, and make-or-buy decisions or any other management decisions which could reasonably be expected to have a significant bearing on costs under the proposed contract. In short, cost or pricing data consist of all facts which can reasonably be expected to contribute to sound estimates of future costs as well as to the validity of costs already incurred. Cost or pricing data, being factual, is that type of information which can be verified. Because the contractor's certificate pertains to "cost or pricing data," it does not make representations as to the accuracy of the contractor's judgment as to the estimated portion of future costs or projections. It does, however, apply to the data upon which the contractor's judgment is based. This distinction between fact and judgment should be clearly understood.

§ 3.807–4 Certificate of current cost or pricing data.

When a certification of cost or pricing data is required in accordance with § 3.807–3, a certificate in the form set forth below shall be included in the contract file along with the memorandum of the negotiation. The contractor shall be required to submit the certificate as soon as practicable after agreement is reached on the contract price.

CERTIFICATE OF CURRENT COST OR PRICING DATA
(OCTOBER 1964)

This is to certify that, to the best of my knowledge and belief, cost or pricing data* submitted to the Contracting Officer or his representative in support of _____** are accurate, complete and current as of the date of execution of this certificate.

Firm _____
Name _____
Title _____
_____***

(Date of execution)

*For definition of "cost or pricing data", see ASPR 3–807.3(e).

**Describe the proposal, quotation, request for price adjustments, or other submission involved, giving appropriate identifying number (e.g., RFP No. _____).

***As a general rule, this date should be the date when the contract price was agreed to. It is not intended that personal knowledge of the contractor's negotiator limits the responsibility of the contractor if the contractor had available at the time of the agreement information showing that the negotiated price is not based on accurate, complete, and current data. Contractors are expected to make a reasonable check to ascertain whether the concern had any information not personally known to the contractor's negotiator at the time of the agreement and which in accordance with ASPR 3–807.3 should be disclosed to the contracting officer for his consideration. Contractors are not expected to make a complete recheck of all data or develop a new cost estimate after the date of agreement and prior to execution of the contract. However, execution of a Certificate of Current Cost or Pricing Data is not intended to relieve a contractor of the responsibility for disclosing circumstances or events, happening subsequent to the date of certification but known to the contractor prior to the date of contract execution, which could reasonably be expected to have a significant bearing on costs under the proposed contract.

§ 3.808–1 Policy.

(a) *General.* It is the policy of the Department of Defense to utilize profit to stimulate efficient contract performance. Profit generally is the basic motive of business enterprise. The Government and defense contractors should be concerned with harnessing this motive to work for more effective and economical contract performance. Negotiation of very low profits, the use of historical averages, or the automatic application of a predetermined percentage to the total estimated cost of a product, does not provide the motivation to accomplish such performance. Furthermore, low average profit rates on defense contracts overall are detrimental to the public interest. Effective national defense in a free enterprise economy requires that the best industrial capabilities be attracted to defense contracts. These capabilities will be driven away from the defense market if defense contracts are characterized by low profit opportunities. Consequently, negotiations aimed merely at reducing prices by reducing profits, with no realization of the function of profit cannot be condoned. For each contract in which profit is negotiated as a separate element of the contract price, the aim of negotiation should be to employ the profit motive so as to impel effective contract performance by which overall costs are economically controlled. To this end, the profit objective must be fitted to the circumstances of the particular procurement, giving due weight to each of the performance, risk, and other factors set forth in §§ 3.808–3.808–6. This will result in a wider range of profits which, in many cases, will be significantly higher than previous norms.

(b) *Contracts priced on the basis of cost analysis.* When cost analysis is performed pursuant to § 3.807–2, profit considerations shall be in accordance with the objectives set forth below. As an inducement for broad reduction in defense costs, the Government should establish a profit objective for contract negotiations which will:

(1) Reward the contractor who undertakes more difficult work requiring higher skills;

(2) Allow the contractor an opportunity to earn profits commensurate with the extent of the cost risk he is willing to assume—the greater the risk assumption, the greater the profit objective established;

(3) Reward those contractors who have an excellent record of past performance and conversely penalize those contractors whose performance has been poor; and

(4) Reward contractors who provide their own facilities and financing or who have established their competence through prior development work undertaken at their own risk.

The weighted guidelines method set forth in § 3.808–2 for establishing profit objectives is designed to provide reasonably precise guidance in applying these principles. This method, properly applied, will tailor profits to the circumstances of each contract in such a way that long range cost reduction objectives will be fostered, and a wider spread of profits will be achieved.

(c) *Contracts priced without cost analysis.* On many contracts and subcontracts, good pricing does not require an examination into costs and profits. Where adequate price competition exists and in other situations where cost analysis is not required (see § 3.807), fixed-price type contracts will be awarded to the lowest responsible offerors without regard to the amount of their profits. Under these circumstances, the profit which is anticipated, or in fact earned, should not be of concern to the Government. In such cases, if a low offeror earns a large profit, it should be considered the normal reward of efficiency in a competitive system and efforts should not be made to reduce such profits.

§ 3.808–2 Weighted guidelines method.

(a) *General.* (1) The weighted guidelines method provides contracting officers with (i) a technique that will insure consideration of the relative value of the appropriate profit factors described in § 3.808–4 in the establishment of a profit objective and the conduct of negotiations; and (ii) a basis for documentation of this objective, including an explanation of any significant departure from this objective in reaching a final agreement. The contracting officer's analysis of these profit factors is based on information available to him prior to negotiations. Such information is furnished in proposals, audit data, performance reports, pre-award surveys and the like. No more data on or analysis of costs should be required in the establishment of a profit objective than is required to determine if costs are reasonable. The weighted guidelines method shall be used in all contracts where cost analysis is performed except as set forth in paragraph (b) of this section.

(2) The contractor's proposal will include cost information for evaluation and a total profit figure. Contractors shall not be required to submit the details of their profit objectives but they shall not be prohibited from doing so if they desire. Elaborate and voluminous presentations are neither required nor desired and may indicate a low index of cost effectiveness, which fact itself should be taken into consideration by the contracting officer in the appropriate section of the weighted guidelines.

(3) The negotiation process does not contemplate or require agreement on either estimated cost elements or profit elements, although the details of analysis and evaluation may be discussed in the fact-finding phase of the negotiation. If the difference between the contractor's profit objective and the contracting officer's profit objective is relatively small, no discussion of individual factors may be necessary. If the negotiating parties' objectives are relatively far apart, a disclosure of weightings and rationale by both parties may be made concerning the total assigned to Input to Total Performance, Assumption of Cost Risk, Performance, Selected Factors and Special Profit Consideration. By thus developing a mutual understanding of the logic of the respective positions, an orderly progression to final agreement should result. Simultaneous, not sequential, agreement will be reached on cost, any incentive profit-sharing formulas, or limitation on profits, and price. The profit objective is a part of an overall negotiation objective which, as a going-in objective, bears a distinct relationship to the target cost objective and any proposed sharing arrangement. Since the profit is merely one of several interrelated variables, the Government negotiator shall not complete the profit negotiation without simultaneously agreeing on the other variables. Specific agreement on the exact weights or values of the individual factors is not required and should not be attempted.

(b) *Exceptions.* (1) Under the following circumstances, other methods for establishing profit objectives may be used. Generally, it is expected that such methods will accomplish the two features of the weighted guidelines methods set

forth in paragraph (a)(1) of this section. These circumstances are:

(i) Architect-engineering contracts;

(ii) Personal or professional service contracts;

(iii) Management contracts, e.g., for maintenance or operation of Government facilities;

(iv) Contracts with non-profit organizations where fees are involved;

(v) Termination settlements;

(vi) Engineering services, labor-hour, time-and-material, and overhaul contracts providing for payment on a man-hour, man-day or man-month basis, and where the contribution by the contractor constitutes the furnishing of personnel rather than the output of an integrated research, engineering, or manufacturing organization; and

(vii) Cost-reimbursement construction contracts.

(2) Other exceptions may be made in the negotiation of contracts presenting unusual pricing situations when specifically authorized by the head of a procuring activity. Such exceptions shall be justified in writing and authorized only in situations where the weighted guidelines method is determined to be unsuitable.

(c) *Limitation.* In the event this or any other method would result in establishing a fee objective in violation of limitations established by statute or this subchapter, the maximum fee objective shall be the percentage allowed pursuant to such limitations. (See § 3.405.) No local administrative ceilings on profit shall be permitted.

§ 3.808–3 Profit objective.

(a) A profit objective is that part of the estimated contract price objective or value which, in the judgment of the contracting officer, is appropriate for the procurement being considered, covering the profit or fee element of the price objective. This objective should realistically reflect the total overall task to be performed and the requirements placed on the contractor. Prior to the negotiation of a contract, change order, or contract modification, where cost analysis is undertaken, the negotiator shall develop a profit objective. The weighted guidelines method, if applicable, shall be used for developing this profit objective. If a change or modification is of a relatively small dollar amount and is basically the same type of work as required in the basic contract, the application of the weighted guidelines method will generally result in a profit objective similar to the profit objective in the basic contract, and therefore this basic rate may be applied to the contract change or modification. However, in cases where the change or modification calls for substantially different work, then the basic contract profit and the contractor's input to total performance may be radically changed and a detailed analysis is necessary. Also, if the dollar amount of the change or contract modification is very significant in comparison to the contract dollar amount, a detailed analysis should be made.

(b) Development of a profit objective should not begin until after a thorough (1) review of proposed contract work; (2) review of all available knowledge regarding the contractor, pursuant to Subpart I, Part 1 of this chapter, including performance, capability reports, audit data, pre-award survey reports and financial statements, as appropriate; and (3) analysis of the contractor's cost estimate and comparison with the Government's estimate or projection of cost.

§ 3.808–4 Profit factors.

(a) The factors set forth below shall be considered in all cases in which profit is to be specifically negotiated. The weight ranges listed after each factor shall be used in all instances where the weighted guidelines method is used.

Profit factors	*Weight ranges (percent)*
Contractor's input to total performance—	
Direct materials:	
Purchased parts	1 to 4
Subcontracted items	1 to 5
Other materials	1 to 4
Engineering labor	9 to 15
Engineering overhead	6 to 9
Manufacturing labor	5 to 9
Manufacturing overhead	4 to 7
General and administrative expenses	6 to 8
Contractor's assumption of contract cost risk	0 to 7
Type of contract.	
Reasonableness of cost estimate.	
Difficulty of contract task.	
Record of contractor's performance	−2 to +2
Management.	
Cost Efficiency.	
Reliability of cost estimates.	
Cost reduction program accomplishments.	
Value engineering accomplishments.	
Timely deliveries.	
Quality of product.	
Inventive and developmental contributions.	
Small business and labor surplus area participation.	
Selected factors	−2 to +2
Source of resources.	
Government or contractor source of financial and material resources.	
Special achievement.	
Other.	

(b) Under the weighted guidelines method, the contracting officer shall first measure the "Contractor's Input to Total Performance" by the assignment of a profit percentage within the designated weight ranges to each element of contract cost recognized by the contracting officer. Such costs are multiplied by the specific percentages, which have been selected in accordance with § 3.808–5(b), to arrive at specific dollar profits.

(c) The suggested categories under the Contractor's Input to Total Performance are similar to those on the Cost and Price Analysis Form (DD Form 633). Often, individual proposals will be in a different format; but, since these categories are broad and basic, they provide sufficient guidance to evaluate all other items of cost.

(d) Although certain classifications of acceptable cost, including travel, subsistence, facilities, test equipment, special tooling, federal manufacturers excise taxes, and royalty expenses, may have been historically excluded from the base upon which profit has been computed, they shall not be excluded when using the weighted guidelines method.

(e) After the contracting officer has computed a total dollar profit for the Contractor's Input to Total Performance, he shall divide this amount by the total recognized costs to determine the composite profit percentage for this factor. To this composite percentage, he shall then add the specific percentages assigned for cost risk, performance, and the other selected factors, to arrive at a total profit percentage. He shall then multiply the total recognized contract costs by this total profit percentage to determine the profit objective. A cardinal principle of the weighted guidelines method is that the specific percentages assigned for cost risk, performance, and other factors are applied to total recognized costs in establishing the profit objective.

§ 3.808–5 Assignment of values to specific factors.

(a) *General.* In making his judgment of the value of each factor, the contracting officer should be governed by the definition, description, and purpose of the factors together with considerations for evaluating them as set forth herein.

(b) *Contractor's input to total performance.* This factor is a measure of how much the contractor himself is expected to contribute to the overall effort necessary to meet the contract performance requirements in an efficient manner. This factor, which is apart from the contractor's responsibility for contract performance, takes into account what resources are necessary and what the contractor himself must do to accomplish a conversion of ideas and materials into the final product called for in the contract. This is a recognition that within a given performance output, or within a given sales dollar figure, necessary efforts on the part of individual contractors can vary widely in both value and quantity, and that the profit objective should reflect the extent and nature of the contractor's contribution to total performance. The evaluation of this factor requires an analysis of the cost content of the proposed contract as follows:

(1) *Direct materials (purchased parts, subcontracted items and other material).* Analysis of these cost items shall include an evaluation of the managerial and technical effort necessary to obtain the required purchased parts, subcontracted items, and other materials, including special tooling. This evaluation shall include consideration of the number of orders and suppliers, and whether established sources are available or new sources must be developed. The contracting officer shall also determine whether the contractor will, for example, obtain the material and tooling by routine orders for readily available supplies (particularly those of substantial value in relation to the total contract cost), or by detailed subcontracts for which the prime contractor will be required to develop complex specifications involving creative design or close tolerance manufacturing requirements.

Consideration should be given to the managerial and technical efforts necessary for the prime contractor to administer subcontracts, and select subcontractors, including efforts to break out subcontracts from sole sources, through the introduction of competition. These determinations should be made for purchases of raw materials or basic commodities, purchases of processed material including all types of components of standard or near-standard characteristics, and purchases of pieces, assemblies, subassemblies, special tooling and other products special to the end-item. In the application of this criterion it should be recognized that the contribution of the prime contractor to his purchasing program might be substantial. This might be applicable in the management of subcontracting programs involving many sources, involving new complex components and instrumentation, incomplete specifications, and close surveillance by the prime contractor's representative. Recognized costs proposed as direct material costs such as scrap charges shall be treated as material for profit evaluation. If intracompany transfers are accepted at price, in accordance with § 15.205-22(e) of this chapter, they shall be evaluated as material. Other intracompany transfers shall be evaluated by individual components of cost, i.e., material, labor and overhead. Normally the lowest weight for direct material is 2 percent. A weighting of less than 2 percent would be appropriate only in unusual circumstances when there is a minimal contribution by the contractor.

(2) *Engineering labor and manufacturing labor.* Analysis of the engineering labor and manufacturing labor items of the cost content of the contract should include evaluation of the comparative quality and level of the engineering talents, manufacturing skills and experience to be employed. In evaluating engineering labor for the purpose of assigning profit dollars, consideration should be given to the amount of notable scientific talent or unusual or scarce engineering talent needed in contrast to journeyman engineering effort or supporting personnel. The diversity, or lack thereof, of scientific and engineering specialties required for contract performance and the corresponding need for engineering supervision and coordination should be evaluated. Similarly, the variety of manufacturing labor skills required and the contractor's manpower resources for meeting these requirements should be considered.

(3) *Engineering overhead, manufacturing overhead, and general and administrative expenses.* (i) Analysis of these overhead items of cost includes the evaluation of the make up of these expenses and how much they contribute to contract performance. This analysis should include a determination of the amount of labor within these overhead pools and how this labor would be treated if it were considered as direct labor under the contract. The allocable labor elements should be given the same profit consideration that they would receive if they were treated as direct labor. The other elements of these overhead pools should be evaluated to determine whether they are routine expenses such as utilities, depreciation, and maintenance, and hence given lesser profit consideration, or whether they are significant contributing elements. The composite of the individual determinations in relation to the elements of the overhead pools will be the profit consideration given the pools as a whole. The procedure for assigning relative values to these overhead expenses differs from the method used in assigning values to the direct labor. The upper and lower limits assignable to the direct labor are absolute. In the case of overhead expenses, individual expenses may be assigned values outside the range as long as the composite ratio is within the range.

(ii) It is not necessary that the contractor's accounting system break down his overhead expenses within the classification of engineering overhead, manufacturing overhead, and general and administrative expenses. The contractor whose accounting system only reflects one overhead rate on all direct labor need not change his system to correspond with the above classifications. The contracting officer in his evaluation of such a contractor's overhead rate could break out the applicable sections of the composite rate which could be classified as engineering overhead, manufacturing overhead and general and administrative expenses and follow the appropriate evaluation technique.

(iii) It is not necessary for the contracting officer to make a separate profit evaluation of overhead expenses in connection with each procurement action for substantially the same product with the same contractor. Once an analysis of the profit weight to be assigned the overhead pool has been made, the weight assigned may be used for future procurements with the same contractor until there is a change in the cost composition of the overhead pool or the contract circumstances.

(c) *Contractor's assumption of contract cost risk.* (1) This factor reflects the policy of the Department of Defense to shift the risk of contract costs to the fullest extent practicable to contractors and to compensate them for the assumption of this risk. Evaluation of this risk requires a determination of (i) the degree of cost responsibility the contractor assumes, (ii) the reliability of the cost estimates in relation to the task assumed, and (iii) the chances of the contractor's success or failure. This factor is specifically limited to the risk of contract costs. Thus, such risks on the part of the contractor as reputation, losing a commercial market, risk of losing potential profits in other fields, or any risk on the part of the purchasing activity, such as the risk of not acquiring an effective weapon, are not within the scope of this factor.

(2) The first and basic determination of the degree of cost responsibility assumed by the contractor is related to the sharing of total risk of contract cost by the Government and the contractor through the selection of contract type. The extremes are a cost-plus-fixed-fee contract requiring only that the contractor use his best efforts to perform a task, and a firm fixed-price contract for a complex item. Such cost-plus-fixed-fee contract would reflect a minimum assumption of cost responsibility, whereas such firm fixed-price contract would reflect a complete assumption of cost responsibility. Therefore, in the first step of determining what value is to be given for the contractor's assumption of contract cost risk, a zero rating shall be given to a proposed cost-plus-fixed-fee best efforts contract, and a 7-percent rating shall be given to a closely priced firm fixed-price contract for a new, complex item.

(3) The second determination is that of the reliability of the cost estimates. Sound price negotiation requires well-defined contract objectives and reliable cost estimates. Prior production experience assists the contractor in preparing reliable cost estimates on new procurements for similar equipment and does not in any way reduce his cost responsibility in a firm fixed-price contract. An excessive cost estimate reduces the possibility that the cost of performance will exceed the contract price, thereby reducing the contractor's assumption of contract cost risk.

(4) The third determination is that of the difficulty of the contractor's task. The contractor's task can be difficult or easy, regardless of the type of contract.

(5) Contractors are likely to assume greater cost risks only if contracting officers objectively analyze the risk incident to proposed contracts and are willing to compensate contractors for it. Generally, a cost-plus-fixed-fee contract would not justify a reward for risk in excess of 1 percent, nor would a firm fixed-price contract justify a reward of less than 5 percent. Where proper contract type selection has been made the reward for risk by contract type would usually fall into the following percentage ranges:

Type of contract	*Percentage ranges*
Cost-plus-fixed-fee	0 to 1
Cost-plus-incentive-fee including cost incentive only	1 to 2
Cost-plus-incentive-fee including cost, performance, and delivery incentives	1½ to 3
Fixed-price-incentive including cost incentive only	2 to 4
Fixed-price-incentive including cost, performance, and delivery incentives	3 to 5
Prospective price redetermination	4 to 5
Firm fixed-price	5 to 7

(i) These ranges may not be appropriate for all procurement situations. For instance, a fixed-price-incentive contract which is closely priced with a low ceiling price and a high incentive share may be tantamount to a firm fixed-price contract. In this situation, the contracting officer might determine that a basis exists for high confidence in the reasonableness of the estimate, and that little opportunity exists for cost reduction without extraordinary efforts. On the other hand, a contract with a high ceiling and low incentive formula could be considered to contain cost-plus-incentive-fee contract features. In this situation, the contracting officer might determine that the Government is retaining much of the contract cost responsibility

and that the risk assumed by the contractor is minimal. Similarly, if a cost-plus-incentive-fee contract includes an unlimited downward (negative) fee adjustment on cost control, it could be comparable to a fixed-price-incentive contract. In such a pricing environment the contracting officer may determine that the Government has transferred a greater amount of cost responsibility to the contractor that is typical under a normal cost-plus-incentive-fee contract.

(ii) The contractor's subcontracting program may have a significant impact on the contractor's acceptance of risk under a contract form. It could cause risk to increase or decrease in terms of both cost and performance. This consideration should be a part of the contracting officer's overall evaluation in selecting a factor to apply for cost risk. It may be determined, for instance, that the prime contractor has effectively transferred real cost risk to a subcontractor and the contract cost risk evaluation may, as a result, be below the range which would otherwise apply for the contract type being proposed. It would be expected that this situation would be found to exist only in a very few extraordinary procurement situations under circumstances of (a) a follow-on production contract, in which a very substantial portion of the total contract costs represent a single subcontract or a very few subcontracts, (b) the subcontractor having established his performance on this requirement in an earlier contract, or contracts, and (c) the fullest incentive reward and penalty feature on cost performance having been passed by the prime to the subcontractor. In a procurement action in which all of these circumstances are found to exist a lower than usual profit weight may appropriately be applied to the aggregate of all recognized costs including the subcontract portion. The contract cost risk evaluation should not be lowered, however, merely on the basis that a substantial portion of the contract costs represent subcontracts without any substantial transfer of contractor's risk, since this could result eventually in a lessening of the amount of work let on subcontracts.

(iii) In making a contract cost risk evaluation in a procurement action that involves definitization of a letter contract, consideration should be given to the effect on total contract cost risk as a result of having partial performance under the letter contract. Under some circumstances it may be reasoned that the total amount of cost risk has been effectively reduced by the existence of a letter contract. Under other circumstances it may be apparent that the contractor's cost risk remained substantially as great as though a letter contract had not been used. To be equitable the determination of a profit weight for application to the total of all recognized costs, both those incurred and those yet to be expended, must be made with consideration to all attendant circumstances, not just to the portion of costs incurred, or percentage of work completed, prior to definitization.

(d) *Record of contract performance.* (1) The purpose of this factor is to motivate contractors to improve their performance by rewarding them for excellent past performance and penalizing them for poor performance. Effective use of this factor requires that (i) reports on the various aspects of past performance be obtained and evaluated; and (ii) this information be used in such a way as to motivate contractors to improve their performance.

(2) Contracting officers should insure that an adequate review is made of contractor's past performance in order that an objective evaluation of this performance may be accomplished. For assistance in evaluating the past and present performance of a contractor who has engaged in advanced development, engineering development or operational systems development, a transcript of his Contractor Performance Evaluation Reports may be requested from the Director of Contractor Performance Evaluation, Office of the Assistant Secretary of Defense (Installations and Logistics). Such transcript or a statement that there is no record on file shall always be obtained for procurements in excess of $1,000,000 (see § 4.215 of this chapter). Reports of cost reduction monitors, small business, labor surplus and other specialists involved in the evaluation of the various aspects of contractor performance should be obtained.

(3) The evaluation of a particular contractor's past performance and the importance placed upon the various subfactors listed below should be done in such a way as to motivate the contractor to improve his performance. For instance, it might be pointless, in evaluating the performance of an autonomous division of a multi-divisional contractor, to place emphasis on the performance of another autonomous division. Under such circumstances, management of the division being evaluated might have no means for controlling the performance of the other division; therefore, emphasis on this performance by assigning a plus or a minus rating to this factor might have a negative affect upon motivation to improve.

(4) The weight to be assigned to this factor is arrived at on a judgment basis rather than an arithmetical averaging of weights assigned to all factors, depending upon the particular procurement situation, and the relative importance of the various factors. For example, an evaluation of a particular contractor may indicate that his performance was satisfactory in most areas, except that he showed a preference for doing all work in-house and a disinclination to support Government small business objectives. In such a case the contracting officer may feel that the importance of these factors might justify the assignment of a lower overall rating for the record of past performance.

(5) As stated above, the purpose of this factor is to reward a contractor for excellent past performance and penalize him for poor performance. Therefore, performance which is rated as merely satisfactory should generally be assigned a weight of zero. However, a contractor who has consistently met contractual requirements may be awarded a plus.

(6) The following factors are to be considered in evaluating a contractor's performance record:

(i) *Management.* Stability and competence of management personnel, their willingness and ability to adjust company resources to meet peculiarly difficult and changing defense requirements are criteria for consideration. The degree of cooperation by the contractor, both business and technical, with the objectives of the Government should be considered.

(ii) *Cost efficiency.* Low cost performance reflecting economic use of facilities and manpower, sound purchasing methods and subcontracting procedures, and effective inventory control are criteria for consideration. Improvement in production efficiency through investment in plant modernization, past production efficiencies, or lack thereof, effectiveness of the contractor's make-or-buy program, purchasing and subcontracting system and inventory control should be evaluated.

(iii) *Reliability of cost estimates.* Accuracy and reliability of previous cost estimates should be considered.

(iv) *Cost reduction program accomplishments.* Accomplishments of contractors who successfully reduce the cost of defense procurement under a cost reduction program established in accordance with Department of Defense criteria should be considered.

(v) *Value engineering accomplishments.* Outstanding accomplishments from value engineering efforts such as substantial savings in later contract costs, spare parts support, or maintenance, should be given special consideration. This factor should be used in recognition of outstanding accomplishments and is in addition to contractor sharing under value engineering incentive provisions in individual contracts.

(vi) *Timely deliveries.* The contractor's delivery record, considering excusable delays and the contractor's efforts to overcome delays, should be analyzed.

(vii) *Quality of product.* Experience with the contractor's product reliability, including the rate of rejection of his product and his acceptance of responsibility for continuing support should be considered.

(viii) *Inventive and developmental contributions.* Extent and nature of contractor-initiated and financed research, development, design work, product engineering, quality control, and manufacturing processes and techniques should be analyzed.

(ix) *Small Business and Labor Surplus Area Participation.* The contractor's policies and procedures which energetically support Government small business and labor surplus area programs should be given favorable consideration. Any unusual effort which the contractor displays in subcontracting with these concerns, particularly for development type work likely to result in later production opportunities, and overall effective-

ness of the contractor in subcontracting with and furnishing assistance to such concerns should be considered. Conversely, failure or unwillingness on the part of the contractor to support Government small business or labor surplus area policies should be viewed as evidence of poor performance for the purpose of establishing a profit objective.

(e) *Selected factors.* The purpose of these factors, which may enter into a particular procurement situation, is to discourage reliance upon Government resources, and to encourage contractors to outstanding performance. Therefore, in assigning a composite profit percentage within the range of −2 to +2 for these Selected Factors, the Source of Resources factor will always be rated from 0 to −2 percent and the Special Achievement factor will always be rated from 0 to +2 perecent. The Other factor may be rated with either a plus or a minus. These factors will rarely be of equal weight in a specific procurement. They should be assigned a weight as a group, in accordance with the following criteria:

(1) *Source of resources (Government or private).* Application of this factor calls for an analysis of the contractor's dependence on Government financial assistance or material assistance in the form of facilities. Contractor reliance upon Government resources shall be discouraged by providing for less favorable profit consideration. Commercial facilities to be rented by the contractor will be evaluated as contractor furnished. Customary progress payments and guaranteed loans with normal guarantees (90 percent or less) shall not be weighted in this evaluation. However, other forms of financial assistance such as extraordinary progress payments, guaranteed loans with abnormal guarantees, or advance payments shall be considered a minus factor. Similarly, the reliance on any other type of Government assistance, including facilities shall be evaluated as a minus from zero. The contractor who uses new Government resources for the performance of a contract will be penalized to a greater degree than the contractor who uses existing Government resources.

(2) *Special achievement, if any, required in the contract.* This factor indicates the need for extra profit consideration when outstanding performance is required. Such achievement may be in the form of a special technical requirement, such as production of some remarkable first, or achievements involving non-technical objectives, such as an extraordinarily fast delivery schedule.

(3) *Other.* Particular procurement situations may give rise to the desirability of using a profit factor other than those in (subparagraphs (1) and (2) of this paragraph. Such factor shall be identified; and the reason for its use shall be documented in accordance with § 3.811.

§ 3.808–6 Special profit consideration.

Contractors who develop military items without Government assistance are entitled to special profit consideration on those items. This consideration shall be in addition to the profit objective arrived at through the weighted guidelines method. One to four percent of recognized cost is established as the normal range of value for this profit factor. The criteria for selection of the specific percentage shall be the importance of the development in furthering defense purposes, the demonstrable initiative in determining the need and application of the development, the extent of the contractor's cost risk, and whether the development cost was recovered directly or indirectly from Government sources.

§ 3.808–7 Examples. [Revoked]

PART 4—SPECIAL TYPES AND METHODS OF PROCUREMENT

17. Subpart A is revoked and §§ 4.205–4(c) and 4.211 are revised, as follows:

§ 4.205–4 Evaluation for award.

* * * * *

(c) In determining to whom the contract shall be awarded, the contracting officer shall consider not only technical competence, but also all other pertinent factors including management capabilities, cost controls including the nature and effectiveness of any cost reduction program, and past performances in adhering to contract requirements, weighing each factor in accordance with the requirements of the particular procurement (see § 1.903 of this chapter). The contracting officer shall notify those sources whose proposals or offers have been determined to be unacceptable of that decision in accordance with § 3.507 of this chapter.

* * * * *

§ 4.211 Scientific and technical reports.

(a) Scientific and technical reports are documents written for the permanent record to document results obtained from and recommendations made on scientific and technical activities relating to a single project, task, or contract or relating to a small group of closely connected efforts within the Department of Defense Research and Development Program. A completed Document Control Data—R&D (DD Form 1473) is to be included in each copy of a scientific or technical report required by the contract. (See § 16.807 of this chapter.)

(b) Wherever a scientific or technical report is required as a product of the research, development, test and evaluation effort, the contracting officer will assure that the requirement for a completed DD Form 1473 is clearly stated and that a complete DD Form 1473 is included with each copy of the required scientific and technical reports.

(c) Research and development contracts are required to contain appropriate data clauses as prescribed in Subpart B, Part 9 of this chapter, which usually provide, among other things, for the reproduction and use for any purpose of the Government of any or all of the information to be provided under the contract. Contracting officers shall require contractors to furnish all such information resulting from research or development contracts. Scientific and technical reports should be reproduced as economically as practicable, consistent with the reporting needs of the Government.

(d) It is important that the results of research and development contracts be made readily available to Government activities, and to non-Government organizations and persons who have a need to know in accordance with procedures of the Military Departments. Defense Documentation Center, Cameron Station, Alexandria, Va., 22314, provides a central service for the interchange of scientific and technical information of value to Department of Defense agencies and contractors.

PART 5—INTERDEPARTMENTAL AND COORDINATED PROCUREMENT

18. Sections 5.104–1, 5.207, 5.701(b), and 5.1106–2 are revised, and in § 5.1203, item 105450 in the table, pertaining to Bell Helicopter Co., is changed, to read as follows:

§ 5.104–1 Completely optional Federal Supply Schedules.

In addition to the Federal Supply Schedule contracts described in §§ 5.102 and 5.103, there are Federal Supply Schedules which are completely optional for use by any Government purchasing activity and on which vendors are not required to accept orders. Such Schedules currently exist in the following areas:

FSC Group	*Title*
25–28–29–38	Motor-Vehicle Parts and Accessories, Gasoline and Diesel Engine and Generator Parts, and Road Building Machinery Parts.
74	Office Machines (other than typewriters), Rental, Repair and Maintenance.

Except where precluded by administrative expense or urgency considerations, optional Federal Supply Schedules shall be considered equally with other sources by the contracting officer in assuring that purchases of items of the type contained in such schedules are made to the best advantage of the Government, price, delivery, service and other factors considered. This section shall in no way minimize the requirements for using formal advertising when the situation warrants. Where purchases are less than $250, the procedure in § 3.604–1 of this chapter will apply.

§ 5.207 Order for services.

Orders for repair or refinishing services from General Services Administration sources shall be placed as follows:

(a) *GSA repair facility.* A delivery order on Order for Supplies or Services (DD Form 1155) (see § 3.608–5 of this chapter) shall be submitted to the General Services Administration regional office which normally serves the procuring activity.

(b) *Federal Supply Schedules.* Delivery orders on DD Form 1155 will be placed directly with the Federal Supply Schedule contractors.

§ 5.701 Authorization and policy relating to placing and filling orders.

* * * * *

(b) Each procuring activity, when it is in the interest of the Government to

do so, may place delivery orders on DD Form 1155 (see § 3.608–6 of this chapter) with any other Government department or agency for supplies or services that any such requisitioned department or agency may be in a position to furnish or perform or to obtain by contract. Generally, an order for supplies or services will not be placed with a department or agency which is not in a position to furnish the supplies or is not equipped to perform the services, except that an order may be filled by means of an outside contract with a commercial source of supply if the order is placed by any one of the following: Department of the Army, Department of the Navy, Department of the Air Force, Department of the Treasury, Civil Aeronautics Administration, or Maritime Commission. An order for services shall not be placed with a department or agency when such services can be performed as conveniently or more cheaply by private contractors.

§ 5.1106–2 Determinations and findings.

(a) *General.* (1) When procurement is by negotiation, the Procuring Department, except as provided in subparagraphs (2) and (3) of this paragraph, shall make the determinations and findings in accordance with Subpart C, Part 3, of this chapter, with respect to coordinated procurement. The Requiring Department shall furnish with the purchase request the information required by the Procuring Department to develop the determinations and findings.

(2) With respect to 10 U.S.C. 2304(a)(13), the Requiring Department shall make the determinations and findings in accordance with Subpart C, Part 3 of this chapter. Two copies of the determinations and findings shall be attached to the purchase request and shall be utilized by the Procuring Department as authority for negotiation, and the Procuring Department need not make further determinations and findings.

(3) With respect to 10 U.S.C. 2304(a)(16) and when the procurement agreements under § 5.1118 (as distinguished from single procurement) do not include mobilization planning responsibility, the Requiring Department shall make the determinations and findings in accordance with Subpart C, Part 3 of this chapter. Two copies of the determinations and findings shall be atached to the purchase request and shall be utilized by the Procuring Department as authority for negotiation, and the Procuring Department need not make further determinations and findings. With respect to single procurement (§ 5.1100–2), the Procuring Department shall make the determinations and findings.

(b) *Foreign end products.* Where a foreign end product is specified by the Requiring Department, that Department is responsible for determining that a domestic source end product is not available as required by § 6.102–3(b) of this chapter. Two copies of the determination that a domestic source end product is not available shall be furnished to the Procuring Department with the military interdepartmental purchase request.

§ 5.1203 Plant cognizance procurement assignments.

Plant index No.	Manufacturer	Location	Current procurement and mobilization planning assigned to
	Aircraft plants		
. . .	. . .	. . .	. . .
105450	Bell Helicopter Co., Division of Bell Aerospace Corp.	Hurst, Tex., Post Office address: Post Office Box 482, Fort Worth, Tex.	Army.*
. . .	. . .	. . .	. . .

*Includes full plant cognizance except that contract negotiation and award is limited to Iroquois Helicopters; the Departments of the Navy and the Air Force shall negotiate and award contracts for their requirements for other Bell products.

PART 6—FOREIGN PURCHASES

19. Section 6.102–3 is revised to read as follows:

§ 6.102–3 Procurements from other Government agencies.

(a) Except as provided in paragraph (b) of this section, as to any item which is to be acquired by one department or agency and subsequently transferred to another, compliance with the Buy American Act and application of its exceptions are the responsibility of the department or agency which first acquires the item. For example, if the General Services Administration acquires a foreign end product pursuant to a GSA determination that the cost of "buying American" would be unreasonable (see § 6.103–3), any Defense activity which is procuring the product from a GSA stores depot shall presume that the product was properly acquired by GSA and may properly be accepted by Defense activities.

(b) In the case of coordinated procurement under subpart K, Part 5 of this chapter, compliance with the Buy American Act is the responsibility of the Procuring Department, except where the Requiring Department specifies a foreign end product in which case the determination that a domestic source end product is not available shall be the responsibility of the Requiring Department (see § 5.1106–2(b) of this chapter).

PART 7—CONTRACT CLAUSES

20. Sections 7.103–16, 7.103–18, 7.104–1, and 7.104–9 are revised; the introductory text of § 7.104–12(a) is revised; and the introductory text of § 7.104–42(a) is revised, as follows:

§ 7.103–16 Contract Work Hours Standards Act—Overtime Compensation.

Insert the contract clause set forth in § 12.303–1 of this chapter. Note the introductory provision required by § 12.303–2 of this chapter in the case of contracts with a State or political subdivision thereof.

§ 7.103–18 Equal opportunity.

Insert the clause set forth in § 12.802 of this chapter.

§ 7.104–1 Clauses for contracts involving construction work.

(a) In accordance with the requirements of § 12.403 of this chapter, insert the clauses entitled:

Davis-Bacon Act.
Contract Work Hours Standards Act—Overtime Compensation.
Apprentices.
Payrolls and Payroll Records.
Compliance with Copeland Regulations.
Withholding of Funds.
Subcontracts.
Contract Termination—Debarment.
Employee Compensation—Cape Kennedy, Patrick Air Force Base, and Merritt Island Launch Area.

(b) In accordance with the requirements of § 6.204–5 of this chapter, insert the clause entitled "Buy American Act".

§ 7.104–9 Rights in data.

In accordance with the requirements of Subpart B, Part 9 of this chapter, insert one of the contract clauses set forth in §§ 9.203(b), 9.204–2, or 9.206 of this chapter, as appropriate. When the contract clause in § 9.203(b) is used, the appropriate additional provisions shall be added in accordance with the requirements in § 9.203; and the additional provisions in § 9.204–1 may be added under the circumstances set forth in that section. When the clause in § 9.203(b) is used, the appropriate "Data—Withholding of Payment" clause in § 9.207 shall also be used.

§ 7.104–12 Military security requirements.

(a) Except as provided in paragraph (b) of this section, insert the following clause in all contracts which are classified by a Department as "Confidential", including "Confidential—Modified Handling Authorized", or higher and in any other contracts the performance of which will require access to such classified information or material. In those cases where the situation so warrants because of the nature of the item or the conditions under which it is to be produced, the contract shall provide by a separate contract provision such additional security safeguards as may be required for the protection of that item. When the "Military Security Requirements" clause is inserted in any contract, the contracting officer or his authorized representative shall prepare and transmit to the contractor, material inspector, security officer of the cognizant Military Department having cognizance of the facility where the prime contract will be performed, and such other agencies as may be determined by the Departments, a Security Requirements Check List (DD Form 254) in accordance with § 16.811 of this chapter. The Security Requirements Check List will also be furnished by the contracting Military Department to the cognizant security office when a classified subcontract is placed under a prime contract which contains the "Mili-

tary Security Requirements" clause. However, if the procurement is for a research contract, consultant service, graphic arts service, alternate storage services, or other procurement of services in which there is no requirement for a breakdown by classification of the various elements of the contract, or subcontract, a letter or other written notice of classification for the entire contract may be used in lieu of the Security Requirements Check List.

* * * * *

§ 7.104–42 Subcontractor cost and pricing data.

(a) The following clause shall be inserted in any cost-reimbursement type, incentive, or price redeterminable contract. In addition, it shall also be inserted in all other negotiated contracts over $100,000, except where the price is based on adequate price competition, established catalog or market prices of commercial items sold in substantial quantities to the general public, or prices set by law or regulation. The contracting officer may include this clause, with appropriate reduction in the dollar amounts included therein, in other negotiated contracts where a Certificate of Current Cost or Pricing Data is required (see § 3.807–3(a)(4) of this chapter) in connection with initial pricing of the contract.

* * * * *

21. In § 7.108–1, the clause heading and clause paragraph (i) are revised; in § 7.108–2, the clause heading and clause paragraph (k) are revised; §§ 7.203–16, 7.203–18, 7.204–1, 7.204–9, 7.302–24, 7.303–1, 7.402–16, 7.402–17, and 7.403–1 are revised to read as follows:

§ 7.108–1 Firm targets.

* * * * *

INCENTIVE PRICE REVISION (FIRM TARGET) (JANUARY 1965)

* * * * *

(i) *Equitable adjustments under other clauses.* If an equitable adjustment in the contract price is made under any other clause of this contract before the total final price is established, the adjustment shall be made in the total target cost and in the maximum dollar limit on the total final price and may be made in the total target profit. If such an adjustment is made after the total final price is established, adjustment shall be made only in the total final price.

* * * * *

§ 7.108–2 Successive targets.

* * * * *

INCENTIVE PRICE REVISION (SUCCESSIVE TARGETS) (JANUARY 1965)

* * * * *

(k) *Equitable adjustments under other clauses.* If an equitable adjustment in the contract price is made under any other clause of this contract before the total final price is established, the adjustment shall be made in the total target cost and in the maximum dollar limit on the total final price and may be made in the total target profit. If such an adjustment is made after the total final price is established, adjustment shall be made only in the total final price.

* * * * *

§ 7.203–16 Contract Work Hours Standards Act—Overtime Compensation.

Insert the contract clause set forth in § 12.303–1 of this chapter. Note the introductory provision required by § 12.303–2 of this chapter in the case of contracts with a State or political subdivision thereof.

§ 7.203–18 Equal opportunity.

Insert the contract clause set forth in § 12.802 of this chapter.

§ 7.204–1 Clauses for contracts involving construction work.

(a) In accordance with the requirements of § 12.403 of this chapter, insert the clauses entitled:

Davis-Bacon Act.
Contract Work Hours Standards Act—Overtime Compensation.
Apprentices.
Payrolls and Payroll Records.
Compliance with Copeland Regulations.
Withholding of Funds.
Subcontracts.
Contract Termination—Debarment.
Employee Compensation—Cape Kennedy, Patrick Air Force Base, and Merritt Island Launch Area.

(b) In accordance with the requirements of § 6.204–5 of this chapter, insert the clause entitled Buy American Act.

§ 7.204–9 Rights in data.

In accordance with the requirements of Subpart B, Part 9 of this chapter, insert one of the contract clauses set forth in §§ 9.203(b), 9.204–2, or 9.206 of this chapter, as appropriate. When the contract clause in § 9.203(b) is used, the appropriate additional provisions shall be added in accordance with the requirements of § 9.203; and the additional provision in § 9.204–1 may be added under the circumstances set forth in that section. When the clause in § 9.203(b) is used, the appropriate "Data—Withholding of Payment" clause in § 9.207 shall also be used.

§ 7.302–24 Basic data clause.

In accordance with requirements of § 9.202 of this chapter, insert the clause set forth in § 9.203(b) with appropriate additional or alternate paragraphs as prescribed by the instructions in §§ 9.203 and 9.204–1, and the appropriate "Data—Withholding of Payment" clause as set forth in § 9.207.

§ 7.303–1 Clauses for contracts involving construction work.

(a) In accordance with the requirements of § 12.403 of this chapter, insert the clauses entitled:

Davis-Bacon Act.
Contract Work Hours Standards Act—Overtime Compensation.
Apprentices.
Payrolls and Payroll Records.
Compliance with Copeland Regulations.
Withholding of Funds.
Subcontracts.
Contract Termination—Debarment.
Employee Compensation—Cape Kennedy, Patrick Air Force Base, and Merritt Island Launch Area.

(b) In accordance with the requirements of § 6.204–5 of this chapter, insert the clause entitled Buy American Act.

§ 7.402–16 Contract Work Hours Standards Act—Overtime Compensation.

In accordance with the instructions of § 12.303 of this chapter, insert the clause set forth therein.

§ 7.402–17 Equal opportunity.

In accordance with the requirements of § 12.802 of this chapter, insert the contract clause set forth therein.

§ 7.403–1 Clauses for contracts involving construction work.

(a) In accordance with the requirements of § 12.403 of this chapter, insert the clauses entitled:

Davis-Bacon Act.
Contract Work Hours Standards Act—Overtime Compensation.
Apprentices.
Payrolls and Payroll Records.
Compliance with Copeland Regulations.
Withholding of Funds.
Subcontracts.
Contract Termination—Debarment.
Employee Compensation—Cape Kennedy, Patrick Air Force Base, and Merritt Island Launch Area.

(b) In accordance with the requirements of § 6.204–5 of this chapter, insert the clause entitled Buy American Act.

22. The heading of Subpart F is changed; new § 7.600 is added; §§ 7.601 and 7.602 are revised; the clause heading of clauses in §§ 7.602–1, 7.602–2, and 7.602–3 are changed, as follows:

Subpart F—Clauses for Construction and Architect-Engineer Contracts

§ 7.600 Scope of subpart.

This subpart sets forth uniform contract clauses for use in connection with the procurement of construction (see § 18.100 of this chapter) and of architect-engineer services for the production and delivery of designs, plans, drawings and specifications, or for supervision and inspection of construction, or both. For format and clauses to be used in a contract for dismantling, demolition or removal of improvements, see § 16.404 of this chapter.

§ 7.601 General.

As used throughout this subpart, the term "construction contract" means any contract (other than a short form construction contract (see §§ 16.401–2 and 16.402–2 of this chapter), a letter contract, a notice of award, or a modification not effecting new procurement) which is for construction as defined in § 18.101–1 of this chapter.

§ 7.602 Required clauses for fixed-price construction contracts.

The following clauses shall be inserted in all fixed-price construction contracts, except as otherwise provided in this subpart.

§ 7.602–1 Definitions.

DEFINITIONS (JUNE 1964)

* * * * *

§ 7.602–2 Specifications and drawings.

SPECIFICATIONS AND DRAWINGS (JUNE 1964)

* * * * *

§ 7.602–3 Changes.

CHANGES (JUNE 1964)

* * * * *

23. Section 7.602–4 is revised; in § 7.602–6, the clause heading of the clause in paragraph (a) is changed; § 7.602–7 is revised; the clause headings of clauses in §§ 7.602–8, 7.602–9, 7.602–11, 7.602–12, 7.602–13, 7.602–14, 7.602–15, and 7.602–16 are changed, as follows:

§ 7.602–4 Changed conditions.

CHANGED CONDITIONS (JUNE 1964)

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 adustment to be made, the dispute shall be determined as provided in the "Disputes" clause of this contract.

When Standard Form 23–A is used, the words "Disputes clause of this contract" in the foregoing paragraph need not be substituted for "Clause 6 of these General Provisions". In accordance with 10 U.S.C. 2306(f), prior to the pricing of any modification pursuant to the "Changed Conditions" clause that is expected to exceed $100,000, except where the price is based on adequate price competition, established catalog or market prices of commercial items sold in substantial quantities to the general public, or prices set by law or regulation, the contracting officer shall require the contractor to furnish a Certificate of Current Cost or Pricing Data (see § 3.807–4 of this chapter) and shall assure that the contract includes or is modified to include a defective pricing data clause (see § 7.104–29).

§ 7.602–6 Disputes.

(a) Except as provided in paragraph (b) of this section, insert the following clause:

DISPUTES (JUNE 1964)

* * * * *

§ 7.602–7 Payments to contractor.

(a) Except as provided in paragraph (b) of this section, insert the following clause:

PAYMENT TO CONTRACTOR (JUNE 1964)

(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) if such consideration is specifically authorized by the contract and (2) if the Contractor furnishes satisfactory evidence that he has acquired title to such material and that it will be utilized on the work covered by this contract.

(c) In making such progress payments, there shall be retained 10 percent of the estimated amount until final completion and acceptance of the contract work. However, if the Contracting Officer, at any time after 50 percent of the work has been completed, finds that satisfactory progress is being made, he may authorize any of the remaining progress payments to be made in full. Also, whenever the work is substantially complete, the contracting Officer, if he considers the amount retained to be in excess of the amount adequate for the protection of the Government, at his discretion, may release to the Contractor all or a portion of such excess amount. Furthermore, on completion and acceptance of each separate building, public work, or other division of the contract, on which the price is stated separately in the contract, payment may be made therefor without retention of a percentage.

(d) All material and work covered by progress payments made shall thereupon become the sole property of the Government, but this provision shall not be construed as relieving the Contractor from the sole responsibility for all material and work upon which payments have been made or the restoration of any damaged work, or as waiving the right of the Government to require the fulfillment of all of the terms of the contract.

(e) Upon completion and acceptance of all work, the amount due the Contractor under this contract shall be paid upon the presentation of a properly executed voucher and after the Contractor shall have furnished the Government with a release, if required, of all claims against the Government arising by virtue of this contract, other than claims in stated amounts as may be specifically excepted by the Contractor from the operation of the release. If the Contractor's claim to amounts payable under the contract has been assigned under the Assignment of Claims Act of 1940, as amended (31 U.S.C. 203, 41 U.S.C. 15), a release may also be required of the assignee.

(b) Where (1) the contract amount exceeds one million dollars, and (2) the time of performance, specified originally, exceeds one year and (3) where the retained percentage provided for in paragraph (c) of the clause above greatly exceeds the amount necessary for the protection of the Government, paragraph (c) of the clause may be modified by adding the following:

Where the time originally specified for completion of this contract exceeds one year, the Contracting Officer, at any time after 50 percent of the work has been completed, if he finds that satisfactory progress is being made, may reduce the total amount retained from progress payments to an amount not less than 10 percent of the estimated value of the work remaining to be done under the contract or 1½ percent of the total contract amount, whichever is the higher. In computing the total contract amount, for the purposes of the preceding sentence, the contract amount for any separate building, public work, or other division of the contract on which the price is stated separately in the contract and on which payment has been in full, including retained percentage thereon under this clause shall be excluded.

§ 7.602–8 Assignment of claims.

ASSIGNMENT OF CLAIMS (JUNE 1964)

* * * * *

§ 7.602–9 Material and workmanship.

MATERIAL AND WORKMANSHIP (JUNE 1964)

* * * * *

§ 7.602–11 Inspection and acceptance.

INSPECTION AND ACCEPTANCE (JUNE 1964)

* * * * *

§ 7.602–12 Superintendence by contractor.

SUPERINTENDENCE BY CONTRACTOR (JUNE 1964)

* * * * *

§ 7.602–13 Permits and responsibilities.

PERMITS AND RESPONSIBILITIES (JUNE 1964)

* * * * *

§ 7.602–14 Conditions affecting the work.

CONDITIONS AFFECTING THE WORK (JUNE 1964)

* * * * *

§ 7.602–15 Other contracts.

OTHER CONTRACTS (JUNE 1964)

* * * * *

§ 7.602–16 Patent indemnity.

PATENT INDEMNITY (JUNE 1964)

* * * * *

24. Section 7.602–18 is revised; the clause heading in § 7.602–19 is changed; §§ 7.602–20, 7.602–23, and 7.602–26 are revised; new §§ 7.602–32, 7.602–33, 7.602–34, 7.602–35, 7.602–36, and 7.602–37 are added: § 7.602–38 is reserved; new §§ 7.602–39, 7.602–40, 7.602–41, 7.602–42, 7.602–43, 7.602–44, 7.602–45, and 7.602–46 are added, as follows:

§ 7.602–18 Covenant against contingent fees.

Insert the clause set forth in § 7.103–20.

§ 7.602–19 Officials not to benefit.

OFFICIALS NOT TO BENEFIT (JUNE 1964)

* * * * *

§ 7.602–20 Buy American.

In accordance with § 6.204 of this chapter, insert the clause set forth in § 6.204–5.

§ 7.602–23 Labor standards provisions.

In accordance with § 12.403 of this chapter, insert the clauses entitled:

Davis-Bacon Act.
Contract Work Hours Standards Act—Overtime Compensation.
Apprentices.
Payrolls and Payroll Records.
Compliance with Copeland Regulations.
Withholding of Funds.
Subcontracts.
Contract Termination—Debarment.
Employee Compensation—Cape Kennedy, Patrick Air Force Base and Merritt Island Launch Area.

§ 7.602–26 Small business.

(a) *Utilization of small business concerns.* In accordance with § 1.707–3(a) of this chapter, insert the clause set forth therein.

(b) *Small business subcontracting program.* In accordance with § 1.707–3 (c) of this chapter, insert the clause included therein.

§ 7.602–32 Composition of Contractor.

COMPOSITION OF CONTRACTOR (JANUARY 1965)

If the Contractor hereunder is comprised of more than one legal entity, each such entity shall be jointly and severally liable hereunder.

§ 7.602–33 Site investigation.

SITE INVESTIGATION (JANUARY 1965)

The Contractor acknowledges that he has investigated and satiafied himself as to the conditions affecting the work, including but not restricted to those bearing upon transportation, disposal, handling and storage of materials, availability of labor, water, electric power, roads and uncertainties of weather, river stages, tides or similar physical conditions at the site, the conformation and conditions of the ground, the character of equipment and facilities needed preliminary to and during prosecution of the work. The Contractor further acknowledges that he has satisfied himself as to the character, quality and quantity of surface and subsurface materials or obstacles to be encountered insofar as this information is reasonably ascertainable from an inspection of the site, including all exploratory work done by the Government, as well as from information presented by the drawings and specifications made a part of this contract. Any failure by the Contractor to aquaint himself with the available information will not relieve him from responsibility for estimating properly the difficulty or cost of successfully performing the work. The Government assumes no responsibility for any conclusions or interpretations made by the Contractor on the basis of the information made available by the Government.

§ 7.602–34 Protection of existing vegetation, structures, utilities, and improvements.

PROTECTION OF EXISTING VEGETATION, STRUCTURES, UTILITIES, AND IMPROVEMENTS (JANUARY 1965)

(a) The Contractor will preserve and protect all existing vegetation such as trees, shrubs, and grass on or adjacent to the site of work which is not to be removed and which does not unreasonably interfere with the construction work. Care will be taken in removing trees authorized for removal to avoid damage to vegetation to remain in place. Any limbs or branches of trees broken during such operations or by the careless operation of equipment, or by workmen, shall be trimmed with a clean cut and painted with an approved tree pruning compound as directed by the Contracting Officer.

(b) The Contractor will protect from damage all existing improvements or utilities at or near the site of the work, the location of which is made known to him, and will repair or restore any damage to such facilities resulting from failure to comply with the requirements of this contract or the failure to exercise reasonable care in the performance of the work. If the Contractor fails or refuses to repair any such damage promptly, the Contracting Officer may have the necessary work performed and charge the cost thereof to the Contractor.

§ 7.602–35 Operations and storage areas.

OPERATIONS AND STORAGE AREAS (JANUARY 1965)

(a) All operations of the Contractor (including storage of materials) upon Government premises shall be confined to areas authorized or approved by the Contracting Officer. The Contractor shall hold and save the Government, its officers and agents, free and harmless from liability of any nature occasioned by his operations.

(b) Temporary buildings (storage sheds, shops, offices, etc.) may be erected by the Contractor only with the approval of the Contracting Officer, and shall be built with labor and materials furnished by the Contractor without expense to the Government. Such temporary buildings and utilities shall remain the property of the Contractor and shall be removed by him at his expense upon the completion of the work. With the written consent of the Contracting Officer, such buildings and utilities may be abandoned and need not be removed.

(c) The Contractor shall, under regulations prescribed by the Contracting Officer, use only established roadways or construct and use such temporary roadways as may be authorized by the Contracting Officer. Where materials are transported in the prosecution of the work, vehicles shall not be loaded beyond the loading capacity recommended by the manufacturer of the vehicle or prescribed by any Federal, State or local law or regulation. When it is necessary to cross curbings or sidewalks, protection against damage shall be provided by the Contractor and any damaged roads, curbings, or sidewalks shall be repaired by, or at the expense of the Contractor.

§ 7.602–36 Progress charts and requirements for overtime work.

PROGRESS CHARTS AND REQUIREMENTS FOR OVERTIME WORK (JANUARY 1965)

(a) The Contractor shall within 5 days or within such time as determined by the Contracting Officer, after date of commencement of work, prepare and submit to the Contracting Officer for approval a practicable schedule, showing the order in which the Contractor proposes to carry on the work, the date on which he will start the several salient features (including procurement of materials, plant and equipment) and the contemplated dates for completing the same. The schedule shall be in the form of a progress chart of suitable scale to indicate appropriately the percentage of work scheduled for completion at any time. The Contractor shall enter on the chart the actual progress at such intervals as directed by the Contracting Officer, and shall immediately deliver to the Contracting Officer three copies thereof. If the Contractor fails to submit a progress schedule within the time herein prescribed, the Contracting Officer may withhold approval of progress payment estimates until such time as the Contractor submits the required progress schedule.

(b) If, in the opinion of the Contracting Officer, the Contractor falls behind the progress schedule, the Contractor shall take such steps as may be necessary to improve his progress and the Contracting Officer may require him to increase the number of shifts, or overtime operations, days of work, or the amount of construction plant, or all of them, and to submit for approval such supplementary schedule or schedules in chart form as may be deemed necessary to demonstrate the manner in which the agreed rate of progress will be regained, all without additional cost to the Government.

(c) Failure of the Contractor to comply with the requirements of the Contracting Officer under this provision shall be grounds for determination by the Contracting Officer that the Contractor is not prosecuting the work with such diligence as will insure completion within the time specified. Upon such determination the Contracting Officer may terminate the Contractor's right to proceed with the work, or any separable part thereof, in accordance with the clause of the contract entitled "Termination for Default—Damages for Delay—Time Extensions."

§ 7.602–37 Subcontractors.

SUBCONTRACTORS (JANUARY 1965)

Within 7 days after the award of any subcontract either by himself or a subcontractor, the Contractor shall deliver to the Contracting Officer a statement setting forth the name and address of the subcontractor and a summary description of the work subcontracted. The Contractor shall at the same time furnish a statement signed by the subcontractor acknowledging the inclusion in his subcontract of the clauses of this contract entitled "Equal Opportunity", "Davis-Bacon Act", "Contract Work Hours Standards Act—Overtime Compensation", "Apprentices", "Payrolls and Payroll Records", "Compliance With Copeland Regulations", "Withholding of Funds", "Subcontracts" and "Contract Termination—Debarment". Nothing contained in this contract shall create any contractual relation between the subcontractor and the Government.

§ 7.602–38 [Reserved]

§ 7.602–39 Use and possession prior to completion.

USE AND POSSESSION PRIOR TO COMPLETION (JANUARY 1965)

The Government shall have the right to take possession of or use any completed or partially completed part of the work. Such possession or use shall not be deemed an acceptance of any work not completed in accordance with the contract. While the Government is in such possession, the Contractor, notwithstanding the provisions of the clause of this contract entitled "Permits and Responsibilities," shall be relieved of the responsibility for loss or damage to the work other than that resulting from the Contractor's fault or negligence. If such prior possession or use by the Government delays the progress of the work or causes additional expense to the Contractor, an equitable adjustment in the contract price or the time of completion will be made and the contract shall be modified in writing accordingly.

§ 7.602–40 Cleaning up.

CLEANING UP (JANUARY 1965)

The Contractor shall at all times keep the construction area, including storage areas used by him, free from accumulations of waste material or rubbish and prior to completion of the work remove any rubbish from the premises and all tools, scaffolding, equipment, and materials not the property of the Government. Upon completion of the construction the Contractor shall leave the work and premises in a clean, neat and workmanlike condition satisfactory to the Contracting Officer.

§ 7.602–41 Additional definitions.

ADDITIONAL DEFINITIONS (JANUARY 1965)

(a) Wherever in the specifications or upon the drawings the words "directed", "required", "ordered", "designated", "prescribed", or words of like import are used, it shall be understood that the "direction", "requirement", "order", "designation", or "prescription", of the Contracting Officer is intended and similarly the words "approved", "acceptable", "satisfactory" or words of like import shall mean "approved by" or "accept-

able to", or "satisfactory to" the Contracting Officer, unless otherwise expressly stated.

(b) Where "as shown", "as indicated", "as detailed", or words of similar import are used, it shall be understood that the reference is made to the drawings accompanying this contract unless stated otherwise. The word "provided" as used herein shall be understood to mean "provided complete in place", that is "furnished and installed".

§ 7.602–42 Accident prevention.

(a) Normally the following clause concerning safety controls, records, reports and corrective action to be taken shall be inserted.

ACCIDENT PREVENTION (JANUARY 1965)

(a) In order to provide safety controls for protection to the life and health of employees and other persons; for prevention of damage to property, materials, supplies, and equipment; and for avoidance of work interruptions in the performance of this contract, the Contractor shall comply with all pertinent provisions of Corps of Engineers Manual, EM 385–1–1, dated 13 March 1958, entitled "General Safety Requirements", as amended, and will also take or cause to be taken such additional measures as the Contracting Officer may determine to be reasonably necessary for the purpose.

(b) The Contractor will maintain an accurate record of, and will report to the Contracting Officer in the manner and on the forms prescribed by the Contracting Officer, exposure data and all accidents resulting in death, traumatic injury, occupational disease, and damage to property, materials, supplies and equipment incident to work performed under this contract.

(c) The Contracting Officer will notify the Contractor of any noncompliance with the foregoing provisions and the action to be taken. The Contractor shall, after receipt of such notice, immediately take corrective action. Such notice, when delivered to the Contractor or his representative at the site of the work, shall be deemed sufficient for the purpose. If the Contractor fails or refuses to comply promptly, the Contracting Officer may issue an order stopping all or part of the work until satisfactory corrective action has been taken. No part of the time lost due to any such stop orders shall be made the subject of claim for extension of time or for excess costs or damages by the Contractor.

(d) Compliance with the provisions of this article by subcontractors will be the responsibility of the Contractor.

(b) In contracts involving work of long duration or of hazardous character, the following paragraph (e) will be added to the above clause:

(e) Prior to commencement of the work the Contractor will:

(1) submit in writing his proposals for effectuating this provision for accident prevention;

(2) meet in conference with representatives of the Contracting Officer to discuss and develop mutual understandings relative to administration of the over-all safety program.

§ 7.602–43 Government inspectors.

GOVERNMENT INSPECTORS (JANUARY 1965)

The work will be conducted under the general direction of the Contracting Officer and is subject to inspection by his appointed inspectors to insure strict compliance with the terms of the contract. No inspector is authorized to change any provision of the specifications without written authorization of the Contracting Officer, nor shall the presence or absence of an inspector relieve the Contractor from any requirements of the contract.

§ 7.602–44 Commencement, prosecution and completion of work.

COMMENCEMENT, PROSECUTION AND COMPLETION OF WORK (JANUARY 1965)

The Contractor will be required to commence work under this contract within _____ calendar days after the date of receipt by him of notice to proceed, to prosecute said work diligently, and to complete the entire work ready for use not later than _____. The time stated for completion shall include final clean-up of the premises.

§ 7.602–45 Contract drawings, maps and specifications.

CONTRACT DRAWINGS, MAPS AND SPECIFICATIONS (JANUARY 1965)

(a) _____ sets (five unless otherwise specified herein) of large scale contract drawings, maps and specifications will be furnished the Contractor without charge except applicable publications incorporated into the technical provisions by reference. Additional sets will be furnished on request at the cost of reproduction. The work shall conform to the following contract drawings and maps, all of which form a part of these specifications and are available in the office of

_____

_____

(Address)

Title	File	Drawing No.

(b) Omissions from the drawings or specifications or the misdescription of details of work which are manifestly necessary to carry out the intent of the drawings and specifications, or which are customarily performed, shall not relieve the Contractor from performing such omitted or misdescribed details of the work but they shall be performed as if fully and correctly set forth and described in the drawings and specifications.

(c) The Contractor shall check all drawings furnished him immediately upon their receipt and shall promptly notify the Contracting Officer of any discrepancies. Figures marked on drawings shall in general be followed in preference to scale measurements. Large scale drawings shall in general govern small scale drawings. The Contractor shall compare all drawings and verify the figures before laying out the work and will be responsible for any errors which might have been avoided thereby.

§ 7.602–46 Price adjustment for suspension, delays or interruption of work.

The following clause shall be included in fixed-price construction contracts:

PRICE ADJUSTMENT FOR SUSPENSION, DELAYS, OR INTERRUPTION OF WORK (NOVEMBER 1961)

(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 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 payment under the contract. Any dispute concerning a question of fact arising under this clause shall be subject to the Disputes clause.

25. Sections 7.603 and 7.603–1 are revised; § 7.603–5 is revoked; §§ 7.603–9, 7.603–12, 7.603–13, 7.603–15, 7.603–22, 7.603–23, 7.603–24, 7.603–25, and 7.603–26 are revised, to read as follows:

§ 7.603 Clauses for fixed-price construction contracts to be used when applicable.

§ 7.603–1 Notice to Government of labor disputes.

Insert the clause set forth in § 7.104–4 in all contracts for items on the DOD Master Urgency List.

§ 7.603–5 Rights in data. [Revoked]

§ 7.603–9 Subcontracts.

In accordance with § 3.903–1 of this chapter, insert the appropriate subcontracts clause, modified if appropriate.

§ 7.603–12 Workmen's compensation insurance overseas.

In accordance with § 10.403 of this chapter, insert the clause set forth therein.

§ 7.603–13 Taxes.

In accordance with the requirements of § 11.403–2 of this chapter, in contracts to be performed outside the United States, its possessions and Puerto Rico, insert one of the clauses set forth in paragraphs (a) and (b) thereof, or if no tax agreement has been executed between the United States and the foreign country and tax relief is not available, insert the clause in § 11.404 of this chapter.

§ 7.603–15 Performance of work by contractor.

In accordance with the requirements of § 13.104 of this chapter, insert the following clause:

PERFORMANCE OF WORK BY CONTRACTOR (JANUARY 1965)

The Contractor shall perform on the site, and with his own organization, work equivalent to at least (words) percent* (figures) of the total amount of work to be performed under the contract. If, during the progress of the work hereunder, the Contractor requests a reduction in such percentage; and the Contracting Officer determines that it would be to the Government's advantage,

*The required percentage shall be the maximum consistent with customary or necessary specialty subcontracting, complexity, and magnitude of the work, and shall not be less than 20 percent, except for housing contracts in which it shall not be less than 15 percent.

the percentage of the work required to be performed by the Contractor may be reduced; provided, written approval of such reduction is obtained by the Contractor from the Contracting Officer.

§ 7.603–22 Government-furnished property clause for fixed-price contracts.

Insert the clause set forth in § 13.702 of this chapter in contracts for construction under which the Government is to furnish to the contractor material, special tooling, or industrial facilities consistent with § 13.303 of this chapter.

§ 7.603–23 Fixed-price incentive contract clause.

The following clause shall be inserted in all negotiated contracts providing for a fixed price with provision for an adjustment reflecting the efficiency and economy exercised by the contractor during performance of the contract.

INCENTIVE PRICE REVISION (JANUARY 1965)

(a) *General.* The total contract price set forth in this contract as it may have been modified, consists of unit prices, lump sum prices or a combination thereof, and such total contract price is a total target price which includes a total target profit of ------ percent of total target costs. The total target price shall be revised in accordance with the provisions of this clause: *Provided*, That the total amount paid under this contract shall not exceed (i) the aggregate of the prices of the lump sum items, plus (ii) the unit prices of the estimated quantity items times the actual quantity of such items, plus (iii) ------ percent of the sum of (i) and (ii) above.

(b) *Submission of data.* Within ------ days after completion of all work and services to be performed under this contract, the Contractor shall submit (i) a detailed statement of costs incurred in the performance of this contract; (ii) such other information as the Contracting Officer may require; and (iii) a price list of all materials, supplies and property, the cost of which is included in (i) above, which are on hand upon completion of the work. Where the Contractor fails to submit the required data within the time specified, no further payment may be made by the Contracting Officer until the data are furnished.

(c) *Price revision.* Upon submission of the data required by paragraph (b) above, the Contractor and the Contracting Officer shall promptly establish the total adjusted price in accordance with the following:

(1) On the basis of the information required by paragraph (b) above, the Contractor and the Contracting Officer shall establish by negotiation the total adjusted cost reasonably incurred or to be incurred for and properly allocable to the work and services performed under this contract and accepted by the Government.

(2) The total adjusted price of the work and services performed under this contract shall be established by adding to the total adjusted cost, as negotiated under (1) above, less the proceeds of any disposition of Contractor inventory in accordance with (g) below, an allowance for profit determined in accordance with (3) below, *Provided, however*, That in no event shall the total adjusted price exceed the amount computed in accordance with paragraph (s) above.

(3) The allowance for profit with respect to this contract shall be determined as follows, subject to the provisions and limitations set forth in subparagraph (2) above:

When the total adjusted cost is—	*The allowance for profit is—*
Equal to the total target cost.	Total target profit.
Greater than the total target cost.	Total target profit less ------ percent (------ %) of the amount by which the total adjusted cost exceeds the total target cost.
Less than the total target cost.	Total target profit plus ------ percent (------ %) of the amount by which the total adjusted cost is less than the total target cost.

(d) *Records.* (1) The Contractor shall maintain books, records, documents, and other evidence, sufficient to reflect properly all direct and indirect costs of whatever nature claimed to have been incurred for the performance of this contract. However, no material change will be required to be made in the Contractor's accounting procedures and practices if they conform to generally accepted accounting practices and if the cost data required to be furnished under (b) above are readily ascertainable. Each subcontract placed by the Contractor hereunder on other than a firm fixed-priced basis (i) shall provide that the subcontractor shall maintain books, records, documents, and other evidence, sufficient to reflect properly all direct and indirect costs of whatever nature claimed to have been incurred in the performance of such subcontract and (ii) shall require each such subcontractor to insert the entire substance of this subparagraph, including this (ii), in all his subcontracts which are on other than a firm fixed-price basis.

(2) The Government may at all reasonable times make such examination or audit as the Contracting Officer may require of the Contractor's books, records, documents, and other evidence pertinent to the performance of this contract.

(e) *Certification.* An authorized responsible official of the Contractor shall certify on each statement of costs submitted to the Contracting Officer pursuant to (b) above that the incurred costs are based upon the records of the Contractor, that such records reflect generally accepted accounting principles and practices normally followed by the Contractor, and that such costs are correct to the best of his knowledge and belief.

(f) *Subcontracts.* (1) No subcontract placed under this contract shall provide for payment on a cost-plus-a-percentage-of-cost basis; and the Contractor shall not, without the prior written consent of the Contracting Officer, place any subcontract which is on a cost-plus-a-fee basis and which would involve a total price in excess of $10,000, including the fee. The Contracting Officer may, in his discretion, ratify in writing any such cost-plus-a-fee subcontract and such action shall constitute the consent of the Contracting Officer as required by this subparagraph (1).

(2) Each subcontract placed by the Contractor hereunder (i) shall provide that the Government may at all reasonable times make such examination or audit as the Contracting Officer may require of the subcontractor's books, records, documents, and other evidence, pertinent to the performance of the subcontract and (ii) shall require each such subcontractor whose subcontract is on other than a firm fixed-price basis to insert the entire substance of this subparagraph, including this (ii), in all his subcontracts. The term "subcontract", as used in this subparagraph (2) only, excludes firm fixed-price subcontracts not in excess of $2,500 and subcontracts for utility services at rates established for uniform application to the general public.

(g) *Contractor inventory.* Any materials, supplies and property the cost of which is allocable to the contract and included in the total adjusted cost, which are on hand upon the completion of the contract, shall be disposed of in accordance with the applicable Government regulations covering the disposition of Contractor inventory and any proceeds of such disposition shall be used to reduce the total adjusted cost established pursuant to paragraph (c) above. Any materials, supplies and property which are on hand upon the completion of the contract, which are not allocable to the contract and as to which no costs have been included in the total adjusted cost, shall be and remain the property of the Contractor.

(h) *Contract modification.* The total adjusted price, as determined in accordance with paragraph (c) above, shall be evidenced by a modification to this contract signed by the Contractor and the Contracting Officer. Such final contract price shall apply to all work and services performed under this contract.

(i) *Adjustment of payment estimates.* If at any time it appears that the final contract price will be substantially greater or less than (i) the aggregate of the prices of the lump sum items, plus (ii) the unit prices of the estimated quantity items times the actual quantity of such items completed, the Contracting Officer may adjust each payment estimate thereafter to be made under the contract by increasing or decreasing the net amount of such payment estimate by the indicated percentage of variation: *Provided, however*, That in no event shall the percentage of increase exceed that indicated in paragraph (a)(iii) above. Any adjustment of payment estimates under this paragraph shall in no way limit or affect the price revision to be computed in accordance with the provisions of this clause.

(j) *Limitation on payments.* Notwithstanding any provisions of this contract authorizing greater payment, the total of all amounts paid or payable under this contract, until price revision has been made to the full extent permitted by this contract, shall not exceed the sum of the following items as reported by the Contractor from time to time as hereinafter provided: (i) the total amount of costs (estimated to the extent necessary) that have been reasonably incurred for and are properly allocable to the contract and (ii) the total amount of target profit used in establishing the total target price and allocable by direct proportion to the work or services performed. Within 45 days after the end of each quarter of the Contractor's fiscal year, beginning for the quarter in which work or services are first performed under this contract and as of the end of each quarter thereafter, the Contractor shall submit a statement setting forth the respective amounts of each of the two numbered items next above, together with the total of all amounts paid or payable under this contract as of the end of each such quarter. If on any quarterly statement the total of the amounts paid exceeds the sum of the two numbered items above, this gross excess shall be paid immediately by the Contractor to the Government or credited against existing unpaid billings.

(k) *Disagreement.* If the Contractor and the Contracting Officer are unable to agree upon the final contract price within 60 days after the date on which the data required by (b) above are to be submitted or within

such further time as specified by the Contracting Officer, the Contracting Officer shall resolve the disagreement by issuing a decision pursuant to the clause of this contract entitled "Disputes."

(i) *Termination.* (i) In the event of a complete termination, the amount payable to the Contractor shall be established in accordance with the clause of this contract entitled "Termination for Convenience of the Government" or "Termination for Default—Damages for Delay—Time Extension" as applicable.

(ii) In the event of a partial termination, the amount payable to the Contractor as to the work and services terminated shall be established in accordance with the clause of this contract entitled "Termination for the Convenience of the Government" or "Termination for Default—Damages for Delay—Time Extensions" as applicable. As to the work and services not terminated the provisions of this clause shall apply.

§ 7.603–24 Shop drawings.

(a) Insert the following clause, with the appropriate addition in paragraph (b) of this section, in contracts requiring the submission of shop drawings for review prior to construction:

SHOP DRAWINGS (JANUARY 1965)

The Contractor shall submit to the Contracting Officer for approval ____ copies (four unless otherwise indicated herein) of all shop drawings as called for under the various headings of these specifications. These drawings shall be complete and detailed. If approved by the Contracting Officer, each copy of the drawings will be identified as having received such approval by being so stamped and dated. The Contractor shall make any corrections required by the Contracting Officer. If the Contractor considers any correction indicated on the drawings to constitute a change to the contract drawings or specifications, notice as required under the clause entitled "Changes" will be given to the Contracting Officer. ____ sets (three unless otherwise indicated herein) of all shop drawings will be retained by the Contracting Officer and one set will be returned to the Contractor. The approval of the drawings by the Contracting Officer shall not be construed as a complete check, but will indicate only that the general method of construction and detailing is satisfactory. Approval of such drawings will not relieve the Contractor of the responsibility for any error which may exist as the Contractor shall be responsible for the dimensions and design of adequate connections, details, and satisfactory construction of all work.

(b) "As built" shop drawings may be required for the permanent record of the using agency.

(1) When reproducible shop drawings are required, the following provision shall be added to the clause in paragraph (a) of this section:

Upon the completion of the work under this contract, the Contractor shall furnish a complete set of reproducibles of all shop drawings as finally approved. These drawings shall show all changes and revisions made up to the time the equipment is completed and accepted.

(2) If reproducible shop drawings are not required, the following provision shall be added to the clause in paragraph (a) of this section:

Upon the completion of the work under this contract, the Contractor shall furnish ____ complete sets of prints of all shop drawings as finally approved. These drawings shall show changes and revisions made up to the time the equipment is completed and accepted.

§ 7.603–25 Physical data.

(a) All the information concerning local conditions pertaining to the performance of the contract work, which has been made available to the Contractor should be referenced into the contract by completing the clause set forth in paragraph (b) of this section. Wherever test borings, analyses, or hydrographic data are to be made available to the Contractor, the wording of this special clause should be such as only to inform the Contractor as to the source of the data and where it may be examined.

(b) Contract clause:

PHYSICAL DATA (JANUARY 1965)

Information and data furnished or referred to below are furnished for the Contractor's information. However, it is expressly understood that the Government will not be responsible for any interpretation or conclusion drawn therefrom by the Contractor.

(a) The physical conditions indicated on the drawings and in the specifications are the result of site investigations by (insert investigational methods used, such as surveys, auger borings, core borings, test pits, probings, test tunnels, etc.)

(b) Weather Conditions. (Insert summary of weather records and warnings.)

(c) Transportation facilities. (Insert the summary of transportation facilities accessible to project, availability, and limitations.)

(d) ---------- (Insert other pertinent information.)

§ 7.603–26 Disputes concerning labor standards.

Insert the following clause in all contracts subject to the Davis-Bacon Act.

DISPUTES CONCERNING LABOR STANDARDS (JANUARY 1965)

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

26. New §§ 7.603–27, 7.603–28, 7.603–29, 7.603–30, 7.603–31, 7.603–32, 7.603–33, 7.603–34, 7.603–35, 7.603–36, 7.603–37, 7.603–38, 7.603–39, 7.603–40, and 7.603–41 are added, as follows:

§ 7.603–27 Variations in estimated quantity contracts.

Insert the following clause in contracts containing estimated quantity items when the Contracting Officer has reserved the right to vary the estimated quantity during the performance of the work to accommodate actual conditions encountered:

VARIATIONS IN ESTIMATED QUANTITIES (JANUARY 1965)

Where the quantity of a pay item in this contract is an estimated quantity and where the actual quantity of such pay item varies more than fifteen (15%) percent above or below the estimated quantity stated in this contract, as it may hereafter be modified, an equitable adjustment in the contract unit price shall be made upon demand of either party. If the quantity variation is such as to cause an increase in the time necessary for completion, the Contracting Officer shall, upon receipt of a written request for an extension of time within ten (10) days from the beginning of such delay, or within such further period of time which may be granted by the Contracting Officer prior to the date of final settlement of the contract, ascertain the facts and make such adjustment for extending the completion date as in his judgment the findings justify. If the parties fail to agree upon an equitable adjustment in the contract price or time the dispute shall be determined as provided in the clause of this contract entitled "Disputes".

§ 7.603–28 Identification of Government furnished property.

Insert the following clause when required. The point at which the Government-furnished property will be delivered to the Contractor should be specifically stated as a part of the information furnished under the special clause on physical data (see § 7.603–25). Special provisions may be required in addition to the clause herein to cover Government or another Contractor's installation, preparation for operation, or testing of equipment.

IDENTIFICATION OF GOVERNMENT FURNISHED PROPERTY (JANUARY 1965)

The Government will furnish to the Contractor the following property to be incorporated or installed in the work or used in its performance. Such property will be furnished f.o.b. railroad cars at the place specified in paragraph ____, or f.o.b. truck at the project site and the Contractor will be required to accept delivery when made, paying any demurrage incurred, and unloading and transporting the property to the job site at his own expense. All such property will be installed or incorporated into the work at the expense of the Contractor, unless otherwise indicated herein. The Contractor shall verify the quantity and condition of such Government-furnished property when delivered to him, acknowledge receipt thereof in writing to the Contracting Officer, and in case of damage to or shortage of such property, he shall within 24 hours report in writing such damage or shortage to the Contracting Officer.

Quantity	Item	Description

§ 7.603–29 Salvage materials and equipment.

Insert the following clause in contracts which involve Government-furnished property which is to be salvaged and reused:

SALVAGE MATERIALS AND EQUIPMENT (JANUARY 1965)

The Contractor shall maintain adequate property control records for all materials or equipment specified to be salvaged. These records may be in accordance with the Contractor's system of property control, if approved by the property administrator. The Contractor shall be responsible for the adequate storage and protection of all salvaged materials and equipment and shall replace, at no cost to the Government, all salvage materials and equipment which are broken or damaged during salvage operations as the result of his negligence, or while in his care.

§ 7.603–30 Availability and use of utility services.

Insert the following clause in contracts for performance at Government installa-

tions when it is determined that Government-owned and operated utility systems and supplies are adequate for the needs of and use of the Contractor as well as the Government.

AVAILABILITY OF UTILITY SERVICES (JANUARY 1965)

It has been determined by the Contracting Officer that Government-owned and operated utility systems and supplies are adequate for the needs and use of the Contractor as well as the Government. All reasonably required amounts of water, gas, electricity, etc., will be made available to the Contractor by the Government from existing system outlets and supplies. The Contractor shall, at his own expense, make all temporary connections and install distribution lines and meters, as required, to determine the amount of water, gas or electricity used by him and such utilities will be paid for by or charged to the Contractor at prevailing rates charged to the Government or, in the event the water, gas or electricity is produced by the Government at reasonable rates as determined by the Contracting Officer. All temporary lines will be furnished, installed, connected, and maintained by the Contractor in a workmanlike manner satisfactory to the Contracting Officer and shall be removed by the Contractor in like manner at his expense prior to final acceptance of the construction.

§ 7.603–31 Layout of work.

Insert the following clause in construction contracts on a lump sum basis except in contracts for (a) airfield pavement construction, (b) dredging, and (c) unit price contracts in which the payment quantity is to be established by field surveys.

LAYOUT OF WORK (JANUARY 1965)

The Contractor shall lay out his work from Government established base lines and bench marks indicated on the drawings and shall be responsible for all measurements in connection therewith. The Contractor shall furnish, at his own expense, all stakes, templates, platforms, equipment, tools, and materials and labor as may be required in laying out any part of the work from the base lines and bench marks established by the Government. The Contractor will be held responsible for the execution of the work to such lines and grades as may be established or indicated by the Contracting Officer. It shall be the responsibility of the Contractor to maintain and preserve all stakes and other marks established by the Contracting Officer until authorized to remove them. If such marks are destroyed, by the Contractor or through his negligence, prior to their authorized removal, they may be replaced by the Contracting Officer at his discretion. The expense of replacement will be deducted from any amounts due or to become due the Contractor.

§ 7.603–32 Misplaced material.

Insert the following clause in all contracts involving work near or on navigable waterways.

MISPLACED MATERIAL (JANUARY 1965)

Should the Contractor, during the progress of the work, lose, dump, throw overboard, sink, or misplace any material, plant, machinery, or appliance, which in the opinion of the Contracting Officer may be dangerous to or obstruct navigation, the Contractor shall recover and remove the same with the utmost dispatch. The Contractor shall give immediate notice, with description and location of such obstructions, to the Contracting Officer or inspector, and when required shall mark or buoy such obstructions until the same are removed. Should he refuse, neglect, or delay compliance with the above requirements, such obstructions may be removed by the Contracting Officer, and the cost of such removal may be deducted from any money due or to become due the Contractor, or may be recovered under his bond. The liability of the Contractor for the removal of a vessel wrecked or sunk without fault or negligence shall be limited to that provided in Sections 15, 19, and 20 of the River and Harbor Act of March 3, 1899. (33 U.S.C. 410 et seq.)

§ 7.603–33 Signal lights.

Insert the following clause in all contracts requiring the use of marine equipment.

SIGNAL LIGHTS (JANUARY 1965)

The Contractor shall display signal lights and conduct his operations in accordance with the General Regulations of the Department of the Army and of the Coast Guard governing lights and day signals to be displayed by towing vessels with tows on which no signals can be displayed, vessels working on wrecks, dredges, and vessels engaged in laying cables or pipe or in submarine or bank protection operations, lights to be displayed on dredge pipe lines, and day signals to be displayed by vessels of more than 65 feet in length moored or anchored in a fairway or channel, and the passing by other vessels of floating plant working in navigable channels, as approved by the Secretary of the Army (33 CFR 201.1–201.16) and the Commandant, U.S. Coast Guard (33 CFR 80.18–80.31a and 33 CFR 95.51–95.70).

§ 7.603–34 Identification of employees.

A clause substantially as follows shall be inserted in all construction contracts where identification is required for security or other reasons:

IDENTIFICATION OF EMPLOYEES (JANUARY 1965)

The Contractor shall be responsible for furnishing to each employee and for requiring each employee engaged on the work to display such identification as may be approved and directed by the Contracting Officer. All prescribed identification shall immediately be delivered to the Contracting Officer, for cancellation upon the release of any employee. When required by the Contracting Officer the Contractor shall obtain and submit fingerprints of all persons employed or to be employed on the project.

§ 7.603–35 Superintendence of subcontractors.

Insert the clause set forth below in contracts for work of a highly technical and complicated nature requiring extraordinary control by the Contractor of the several parts of the work, or in contracts covering work spread over several places on the site of work.

SUPERINTENDENCE OF SUBCONTRACTORS (JANUARY 1965)

(a) The Contractor shall be required to furnish the following, in addition to the superintendence required by the General Provision entitled "Superintendence by Contractor":

(i) If more than 50 percent and less than 70 percent of the value of the contract work is subcontracted, one superintendent shall be provided at the site and on the Contractor's payroll to be responsible for coordinating, directing, inspecting and expediting the subcontract work.

(ii) If 70 percent or more of the value of the work is subcontracted, the Contractor shall be required to furnish two such superintendents to be responsible for coordinating, directing, inspecting and expediting the subcontract work.

(b) If the Contracting Officer, at any time after 50 percent of the subcontracted work has been completed, finds that satisfactory progress is being made, he may waive all or part of the above requirement for additional superintendence subject to the right of the Contracting Officer to reinstate such requirement if at any time during the progress of the remaining work he finds that satisfactory progress is not being made.

§ 7.603–36 Time extensions for delays to elements of the work.

The following clause shall be inserted in contracts in which there are separate completion dates for various items of work and liquidated damages are provided for:

TIME EXTENSIONS (JANUARY 1965)

Notwithstanding any other provisions of this contract it is mutually understood that the time extensions for changes in the work will depend upon the extent, if any, by which the changes cause delay in the completion of the various elements of construction. The change order granting the time extension may provide that the contract completion date will be extended only for those specific elements so delayed and that the remaining contract completion dates for all other portions of the work will not be altered and may further provide for an equitable readjustment of liquidated damages pursuant to the new completion schedule.

§ 7.603–37 Payment for mobilization and preparatory work.

Insert one of the appropriate following clauses in contracts containing a separate bid item for mobilization and preparatory work with the approval of the head of the procuring activity.

(a) In major construction contracts requiring major or special items of plant and equipment or large stock piles of material which are considered to be in excess of the type, kind and quantity presumed to be normal equipment of a Contractor qualified to undertake the work, insert the following clause.

PAYMENT FOR MOBILIZATION AND PREPARATORY WORK, PAYMENT ITEM NO. _____ (JANUARY 1965)

(a) Payments will be made under this contract on the actual expenditures made by the Contractor for mobilization and preparatory work under payment Item No. _____ as follows: The Contractor may submit to the Contracting Officer certified accounts of the actual payments made by him for construction plant exceeding $10,000 in value per unit, as appraised by the Contracting Officer at the site of the work, acquired for the execution of the work; for the transportation of all plant and equipment to the site; for material purchased for the prosecution of the contract, but not to be incorporated in the work; for construction of camps, access roads or railroads, trailer courts, mess halls, dormitories or living quarters, field headquarters facilities and construction yards, and for personal services and hire of plant on work preparatory to commencing actual work on the construction items for which payment is provided under the terms of the contract. Accounts so submitted must be accompanied by certificate of the Contractor, supported by receipted bills or certified copies of payrolls and freight bills, showing that he has acquired said construction plant and material free from all encumbrances and agreement that it will not be removed from the site and that structures and facilities prepared or erected for the prosecution of the contract work will be maintained and not dismantled prior to the

completion and acceptance of the entire work without the written permission of the Contracting Officer. If the Contracting Officer finds that said construction plant, material, equipment and the mobilization and preparatory work performed are suitable and necessary to the efficient prosecution of the contract and that the said preparatory work has been done with proper economy and efficiency, payment, less the prescribed retained percentage, will be made therefor to the Contractor. Payment for construction plant, material and structures and facilities prepared or erected for prosecution of the contract work shall not exceed the cost thereof to the Contractor less the estimated value upon the completion of the contract as determined by the Contracting Officer. In no event shall such payment exceed 100 percent of the cost to the Contractor of any such items which have no appreciable salvage value and 75 percent of the cost to the Contractor of such items which have an appreciable salvage value. No payment will be made in reimbursement of the premium paid on the performance bond or payment bond. The findings of the Contracting Officer as to the suitability and value of the construction plant, equipment, materials, structures or facilities shall not be subject to appeal.

(b) Payments for mobilization and preparatory work will be made in accordance with (a) above, and such payments will be deducted from the contract price for Item No. _____ "Mobilization and Preparatory Work" until the total amount thus charged to this item reduces this item to zero, after which no further payments will be made under this item. If the total of such payments made does not reduce this item to zero, the balance will be paid to the Contractor in the final payment under the contract. The retained percentage will be paid in accordance with the clause of this contract entitled "Payments to Contractor".

(b)(1) In contracts involving major mobilization expense of plant, equipment and materials other than such as are covered in paragraph (a) of this section, which is occasioned by the location or nature of the work; such as mobilization at an offshore location or towing a dredge to a remote location, insert the following clause:

MOBILIZATION AND DEMOBILIZATION, PAYMENT ITEM NO. _____ (JANUARY 1965)

(a) All costs connected with the mobilization and demobilization of all of the contractor's dredging plant and equipment will be paid for at the contract lump sum price for this item. _____ percent (_____ percent) of the lump sum price will be paid to the Contractor upon completion of his mobilization at the work site. The remaining _____ (_____ percent) will be included in the final payment for work under this contract.

(b) In the event the Contracting Officer considers that the amount in this item (_____ percent), which represents mobilization, does not bear a reasonable relation to the cost of the work in this contract, the Contracting Officer may require the Contractor to produce cost data to justify this portion of the bid. Failure to justify such price to the satisfaction of the Contracting Officer will result in payment of actual mobilization costs, as determined by the Contracting Officer at the completion of mobilization, and payment of the remainder of this item in the final payment under this contract. The determination of the Contracting Officer is not subject to appeal.

(2) The percentage of the lump sum price, for mobilization and demobilization in paragraph (a) of the above clause, attributed to mobilization should generally be sixty percent (60%) and the remaining forty percent (40%) considered to be the cost of demobilization. These percentages may be varied to reflect the situation contemplated under the particular contract, but in no event should mobilization exceed eighty percent (80%) of the payment item.

§ 7.603–38 Exclusion of periods in computing completion schedules.

Insert the following clause in contracts which provide that no work will be required between certain dates:

EXCLUSION OF PERIODS IN COMPUTING COMPLETION SCHEDULES (JANUARY 1965)

No work will be required during the period between _____ and _____ inclusive and such period has not been considered in computing the time allowed for completion. The Contractor may, however, perform work during all or any part of this period upon giving prior written notice to the Contracting Officer. If the work performed during such period is less than* (_____ cubic yards) (the average monthly work necessary to complete the contract within the time specified) and the Contracting Officer maintains an inspection force during this period to inspect the work, the Contractor will be charged the percentage of the cost of maintaining such force that his work is less than* (_____ cubic yards) (the average monthly work necessary to complete the contract within the time specified).

*Delete inapplicable provision.

§ 7.603–39 Amount of liquidated damages.

(See § 18.113.) Insert the following clause in contracts providing for liquidated damages:

LIQUIDATED DAMAGES (JANUARY 1965)

In case of failure on the part of the Contractor to complete the work within the time fixed in the contract or any extensions thereof, the Contractor shall pay to the Government as liquidated damages, pursuant to the clause of this contract entitled "Terminations for Default—Damages for Delay—Time Extensions", the sum of _____ for each day of delay.

§ 7.603–40 Required source for jewel bearings.

In accordance with the requirements of § 1.315 of this chapter, insert the clause set forth therein.

§ 7.603–41 Employment of ocean-going vessels by construction contractors.

In accordance with the requirements of § 1.1409 of this chapter, insert the clause set forth therein.

27. Sections 7.604 and 7.604–1 are revised; §§ 7.604–3 and 7.604–4 are revoked; and new §§ 7.605, 7.605–1 consecutively through 7.605–39 are added, as follows:

§ 7.604 Additional clauses.

The following clauses shall be inserted in contracts where it is desired to cover the subject matter thereof in such contracts.

§ 7.604–1 Alterations in contract.

The following clause may be used if applicable, in negotiated contracts where Standard Form 23 is not used:

ALTERATIONS (JANUARY 1961)

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

§ 7.604–3 Price adjustment for suspension, delays, or interruption of work. [Revoked]

§ 7.604–4 Taxes where foreign agreements do not apply. [Revoked]

§ 7.605 Required clauses for cost-reimbursement type construction contracts.

The following clauses shall be inserted in all cost-reimbursement type construction contracts:

§ 7.605–1 Statement of work.

STATEMENT OF WORK (JANUARY 1965)

The Contractor shall furnish all labor, materials, equipment, and services (except those furnished by the Government) for the construction of (insert a brief description of the project) in accordance with the drawings and specifications or instructions attached hereto as Appendix "A" and made a part hereof, or to be furnished hereafter by the Contracting Officer and subject in every detail to his supervision, direction and instructions.

§ 7.605–2 Changes.

Insert the clause set forth in § 7.203–2 with the following changes in wording: Delete the first sentence and substitute "The Contracting Officer may at any time, by a written order, and without notice to the sureties, if any, make changes, within the general scope of this contract, in the plans and specifications or instructions incorporated herein". Delete the words "delivery schedule" from the second sentence and substitute the words "completion time".

§ 7.605–3 Estimated cost, performance period.

ESTIMATED COST, PERFORMANCE PERIOD (JANUARY 1965)

It is estimated that the construction cost of work required under this contract will be _____ Dollars ($_____), exclusive of the Contractor's fee, and that the work herein contracted for will be ready for utilization by the Government on or before _____, 19__. It is expressly understood, however, that neither the Government nor the Contractor guarantees the correctness of either of these estimates.

§ 7.605–4 Limitation of cost.

Insert the clause set forth in § 7.203–3 with the following changes in wording. Delete the word "schedule" wherever it appears and substitute the words "this contract".

§ 7.605–5 Allowable cost, fixed fee, and payment.

Insert the clause set forth in § 7.203–4(a) with the following changes:

(a) Delete paragraph (a) and substitute the following:

(a) For the performance of this contract, the Government shall pay to the Contractor:

(i) The cost thereof (hereinafter referred to as "allowable cost") determined by the Contracting Officer* to be allowable in accordance with—

(A) Section XV, Part 4, of the Armed Services Procurement Regulation as in effect on the date of this contract; and

(B) The terms of this contract; and

(ii) a fixed fee in the amount of _____ Dollars ($_____).

(b) Delete paragraph (c) and substitute the following:

(c) Promptly after receipt of each invoice or voucher and statement of cost, the Government shall, except as otherwise provided in this contract, subject to the provisions of (d) below, make payment thereon as approved by the Contracting Officer.* Payment of the fixed fee, if any, shall be made to the Contractor in installments based upon the percentage of completion of the work as determined from estimates submitted to and approved by the Contracting Officer*; *Provided, however,* That after payment of eighty-five per cent (85%) of the fixed fee set forth in (a) above, further payment on account of the fixed fee shall be withheld until a reserve of either fifteen percent (15%) of the total fixed fee or one hundred thousand dollars ($100,000), whichever is less, shall have been set aside. (January 1965)

*For contracts of the Department of the Navy, see § 7.203–4(c)(1).

§ 7.605–6 Insurance.

INSURANCE (JANUARY 1965)

(a) The Contractor shall procure and thereafter maintain such bonds and insurance in such forms and such amounts and for such periods of time as the Contracting Officer may require in writing and shall be reimbursed for the cost thereof.

(b) In every instance where this contract requires the United States to reimburse the Contractor for the payment of the premium on a bond or insurance policy, the bond or insurance policy shall contain an endorsement or other recital excluding by appropriate language any claim on the part of the insurer or obligor to be subrogated, on payment of a loss or otherwise, to any claim against the United States.

(c) The Contractor shall give the Contracting Officer or his representative immediate notice in writing of any suit or action filed against the Contractor arising out of the performance of this contract and of any claim against the Contractor the cost and expense of which are reimbursable under the provisions of the Clause entitled "Allowable Cost, Fixed Fee and Payment" hereof, and the risk of which is then uninsured or in which the amount claimed exceeds the amount of insurance coverage. The Contractor shall furnish immediately to the Contracting Officer copies of all pertinent papers received by the Contractor. Insofar as the following shall not conflict with any policy or contract of insurance, and upon request of the Contracting Officer, the Contractor shall do any and all things to effect an assignment and subrogation in favor of the Government, of all Contractor's rights and claims except against the Government, arising from or growing out of such asserted claims, and if required by the Contracting Officer, shall authorize representatives of the Government to settle and/or defend any such claim and to represent or take charge of any such litigation affecting the Contractor.

§ 7.605–7 Direction of work.

DIRECTION OF WORK (JANUARY 1965)

During the performance of this contract, the work shall be under the full-time resident direction of the Contractor, if an individual; of one or more principal partners if the Contractor is a partnership; or in case the Contractor is a corporation, association, or similar legal entity, one or more senior officers thereof; *Provided, however,* That the Contractor, whether an individual, a partnership, a corporation, or other legal entity, may be represented in the direction of the work by some person of a class other than those specified above, if the Contracting Officer gives his approval. In any event, the Contractor shall not be entitled to be reimbursed for any salary, wages or like compensation paid for such direction of the work, whether performed by an individual, a partner, a corporate officer or other representative.

§ 7.605–8 Discounts.

DISCOUNTS (JANUARY 1965)

The Contractor shall, to the extent of his ability, take all cash and trade discounts, rebates, allowances, credits, salvage, commissions, and bonifications, and when unable to take advantage of such benefits he shall promptly notify the Contracting Officer of the reason therefor. In determining the actual net cost of articles and materials of every kind required for the purpose of this contract, there shall be deducted from the gross cost thereof all cash and trade discounts, rebates, allowances, credits, commissions, and bonifications which have accrued to the benefit of the Contractor or would have so accrued but for the fault or neglect of the Contractor. Such benefits lost through no fault or neglect on the part of the Contractor, or lost through fault of the Government, shall not be deducted from gross costs.

§ 7.605–9 Direct payments.

DIRECT PAYMENTS (JANUARY 1965)

(a) *To suppliers, laborers, and mechanics.* If bills for purchase of material, machinery or equipment, or payrolls covering employment of laborers or mechanics incurred by the Contractor or by any subcontractor hereunder are not paid promptly by the Contractor or subcontractor, as the case may be, the Contracting Officer may, in his discretion, withhold from payments otherwise due the Contractor an amount equivalent to the amount of any such bill or payroll. Should the Contractor neglect or refuse to pay such bills or payrolls or to direct any subcontractor to pay such bills or payrolls within five (5) days after notice from the Contracting Officer so to do, the Government shall have the right to pay such bills or payrolls directly, and in such event a deduction equal to five percent (5%) of the amount so paid directly shall be made from the Contractor's fee.

(b) *To common carriers.* The Government reserves the right to pay directly to common carriers any or all freight charges on construction plant, materials and supplies.

§ 7.605–10 Approved construction plant.

APPROVED CONSTRUCTION PLANT (JANUARY 1965)

Upon approval of the Contracting Officer, construction plant furnished by the Contractor will be shown in the attached Appendix "B" or modification thereto.

§ 7.605–11 Audit and records.

In accordance with the requirements of § 7.104–41, insert the clause set forth in (c) thereof.

§ 7.605–12 Price reduction for defective cost or pricing data.

Insert the clause set forth in § 7.104–29(a).

§ 7.605–13 Subcontractor cost and pricing data.

Insert the clause set forth in § 7.104–42(a).

§ 7.605–14 Government property.

Insert the clause set forth in § 13.703 of this chapter.

§ 7.605–15 Examination of records.

Insert the clause set forth in § 7.203–7.

§ 7.605–16 Contracting Officer's decisions.

CONTRACTING OFFICER'S DECISIONS (JANUARY 1965)

The extent and character of the work to be done by the Contractor shall be subject to the general supervision, direction, control, and approval of the Contracting Officer.

§ 7.605–17 Disputes.

Insert the clause set forth in § 7.602–6.

§ 7.605–18 Labor.

In accordance with the requirements of § 12.403 of this chapter, insert the appropriate clauses set forth therein.

§ 7.605–19 Equal opportunity.

Insert the clause set forth in § 12.802 of this chapter.

§ 7.605–20 Notice to the Government of labor disputes.

Insert the clause set forth in § 7.104–4.

§ 7.605–21 Special requirements.

SPECIAL REQUIREMENTS (JANUARY 1965)

The Contractor hereby agrees that he will:

(a) Be responsible for obtaining any necessary licenses and permits, and complying with any applicable Federal, State and municipal laws, codes, and regulations in connection with the prosecution of the work.

(b) Reduce to writing, unless this provision is waived in writing by the Contracting Officer, every contract in excess of Two Thousand Dollars ($2,000) made by him for the purpose of the work hereunder for services, materials, supplies, machinery, equipment, or for the use thereof, insert therein a provision that such contract is assignable to the Government, make all such contracts in his own name, and not bind or purport to bind the Government or the Contracting Officer thereunder.

(c) Furnish sufficient technical, supervisory and administrative personnel to insure the prosecution of the work in accordance with the progress schedule approved by the Contracting Officer.

(d) Cause all work under this contract to 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.

§ 7.605–22 Composition of contractor.

Insert the clause set forth in § 7.602–32.

§ 7.605–23 Subcontracts.

In accordance with the requirements of § 3.903–2 of this chapter insert the clause set forth in § 7.203–8(a) subject to the instructions in § 7.203–8 (b) and (c) except that in (c) the variations specified therein may be established by the head of a procuring activity

§ 7.605–24 Accident prevention.

Insert the clause set forth in § 7.602–42.

§ 7.605–25 Contractor's organization and methods.

CONTRACTOR'S ORGANIZATION AND METHODS (JANUARY 1965)

Upon the execution of this contract, the Contractor shall submit to the Contracting Officer a chart showing in general the executive and administrative organization, duties, and personnel to be employed in connection with the work under the contract; and the data so furnished shall be supplemented as additional information becomes available.

§ 7.605–26 Termination.

Insert the clause set forth in § 8.702(a) of this chapter as modified by § 8.702(b).

§ 7.605–27 Convict labor.

Insert the clause set forth in § 12.203 of this chapter.

§ 7.605–28 Officials not to benefit.

Insert the clause set forth in § 7.602–19.

§ 7.605–29 Covenant against contingent fees.

Insert the clause set forth in § 7.103–20.

§ 7.605–30 Gratuities.

Insert the clause set forth in § 7.104–16.

§ 7.605–31 Assignment of claims.

If the contract is negotiated in contemplation that the contractor may make an assignment, insert the clause set forth in § 7.602–8.

§ 7.605–32 Renegotiation.

Insert the appropriate clause set forth in § 7.103–13.

§ 7.605–33 Authorization and consent.

In accordance with the requirements of § 9.102–1 of this chapter, include the clause set forth therein.

§ 7.605–34 Notice and assistance regarding patent and copyright infringement.

In accordance with the requirements of § 9.104 of this chapter, insert the clause set forth therein.

§ 7.605–35 Patent indemnity.

Insert the clause set forth in § 7.602–16.

§ 7.605–36 Utilization of small business concerns.

In accordance with § 1.707–3(a) of this chapter, insert the claus e set forth therein.

§ 7.605–37 Competition in subcontracting.

Insert the clause set forth in § 7.104–40.

§ 7.605–38 Definitions.

Insert the clause set forth in § 7.602–1.

§ 7.605–39 Excusable delays.

In accordance with § 18.624 of this chapter, insert the clause set forth in § 8.708 of this chapter.

28. New §§ 7.606, 7.606–1 consecutively through 7.606–13 are added; and new §§ 7.607, 7.607–1 consecutively through 7.607–26 are added, to read as follows:

§ 7.606 Clauses to be used where applicable for cost-reimbursement type construction contracts.

§ 7.606–1 Incentive fee clause for cost-type construction contracts.

(a) In accordance with § 3.405–4 of this chapter, the clause set forth below shall be inserted in cost-type construction contracts which provide for an adjustment in the Contractor's fee to reflect the efficiency and economy exercised by the Contractor in the performance of the contract.

(b) Incentive fee cost reimbursement construction contracts will be prepared by using the cost-plus-a-fixed-fee construction contract format set forth in § 16.402–3 of this chapter, including the clauses in §§ 7.605 through 7.606–13, modified in the following particulars:

(1) Change the title of the format to read "Cost-Plus-an-Incentive-Fee Construction Contract";

(2) Delete the clause entitled "Allowable Cost, Fixed Fee and Payment";

(3) Insert the clause set forth in § 7.203–4(b) entitled "Allowable Cost, Incentive Fee and Payment" with the following changes:

(i) Delete paragraph (a)(1) and substitute: "For the performance of this contract the Government shall pay to the Contractor—

(*a*) the cost thereof (hereinafter referred to as "Allowable Cost") determined by the Contracting Officer*

(*1*) Section XV, Part 4, of the Armed Services Procurement Regulation as in effect on the date of this contract; and

(*2*) The terms of this contract; and

(*b*) A fee in the amount of _____ dollars ($_____) adjusted as provided in (i) below."

(ii) Delete paragraph (a)(2) and substitute: "The target cost and target fee of this contract _____ dollars ($_____) and _____ dollars ($_____) respectively shall be subject to adjustment in accordance with (h) and (i) below.

As used herein the term—

(*a*) "target cost" means the estimated cost, exclusive of the estimated amount of rental for Contractor-owned or controlled equipment, of this contract initially negotiated adjusted in accordance with (h) below; and

(*b*) "target fee" means the fee which was initially negotiated on the assumption that this contract would be performed for a cost equal to the estimated cost of this contract initially negotiated, adjusted in accordance with (h) below".

(iii) Delete paragraph (c) and substitute the following: "Promptly after receipt of each invoice or voucher and statement of cost the Government shall, except as otherwise provided in this contract, subject to the provisions of (d) below, make payment thereon as approved by the Contracting Officer.* Payment of the fee shall be made to the Contractor in installments based upon the percentage of completion of the work as determined from estimates submitted to and approved by the Contracting officer*: *Provided, however,* That after payment of ninety-five percent (95%) of the minimum fee provided for in (i) below, further payment on account of the fee shall be withheld until a reserve of either fifteen percent (15%) of the target fee, or one hundred thousand dollars ($100,000), whichever is less shall have been set aside".

(iv) Delete subparagraph (i) and substitute: "The fee payable hereunder shall be the target fee increased by (insert Contractor's participation), cents for each dollar by which the total allowable cost, exclusive of the total rental paid for Contractor-owned or controlled equipment, is less than the target cost; or decreased by (insert Contractor's participation), cents for each dollar by which the total allowable cost, exclusive of the total rental for Contractor-owned or controlled equipment, exceeds the target cost. In no event shall the fee be greater than _____ percent or less than _____ percent of the target cost; and within these limits such fees shall be subject to adjustment by reason of the increase or decrease of the total allowable cost on account of payments under the assignment required by (f)(i) above and claims excepted from the release required by (f)(ii) above."

*For contracts of the Department of the Navy, see § 7.203–4(c)(1).

§ 7.606–2 Approval of wage rates.

Insert the following clause in contracts to be performed in the United States:

APPROVAL OF WAGE RATES (JANUARY 1965)

All wage rates in excess of the applicable Davis-Bacon Wage rates for this contract, including compensation for overtime pursuant to paragraph 2 of Standard Form 19–A, for laborers and mechanics engaged in work under this contract shall be approved in writing by the Head of a Procuring Activity or a representative expressly designated by him for that purpose. Any amount paid by the Contractor to any laborer or mechanic in excess of the wage rate approved for such laborer or mechanic by the Head of a Procuring Activity or a representative expressly designated by him for that purpose shall be at the expense of the Contractor and shall not be reimbursed by the Government.

§ 7.606–3 Buy American.

In accordance with § 6.204 of this chapter, insert the clause set forth in § 6.204–5 of this chapter.

§ 7.606–4 Nondomestic construction materials.

In accordance with § 6.204–4 of this chapter, insert the clause set forth therein.

§ 7.606–5 Priorities, allocations, and allotments.

Insert the clause set forth in § 7.104–18.

§ 7.606–6 Interest.

In accordance with §§ 163.118 and 163.119 of this chapter, insert the clause set forth in § 163.118.

§ 7.606–7 Military security requirements.

In accordance with § 7.104–12, insert the clause set forth therein in contracts involving classified material, except those to be performed outside the United States, its possessions and Puerto Rico.

§ 7.606–8 Workmen's compensation insurance (Defense Base Act).

In accordance with § 10.403 of this chapter, insert the contract clause set forth therein in contracts to be performed outside the United States.

§ 7.606–9 Use of foreign currency. [Reserved]

§ 7.606–10 Alterations.

Insert the clause set forth in § 7.604–1.

§ 7.606–11 Payment for overtime premiums.

In accordance with the requirements of § 12.102–3(a) of this chapter, insert the clause set forth therein.

§ 7.606–12 Small business subcontracting program.

In accordance with § 1.707–3(c) of this chapter, insert the clause set forth therein.

§ 7.606–13 Approval of contract.

Insert the clause set forth in § 7.105–2 where approval of the contract is required.

§ 7.607 Required clauses for lump sum architect-engineer contracts.

The following clauses shall be inserted in all lump-sum architect-engineer contracts:

§ 7.607–1 Method of payment.

METHOD OF PAYMENT (JANUARY 1965)

(a) Estimates shall be made monthly of the amount and value of the work and services performed by the Architect-Engineer under this contract, such estimates to be prepared by the Architect-Engineer and accompanied by such supporting data as may be required by the Contracting Officer.

(b) Upon approval of such estimate by the Contracting Officer payment upon properly certified vouchers shall be made to the Architect-Engineer as soon as practicable of 90 percent of the amount as determined above, less all previous payments: *Provided, however,* That if the Contracting Officer determines that the work is substantially complete and that the amount of retained percentages is in excess of the amount considered by him to be adequate for the protection of the Government, he may at his discretion release to the Architect-Engineer such excess amount.

(c) Upon satisfactory completion by the Architect-Engineer and acceptance by the Contracting Officer of the work done by the Architect-Engineer in accordance with the foregoing "Statement of Architect-Engineer Services", the Architect-Engineer will be paid the unpaid balance of any money due for work under said statement, including retained percentages relating to this portion of the work. In the event that the Government exercises the option under Title II of this Contract, progress payments as provided for in (a) and (b) above will be made for this portion of the contract work.

(d) Upon satisfactory completion of the construction work and its final acceptance, the Architect-Engineer shall be paid the unpaid balance of any money due hereunder. Prior to such final payment under the contract, or prior settlement upon termination of the contract, and as a condition precedent thereto, the Architect-Engineer shall execute and deliver to the Contracting Officer a release of all claims against the Government arising under or by virtue of this contract, other than such claims, if any, as may be specifically excepted by the Architect-Engineer from the operation of the release in stated amounts to be set forth therein.

§ 7.607–2 Drawings and other data to become property of Government.

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

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

§ 7.607–3 Contracting officer's decisions.

CONTRACTING OFFICER'S DECISIONS (JANUARY 1965)

The extent and character of the work to be done by the Architect-Engineer shall be subject to the general supervision, direction, control and approval of the Contracting Officer.

§ 7.607–4 Disputes.

Insert the clause set forth in § 7.602–6, substituting "Architect-Engineer" for "Contractor" wherever the latter term is used.

§ 7.607–5 Changes.

CHANGES (JANUARY 1965)

The Contracting Officer may at any time, by written order, and without notice to the sureties, make changes within the general scope of the contract in the work and service to be performed. If any such changes cause an increase or decrease in the Architect-Engineer's cost of, or the time required for, performance of this contract, an equitable adjustment shall be made and the contract shall be modified in writing accordingly. Any claim by the Architect-Engineer for adjustment under this clause must be asserted in writing within 30 days from the date of receipt by the Architect-Engineer 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 the "Disputes" clause of this contract; but nothing provided in this clause shall excuse the Architect-Engineer 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.

§ 7.607–6 Subcontractors and outside associates and consultants.

SUBCONTRACTORS AND OUTSIDE ASSOCIATES AND CONSULTANTS (JANUARY 1965)

Any subcontractors and outside associates or consultants required by the Architect-Engineer in connection with the services covered by the contract will be limited to such individuals or firms as were specifically identified and agreed to during negotiations. Any substitution in such subcontractors, associates, or consultants will be subject to the prior approval of the Contracting Officer.

§ 7.607–7 Termination for convenience of the Government.

Insert the clause set forth in § 8.701(a) of this chapter as modified by §§ 8.701(d) or 8.705–2 as appropriate.

§ 7.607–8 Covenant against contingent fees.

Insert the clause set forth in § 7.103–20 substituting "Architect-Engineer" for "Contractor".

§ 7.607–9 Officials not to benefit.

Insert the clause set forth in § 7.602–19.

§ 7.607–10 Assignment of claims.

Insert the clause set forth in § 7.602–8 substituting "Architect-Engineer" for "Contractor".

§ 7.607–11 Accident prevention.

Insert the clause set forth in § 7.602–42, except in contracts for Title I services only, where no field work is involved, substituting "Architect-Engineer" for "Contractor".

§ 7.607–12 Equal opportunity.

Insert the clause set forth in § 12.802 of this chapter, in contracts exceeding $10,000.

§ 7.607–13 Convict labor.

Insert the clause set forth in § 12.203 of this chapter, substituting "Architect-Engineer" for "Contractor".

§ 7.607–14 Contract Work Hours Standards Act—Overtime compensation.

Insert the clause set forth in § 12.403–1 of this chapter in contracts exceeding $2,500.

§ 7.607–15 Renegotiation.

Insert the appropriate clause set forth in § 7.103–13, substituting "Architect-Engineer" for "Contractor".

§ 7.607–16 Definitions.

Insert the clause set forth in § 7.602–1.

§ 7.607–17 Gratuities.

Insert the clause set forth in § 7.104–16, substituting "Architect-Engineer" for "Contractor".

§ 7.607–18 Examination of records.

Insert the clause set forth in § 7.104–15, substituting "Architect-Engineer" for "Contractor".

§ 7.607–19 Interest.

In accordance with §§ 163.118 and 163.119 of this chapter, insert the clause set forth in § 163.118.

§ 7.607–20 Military security requirements.

Insert the clause set forth in § 7.104–12.

§ 7.607–21 Composition of contractor.

Insert the clause set forth in § 7.602–32.

§ 7.607–22 Audit and records.

In accordance with § 7.104–41 insert the appropriate clause set forth therein.

§ 7.607–23 Price reduction for defective cost or pricing data.

Insert the clause set forth in § 7.104–29 (a).

§ 7.607–24 Subcontractor cost and pricing data.

Insert the clause set forth in § 7.104–42 (a).

§ 7.607–25 Alterations.

Insert the clause set forth in § 7.604–1.

§ 7.607–26 Termination for default.

Insert the clause set forth in § 8.711 of this chapter.

29. Sections 7.702–46, 7.703–38, 7.704–30, 7.705–5, 7.901–5, 7.901–11, and 7.901–13 are revised to read as follows:

§ 7.702–46 Contract Work Hours Standards Act—Overtime Compensation.

Insert the contract clause set forth in § 12.403–1(2) of this chapter.

§ 7.703–38 Contract Work Hours Standards Act—Overtime Compensation.

Insert the contract clause set forth in § 12.403–1(2) of this chapter.

§ 7.704–30 Contract Work Hours Standards Act—Overtime Compensation.

Insert the contract clause set forth in § 12.403–1(2) of this chapter.

§ 7.705–5 Labor Standards for construction work.

Except as provided in §§ 12.403–3 and 12.403–4 of this chapter, every construction contract, as this term is defined in § 12.402, shall include the following.

LABOR STANDARDS FOR CONSTRUCTION WORK (SEPTEMBER 1964)

(a) In the event that construction, alteration, or repair (including painting and decorating) of public buildings or public works is to be performed hereunder, the Contractor shall, prior to commencing the work, request the determination of the Contracting Officer as to the applicability of the Davis-Bacon and Copeland Acts and shall not perform any of said items hereunder without receipt of such determination.

(b) The Contractor shall, in the performance of items of work so determined to be subject to the Davis-Bacon Act, comply with the following clauses set forth in 12–403.1 of the Armed Services Procurement Regulation in effect as of the date of this contract:

(i) "Davis-Bacon Act (40 U.S.C. 276a–7)",
(ii) "Apprentices",
(iii) "Payrolls and Payroll Records",
(iv) "Compliance with Copeland Regulations",
(v) "Withholding of Funds",
(vi) "Subcontracts", and
(vii) "Contract Termination—Debarment".

(c) Upon determination that the Davis-Bacon Act is applicable to any item of work to be performed hereunder, the Contractor shall submit a request for a predetermination of the prevailing wage rates to be made applicable to such work. Upon receipt of such request, the Contracting Officer shall, as soon as possible, obtain a predetermination of the applicable prevailing wage rates and publish such rates and incidental instructions in numbered exhibits to this contract. Upon publication thereof, such exhibits shall be considered the wage determination decision of the Secretary of Labor referred to in paragraph (a) of the "Davis-Bacon Act" clause. Each such exhibit shall indicate to what work the rates set forth therein shall apply, including the period of time within which subcontracts subject to such rates may be issued.

§ 7.901–5 Government property.

Insert the clause set forth in § 13.703 of this chapter except that:

(a) The phrase "estimated cost, fixed-fee or delivery or performance dates, or all of them," appearing in lines 14 and 15 of paragraph (a) shall be deleted and the phrase "ceiling price, hourly rate, the delivery or performance date, or all of them," substituted therefor;

(b) Paragraph (i) shall be deleted, and paragraph (i) of the clause set forth in § 13.702(a) of this chapter substituted therefor; and

(c) Add to the end of paragraph (g)(3), the following: "For any such repairs or renovations so directed, the Contracting Officer shall, upon written request of the Contractor, equitably adjust the ceiling price, hourly rate, delivery or performance date, or all of them in accordance with the procedures provided for in the clause of this contract entitled "Changes". In any such equitable adjustment due regard shall be given to the liability of the Contractor as determined under (1) above."

§ 7.901–11 Contract Work Hours Standards Act—Overtime compensation.

Insert the clause set forth in § 12.303–1 of this chapter.

§ 7.901–13 Equal opportunity.

Insert the clause set forth in § 12.802 of this chapter.

PART 8—TERMINATION OF CONTRACTS

30. Sections 8.101–15, 8.208–4(a)(1)(ii), 8.407, 8.503–2(a), 8.503–4, 8.505–1(c), and 8.505–3 are revised to read as follows:

§ 8.101–15 Industrial plant equipment.

"Industrial plant equipment" means that part of plant equipment which is listed in § 13.312 of this chapter and is reportable to the Defense Supply Agency for screening in accordance with § 8.505.

§ 8.208–4 Authorization for subcontract settlements without approval or ratification.

(a)(1) * * *

(ii) Any termination inventory included in determining the amount of the settlement will be disposed of in accordance with § 8.513, except that the disposition of such inventory shall not (*a*) be subject to review by the contracting officer under § 8.513–1 or § 8.513–3, or (*b*) be subject to § 8.513–4; provided, however, no industrial plant equipment included in such inventory shall be disposed of prior to screening pursuant to § 8.505; and

* * * * *

§ 8.407 Termination for default.

The right to terminate a cost-reimbursement type contract for default is provided for in the Termination clause set forth in § 8.702. In the event of termination, the contractor shall be reimbursed his allowable costs in accordance with the clause, and an appropriate reduction shall be made in the total fee, if any, computed in accordance with the default provisions of the contract (see paragraph (e)(i)(D)(II) of the clause in § 8.702). The costs of preparing the contractor's settlement proposal are not allowable. A cost-reimbursement type contract does not contain any provision for recovery of excess costs of reprocurement after termination for default, but see paragraph (b) of the clause set forth in § 7.203–5 of this chapter with respect to failure of the contractor to replace or correct defective supplies. The procedures set forth in § 8.602 and § 18.618 of this chapter shall be used to the extent appropriate in considering the termination for default of a cost-reimbursement type contract. A ten-day notice to the contractor prior to termination for default is required in every case by the Termination clause in § 8.702.

§ 8.503–2 Separate schedules.

* * * * *

(a) Industrial plant equipment (see § 13.312 of this chapter).

* * * * *

§ 8.503–4 Inventory schedule certificate.

The certificate on the inventory schedules listed in §§ 8.802–4 through 8.802–8 and set forth in F–200.542, F–200.542c, F–200.543, F–200.543c, F–200.544, F–200.544c, F–200.545, F–200.545c, and F–200.832[1] shall be executed by the contractor on each schedule submitted. The certificate, among other things, tenders title to the Government of the property listed therein, unless the Government already has title thereto. In the case of industrial plant equipment, a DD Form 1342s, DoD Property Record Supplementary Data (see § 30.2, item 304.3, § 30.3, item 207.5, of this chapter, and F–200.1342s) shall be submitted for each unit of equipment in the inventory when the condition is N (new or unused); E (used, reconditioned); O (used, usable without repairs); and R (used, repairs required).

§ 8.505–1 General.

* * * * *

(c) Industrial plant equipment shall be screened in accordance with § 8.505–3. Except for industrial plant equipment, termination inventory to which § 8.208–4 applies is not subject to this paragraph § 8.505.

* * * * *

§ 8.505–3 Procedures for industrial plant equipment.

(a) First through 30th day: Upon receipt of acceptable DD Form 1342s, DoD Property Record Supplementary Data, for industrial plant equipment from the contractor, the contracting officer will designate the 90th day from the date of receipt as the automatic release date (ARD). The ARD will be entered in block 60 of the DD Form 1342s and shall not be extended, except as provided in paragraph (d) of this section. The contracting officer will forward two (2) copies of the DD Form 1342s to the Defense Industrial Plant Equipment Center, Memphis, Tenn., 38102, within 48 hours after establishing the ARD. The Defense Industrial Plant Equipment Center will screen inventory reports against all requirements submitted by DoD activities and against DoD reserve requirements, with priority being given to requirements of the reporting Department through the 30th day. The Defense Logistics Services Center will provide for circulation of industrial plant equipment excess lists to activities designated by the Military Departments and to foreign countries and international organizations eligible for military assistance. DoD activities requesting industrial plant equipment from excess lists will prepare DD Form 1419, Requisition and Certificate of Non-Availability (see F–200.1419), giving special attention to cost reduction data required in block 22 of the form. DD Form 1419 will be transmitted to the Defense Industrial

[1] Appendix F has been filed with the Office of the Federal Register; copies of forms may be obtained through the contracting officer in any of the military departments.

Plant Equipment Center for determination of item availability. Foreign governments will use normal requisitioning procedures to the Defense Logistics Services Center. The Defense Industrial Plant Equipment Center will issue appropriate instructions and property movement orders to the contracting officer.

(b) 31st through 75th day: On the 31st day, the Defense Logistics Services Center will forward, as appropriate, the excess data to the applicable General Services Administration Regional Office for Federal utilization screening through the 75th day. Requests received by the Defense Industrial Plant Equipment Center after the 31st day will be forwarded to the Defense Logistics Services Center which will advise the General Services Administration and request withdrawal. During the period from the 31st through the 75th day, the General Services Administration will honor requests from any agency of the Government on a "first come-first served" basis and will forward the approved transfer documents to the Defense Industrial Plant Equipment Center. The Defense Industrial Plant Equipment Center will issue appropriate instructions and property movement orders to the contracting officer.

(c) 76th through 90th day: During this period the General Services Administration will provide for the screening of all remaining industrial plant equipment by the Department of Health, Education, and Welfare for possible donation. The General Services Administration will receive Department of Health, Education, and Welfare requests for industrial plant equipment and will forward approved transfer documents to the Defense Industrial Plant Equipment Center, which will issue appropriate instructions and property movement orders to the contracting officer.

(d) If a Department of Defense requirement develops after the 90th day for an item which has not been withdrawn, the ARD may be extended as justified through the contracting officer and with the approval of the contractor.

(e) Items of Industrial Plant Equipment with an acquisition value of less than $1,000 shall not be reported to the Defense Supply Agency but shall be reported and screened in accordance with § 8.505–2.

31. Sections 8.602–3 (b) and (e) and 8.602–4(a) are revised, and §§ 8.603, 8.603–1, 8.603–2, 8.603–3, 8.603–4, 8.603–5 and 8.603–6 are revoked, as follows:

§ 8.602–3 Procedure for default.

* * * * *

(b) (1) If the foregoing consideration indicates that termination for default is appropriate, the contracting officer should, if practicable, notify the contractor by letter of the possibility of such termination. This letter shall call the contractor's attention to his contractual liabilities in the event the contract is terminated for default and request an explanation of the contractor's failure to perform the contract. The letter may further state that failure of the contractor to present such explanation may be taken as an admission that no valid explanation exists. When appropriate, the letter may invite the contractor to discuss the matter at a conference.

(2) Whenever a termination for default appears imminent, a written notification of that fact (not an actual notice of default) may be given by the contracting officer to the surety at both its home and local offices.

(3) If it is requested by the surety, and agreed to by the contractor and his assignees, if any, arrangement may be made to have future checks mailed to the contractor in care of the surety. In such a case, the contractor must forward a written request to the designated disbursing officer specifically directing a change in address for mailing of checks.

* * * * *

(e) The same distribution shall be made of the termination notice as was made of the contract. A copy thereof shall also be furnished to the contractor's surety at the same time that the notice is furnished to the contractor. The surety at the same time should be requested to advise if he desires to enter into any arrangement for completion of the work. In addition, the disbursing officer involved shall be notified to withhold further payments under the terminated contract pending further advice which should be furnished at the earliest practicable time.

* * * * *

§ 8.602–4 Procedure in lieu of termination for default.

* * * * *

(a) Permit the contractor, his surety, or his guarantor, to continue performance of the contract under a revised delivery schedule (see § 10.112(b) of this chapter for requirement of notification of surety);

* * * * *

§ 8.603 Termination of fixed-price construction contracts for default. [Revoked]

§ 8.603–1 Termination of contractor's right to proceed. [Revoked]

§ 8.603–2 Effect of termination for default. [Revoked]

§ 8.603–3 Procedure for default. [Revoked]

§ 8.603–4 Procedure in lieu of termination for default. [Revoked]

§ 8.603–5 Memorandum by the contracting officer. [Revoked]

§ 8.603–6 Other damages. [Revoked]

32. In § 8.701, the introductory text of paragraph (a) is revised, and new paragraphs (c) and (d) are added; in § 8.702, the existing text is designated as paragraph (a) and new paragraphs (b) and (c) are added; and § 8.703 is revoked, as follows:

§ 8.701 Termination clause for fixed-price contracts.

(a) Except as otherwise permitted by § 8.705 and paragraph (b) of this section, the following clause shall be used in any fixed-price contract in excess of $2,500 for supplies or experimental, developmental, or research work other than experimental, development, or research work with educational or nonprofit institutions, where no profit is contemplated. The following clause shall be used in all fixed price construction contracts in excess of $10,000 except that paragraph (e) and (f) thereof shall be deleted and the paragraphs in paragraph (c) of this section shall be used.

* * * * *

(c) The following clause paragraphs shall be used in place of clause paragraphs (e) and (f) of the clause in paragraph (a) of this section when the contract is for construction in excess of $10,000.

(e) In the event of the failure of the Contractor and the Contracting Officer to agree as provided in paragraph (d) upon the whole amount to be paid to the Contractor by reason of the termination of work pursuant to this clause, the Contracting Officer shall, subject to any Settlement Review Board Approvals required by Section VIII of the Armed Services Procurement Regulation in effect as of the date of execution of this contract, determine, on the basis of information available to him, the amount, if any, due to the Contractor by reason of the termination and shall pay to the Contractor the amounts determined as follows:

(1) with respect to all contract work performed prior to the effective date of the Notice of Termination, and total (without duplication of any items) of—

(A) the cost of such work;

(B) the cost of settling and paying claims arising out of the termination of work under subcontract or orders as provided in paragraph (b)(v) above, exclusive of the amounts paid or payable on account of supplies or materials delivered or services furnished by the subcontractor prior to the effective date of the Notice of Termination of Work under this contract, which amounts shall be included in the cost on account of which payment is made under (A) above; and

(C) a sum, as a profit, equal to 2 percent of the part of the amount determined under (A) above which represents the cost of articles or materials delivered to the site but not incorporated in the work in place on the effective date of the Notice of Termination, plus a sum equal to 8 percent of the remainder of such amount, but the aggregate of such sums shall not exceed 6 percent of the whole of the amount determined under (A) above: *Provided, however,* That if it appears that the contractor would have sustained a loss on the entire contract had it been completed, no profit shall be included or allowed under this subdivision (C) and an appropriate adjustment shall be made reducing the amount of the settlement to reflect the indicated rate of loss; and

(ii) the reasonable cost of the preservation and protection of property incurred pursuant to paragraph (b)(ix); and any other reasonable cost incidental to determination of work under this contract, including expense incidental to the determination of the amount due to the Contractor as the result of the termination of work under this contract.

The total sum to be paid to the contractor under (1) above shall not exceed the total contract price as reduced by the amount of payments otherwise made and as further reduced by the contract price of work not terminated. Except for normal spoilage, and except to the extent that the Government shall have otherwise expressly assumed the risk of loss, there shall be excluded from the amounts payable to the contractor under (1) above, the fair value, as determined by the contracting officer, of property which is destroyed, lost, stolen, or damaged so as to become undeliverable to the Government, or to a buyer pursuant to paragraph (b)(vii).

(f) Any determination of costs under paragraph (c) or (e) hereof shall be governed by the principles for consideration of costs set forth in Section XV, Part 4, of the Armed Services Procurement Regulation, as in effect on the date of this contract.

(d) In any contract for Architect-Engineer services in excess of $10,000, the clause in paragraph (a) of this section as modified by paragraph (c) of this section shall be used, the term "Architect-Engineer" shall be substituted for the term "Contractor", and the following paragraph (e) shall be used in place of paragraph (e) therein:

(e) In the event of the failure of the Architect-Engineer and the Contracting Officer to agree as provided in paragraph (d) upon the whole amount to be paid to the Architect-Engineer by reason of the termination of work pursuant to this clause, the Contracting Officer shall, subject to any Settlement Review Board approvals required by Section VIII of the Armed Services Procurement Regulation in effect as of the date of execution of this contract, determine, on the basis of information available to him, the amount, if any, due to the Architect-Engineer by reason of the termination and shall pay to the Architect-Engineer the amounts determined as follows:

(i) For completed work and services accepted by the Government, the price or prices specified in the contract for such work, less any payments previously made;

(ii) The total of—

(A) the costs incurred in the performance of the work and services terminated, including initial costs and preparatory expenses allocable thereto, but exclusive of any costs attributable to the work and services paid or to be paid for under paragraph (e)(i) hereof;

(B) the cost of settling and paying claims arising out of the termination of work or services under subcontracts or orders as provided in paragraph (b)(v) above, which are properly chargeable to the terminated portion of the contract (exclusive of amounts paid or payable on account of work or services delivered or furnished by subcontractors prior to the effective date of termination, which amounts shall be included in the costs payable under (A) above); and

(C) a sum, as a profit, equal to 6 percent of the whole of the amount determined under (A) above; provided, however, that if it appears that the Architect-Engineer would have sustained a loss on the entire contract had it been completed, no profit shall be included or allowed under this subdivision (C) and an appropriate adjustment shall be made reducing the amount of the settlement to reflect the indicated rate of loss; and

(iii) The reasonable cost of the preservation and protection of property incurred pursuant to paragraph (b)(ix); and any other reasonable cost incidental to the termination of work under this contract, including expense incidental to the determination of the amount due to the Architect-Engineer as a result of the termination of work under this contract.

The total sum to be paid to the Architect-Engineer under (i) and (ii) above shall not exceed the total contract price as reduced by the amount of payments otherwise made and as further reduced by the contract price of work not terminated. Except for normal spoilage, and except to the extent that the Government shall have otherwise expressly assumed the risk of loss, there shall be excluded from the amounts payable to the Architect-Engineer under (ii) above, the fair value, as determined by the contracting officer, of property which is destroyed, lost, stolen, or damaged so as to become undeliverable to the Government, or a buyer pursuant to paragraph (b)(vii).

§ 8.702 Termination clause for cost-reimbursement type contracts.

(a) * * *

(b) In all cost-reimbursement type construction contracts paragraph (e)(i)(D)(II) of the clause in paragraph (a) of this section should be deleted and the following substituted:

(II) In the event of the termination of this contract for the default of the Contractor, the total fee payable shall be such proportionate part of the fee as the actual work in place bears to the total work in place required by the contract. (January 1965)

(c) In any contract for Architect-Engineer services where the clause in paragraph (a) of this section is used, the term "Architect-Engineer" shall be substituted for the term "contractor" wherever that term appears in the clause and paragraph (e)(i)(D)(II) shall be deleted and the following clause substituted therefor:

(II) In the event of the termination of this contract for the default of the Architect-Engineer, the total fee payable shall be such proportionate part of the fee as the weighted value of the actual working drawings completed bears to the weighted value of the working drawings required or contemplated by the contract. (January 1965)

§ 8.703 Termination clause for fixed-price construction contracts. [Revoked]

33. Section 8.705–2 is revised; new § 8.705–3 is added; §§ 8.707, 8.708 and 8.709 are revised; new § 8.711 is added; § 8.801–1 is revised; and in § 8.801–2, the introductory text is revised and new paragraphs (b) and (c) are added, as follows:

§ 8.705–2 Construction contracts.

Generally, there is no need for a termination clause in construction contracts not in excess of $10,000. However, where the contracting officer determines that a termination clause should be included in such a contract, the following clause shall be used:

TERMINATION FOR CONVENIENCE OF THE GOVERNMENT (JANUARY 1965)

The Contracting Officer, by written notice, may terminate this contract, in whole or in part, when it is in the interest of the Government. If this contract is so terminated, the rights, duties and obligations of the parties hereto shall be in accordance with the applicable Sections of the Armed Services Procurement Regulation in effect on the date of this contract.

§ 8.705–3 Architect-engineer contracts.

The clause in § 8.705–2 shall be used in Architect-Engineer contracts not in excess of $10,000.

§ 8.707 Default clause for fixed-price supply contracts.

Insert the following clause:

DEFAULT (JUNE 1964)

(a) The Government may, subject to the provisions of paragraph (c) below, by written notice of default to the Contractor, terminate the whole or any part of this contract in any one of the following circumstances:

(i) If the Contractor fails to make delivery of the supplies or to perform the services within the time specified herein or any extension thereof; or

(ii) If the Contractor fails to perform any of the other provisions of this contract, or so fails to make progress as to endanger performance of this contract in accordance with its terms, and in either of these two circumstances does not cure such failure within a period of 10 days (or such longer period as the Contracting Officer may authorize in writing) after receipt of notice from the Contracting Officer specifying such failure.

(b) In the event the Government terminates this contract in whole or in part as provided in paragraph (a) of this clause, the Government may procure, upon such terms and in such manner as the Contracting Officer may deem appropriate, supplies or services similar to those so terminated, and the Contractor shall be liable to the Government for any excess costs for such similar supplies or services: *Provided*, That the Contractor shall continue the performance of this contract to the extent not terminated under the provisions of this clause.

(c) Except with respect to defaults of subcontractors, the Contractor shall not be liable for any excess costs if the failure to perform the contract arises out of causes beyond the control and without the fault or negligence of the Contractor. Such causes may include, but are not restricted to, acts of God or of the public enemy, acts of the Government in either its sovereign or contractual capacity, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes, and unusually severe weather; but in every case the failure to perform must be beyond the control and without the fault or negligence of the Contractor. If the failure to perform is caused by the default of a subcontractor, and if such default arises out of causes beyond the control of both the Contractor and subcontractor, and without the fault or negligence of either of them, the Contractor shall not be liable for any excess costs for failure to perform, unless the supplies or services to be furnished by the subcontractor were obtainable from other sources in sufficient time to permit the Contractor to meet the required delivery schedule.

(d) If this contract is terminated as provided in paragraph (a) of this clause, the Government, in addition to any other rights provided in this clause, may require the Contractor to transfer title and deliver to the Government, in the manner and to the extent directed by the Contracting Officer, (i) any completed supplies, and (ii) such partially completed supplies and materials, parts, tools, dies, jigs, fixtures, plans, drawings, information, and contract rights (hereinafter called "manufacturing materials") as the Contractor has specifically produced or specifically acquired for the performance of such part of this contract as has been terminated; and the Contractor shall, upon direction of the Contracting Officer, protect and preserve property in the possession of the Contractor in which the Government has an interest. Payment for completed supplies delivered to and accepted by the Government shall be at the contract price. Payment for manufacturing materials delivered to and accepted by the Government and for the protection and preservation of property shall be in an amount agreed upon by the Contractor and Contracting Officer; failure to agree to such amount shall be a dispute concerning a question of fact within the meaning of the clause of this contract entitled "Disputes". The Government may withhold from amounts otherwise due the Contractor for such completed supplies or manufacturing materials such sum as the Contracting Officer determines to be necessary to protect the Government against loss because of outstanding liens or claims of former lien holders.

(e) If, after notice of termination of this contract under the provisions of this clause, it is determined for any reason that the Contractor was not in default under the provisions of this clause, or that the default was excusable under the provisions of this clause, the rights and obligations of the parties shall, if the contract contains a clause providing for termination for convenience of the Government, be the same as if the notice of termination had been issued pursuant to such clause. If, after notice of termination of this contract under the provisions of this clause, it is determined for any reason that the Contractor was not in default under the provisions of this clause, and if this contract does not contain a clause providing for termination for convenience of the Government, the contract shall be equitably adjusted to compensate for such termination and the contract modified accordingly; failure to agree to any such adjustment shall be a dispute concerning a question of fact within the meaning of the clause of this contract entitled "Disputes".

(f) The rights and remedies of the Government provided in this clause shall not be exclusive and are in addition to any other rights and remedies provided by law or under this contract.

§ 8.708 Excusable delays clause for cost-reimbursement type contracts.

(a) *General.* The following clause shall be used in all cost-reimbursement type supply contracts as defined in § 7.202 of this chapter, in all cost-reimbursement type construction contracts, and in all cost-reimbursement type research and development contracts that contain the Termination clause in § 8.702. It may be used in contracts that contain the Termination clause in § 8.704.

EXCUSABLE DELAYS (JULY 1958)

Except with respect to defaults of subcontractors, the Contractor shall not be in default by reason of any failure in performance of this contract in accordance with its terms (including any failure by the Contractor to make progress in the prosecution of the work hereunder which endangers such performance) if such failure arises out of causes beyond the control and without the fault or negligence of the Contractor. Such causes may include, but are not restricted to: acts of God or of the public enemy; acts of the Government in either its sovereign or contractual capacity; fires; floods; epidemics; quarantine restrictions; strikes; freight embargoes; and unusually severe weather; but in every case the failure to perform must be beyond the control and without the fault or negligence of the Contractor. If the failure to perform is caused by the failure of a subcontractor to perform or make progress, and if such failure arises out of causes beyond the control of both the Contractor and subcontractor, and without the fault or negligence of either of them, the Contractor shall not be deemed to be in default, unless (i) the supplies or services to be furnished by the subcontractor were obtainable from other sources, (ii) the Contracting Officer shall have ordered the Contractor in writing to procure such supplies or services from such other sources, and (iii) the Contractor shall have failed to comply reasonably with such order. Upon request of the Contractor, the Contracting Officer shall ascertain the facts and extent of such failure and, if he shall determine that any failure to perform was occasioned by any one or more of the said causes, the delivery schedule shall be revised accordingly, subject to the rights of the Government under the clause hereof entitled "Termination".

(b) *Architect-engineer contracts.* The following clause shall be inserted in each cost-reimbursement type architect-engineer contract:

EXCUSABLE DELAYS (JANUARY 1965)

The Architect-Engineer shall not be in default by reason of any failure in performance of this contract in accordance with its terms (including any failure by the Architect-Engineer to make progress in the prosecution of the work hereunder which endangers such performance) if such failure arises out of causes beyond the control and without the fault of negligence of the Architect-Engineer. Such causes may include but are not restricted to: acts of God or of the public enemy; acts of the Government in either its sovereign or contractual capacity; fires; floods; epidemics; quarantine restrictions; strikes; and unusually severe weather; but in every case, the failure to perform must be beyond the control and without the fault or negligence of the Architect-Engineer. Upon request of the Architect-Engineer, the Contracting Officer shall ascertain the facts and extent of such failure and, if he shall determine that any failure to perform was occasioned by any one or more of the said causes, the completion dates shall be revised accordingly subject to the rights of the Government under the clause of this contract entitled "Termination".

§ 8.709 Default clause for fixed-price construction contracts.

(a) The following clause shall be used in each fixed-price construction contract in excess of $10,000:

TERMINATION FOR DEFAULT—DAMAGES FOR DELAY—TIME EXTENSIONS (JUNE 1964)

(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 extenson 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 faults 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 the "Disputes" clause of this contract.

(e) If, after notice of termination of the Contractor's right to proceed under the provisions of this clause, it is determined for any reason that the Contractor was not in default under the provisions of this clause, or that the delay was excusable under the provisions of this clause, the rights and obligations of the parties shall, if the contract contains a clause providing for termination for convenience of the Government, be the same as if the notice of termination had been issued pursuant to such clause. If, in the foregoing circumstances, this contract does not contain a clause providing for termination for convenience of the Government, the contract shall be equitably adjusted to compensate for such termination and the contract modified accordingly; failure to agree to any such adjustment shall be a dispute concerning a question of fact within the meaning of the clause of this contract entitled "Disputes".

(f) The rights and remedies of the Government provided in this clause are in addition to any other rights and remedies provided by law or under this contract.

(b) During a period of national emergency, paragraph (d) of the above clause may be changed by deleting the word "unforeseeable" and inserting the phrase "other than normal weather," after the word "causes" wherever it appears. Where Standard Form 23A is used, the words "Disputes clause of this contract" in the foregoing paragraph need not be substituted for "Clause 6 of these General Provisions".

§ 8.711 Default clause for fixed-price architect-engineer contracts.

The following clause shall be inserted in each fixed-price architect-engineer contract:

TERMINATION FOR DEFAULT (JANUARY 1965)

(a) The performance of work under the contract may be terminated by the Government in accordance with this clause in whole, or from time to time in part, whenever the Architect-Engineer shall default in performance of this contract in accordance with its terms (including in the term "default" any such failure by the Architect-Engineer to make progress in the prosecution of the work hereunder as endangers such performance), and shall fail to cure such default within a period of ten days (or such longer periods as the Contracting Officer may allow) after receipt by the Archnitect-Engineer of a notice specifying the default.

(b) If the contract is so terminated, the Government may take over the work and services and prosecute the same to completion by contract or otherwise, and the Architect-Engineer shall be liable to the Government for any excess cost occasioned to the Government thereby.

(c) The contract may not be so terminated if the failure to perform arises from unforeseeable causes beyond the control and with-

out the fault or negligence of the Architect-Engineer. Such causes may include, but are not restricted to acts of God, acts of the public enemy, acts of the Government in either its sovereign or contractual capacity, fires, floods, epidemics, quarantine restrictions, strikes and unusually severe weather; but in every case the failure to perform must be beyond the control and without the fault or negligence of the Architect-Engineer; and the Architect-Engineer, within ten 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 delay and extend the time for completing the work when, in his judgment, the findings of fact justify such an extension, and his finding of fact shall be final and conclusive on the parties, subject only to appeal as provided in the clause of this contract entitled "Disputes".

(d) If, after Notice of Termination of the contract under the provisions of this clause, it is determined for any reason that the Architect-Engineer was not in default under the provisions of this clause or that the default was excusable under the provisions of this clause, the rights and obligations of the parties shall be the same as if the Notice of Termination had been issued pursuant to the clause of this contract entitled "Termination for the Convenience of the Government".

(e) 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.

§ 8.801–1 Telegraphic notice of termination.

(a) The following form of telegraphic notice is approved for use where a contract for supplies is being completely terminated.

Date _____

XYZ Corporation
New York, N.Y.

Your Contract No. _____ is hereby terminated in its entirety pursuant to clause _____ of the contract effective [*here insert* "Immediately" *or* "On _____ 19__" (*inserting the date*) *or* "as soon as you have delivered thereunder including previous deliveries the following items" (*listing items*)]. Immediately stop all work, terminate subcontracts and place no further orders except to extent (*insert if applicable*—necessary to perform any portion thereof not terminated hereby or) that you or a subcontractor wisht to retain and continue for own account any work in process or other materials. Telegraph similar instructions to all subcontractors and suppliers. Letter and instructions follow.

_____
(*Name and rank*)
(*Contracting Officer*)

(b) The following form of telegraphic notice is approved for use where a contract for supplies is being partially terminated.

Date _____

XYZ Corporation
New York, N.Y.

Your Contract No. _____ is hereby partially terminated pursuant to clause _____ of the contract effective on _____ 19__, on which date you will reduce its total number of items to be delivered as follows (*inserting instructions as to reduced deliveries*) immediately stop all work, interminate subcontracts and place no further orders except to extent necessary to perform any portion thereof not terminated hereby or that you or a subcontractor wish to retain and continue for own account any work in process or other materials. Telegraph similar instructions to all subcontractors and suppliers. Letter and instructions follow.

_____
(*Name and rank*)
(*Contracting Officer*)

(c) The following form of telegraphic notice is approved for use where a contract for construction is being completely terminated for the convenience of the Government:

Date _____

XYZ Corporation
New York, N.Y.

Your Contract No. _____ for construction of _____ is hereby terminated effective immediately for the convenience of the Government pursuant to Clauge _____ of the contract. Immediately stop all work, terminate subcontracts and place no further orders. Telegraph similar instructions to all subcontractors and suppliers. Letter and instructions follow.

_____
(*Name and rank*)
(*Contracting Officer*)

(d) The following form of telegraphic notice is approved for use where a contract for construction is being partially terminated for the convenience of the Government:

Date _____

XYZ Corporation
New York, N.Y.

Your Contract No. _____ for construction of _____ is hereby partially terminated effective immediately for the convenience of the Government pursuant to clause _____ of the contract to the following extent _____. Immediately stop all work, terminate subcontracts and place no further orders except to extent necessary to perform portion thereof not terminated hereby. Telegraph similar instructions to all subcontractors and suppliers. Letter and instructions follow.

_____
(*Name and rank*)
(*Contracting Officer*)

§ 8.801–2 Letter notice of termination.

(a) The following form of notice of termination is approved for use where a prime contract for supplies is being terminated. With appropriate modifications, it is suitable for use in terminating subcontracts:

* * * * *

(b) The following form of notice of termination is approved for use to confirm telegraphic notification where a contract for construction has been totally or partially terminated:

NOTICE OF TERMINATION

Date _____

XYZ Corporation,
New York, N.Y.
Gentlemen:
Re: Contract No. _____ for construction of _____

1. *Effective date of termination.* This letter will confirm the Government's telegram to you dated _____, terminating [in part] your Contract No. _____ (hereinafter referred to as "the contract") for the convenience of the Government, in accordance with Clause _____ thereof. Such termination is effective on the date and in the manner stated in such telegram, reference to which is hereby made.

2. *Cessation of work and notification to your immediate subcontractors.* (a) You shall stop all work, and place no further orders in connection with the contract, except (1) to the extent necessary to perform any portion thereof not terminated by this notice or (2) to the extent necessary to perform any work directed by the contracting officer.

(b) You shall give notice of termination to each of your immediate subcontractors and suppliers who will be affected by the termination of your contract. In such notice you shall (1) give him the number of your contract with the Government (2) state that it has been terminated for the convenience of the Government and the extent thereof, (3) give him the name and address of the contracting officer, (4) instruct him to stop all work, to place no more orders and to terminate all subcontracts under this contract with you (subject to the same exceptions stated in 2(a) above), (5) direct him to submit his settlement proposal promptly in order to expedite settlement, and (6) request him to give similar notice and instructions to his immediate subcontractors.

(c) You shall forthwith transfer title to and deliver to the Government, in accordance with any instructions of the contracting officer, all items of termination inventory (including subcontractor termination inventory which under the terms of the subcontract or purchase order concerned you have the right to take over) of the following types or classes [insert proper identification or "none"].

(d) You shall notify the Contracting Officer of any pending or subsequent legal proceedings which relate to any subcontracts or purchase orders under the terminated contract.

(e) You shall take such other action as may be required by the Contracting Officer or under the termination clause contained in your contract.

3. *Termination inventory.* In connection with settlement of your claim it will be necessary to establish that all your termination inventory and that of your subcontractors has been properly accounted for.

4. *Submission of settlement proposal.* To assist you in prompt submission of your settlement proposal, there is inclosed a supply of the standard forms.

5. *Settlements with subcontractors.* You remain liable to your subcontractors and suppliers for claims arising by reason of the termination of their subcontracts or orders. You are requested to settle such termination claims as promptly as possible. For purposes of reimbursement by the Government, such settlements will be governed by the applicable provisions of the Armed Services Procurement Regulation.

6. The office named below will be in charge of the settlement of your claim. As to any matters not covered by this Notice, you should consult the office named below.

7. Please acknowledge receipt of this Notice as shown below.

Inclosures

_____
(*Contracting Officer*)
_____
(*Name of Office*)
_____
(*Address*)

Acknowledgment of Notice

The undersigned hereby acknowledges receipt of a signed copy of the foregoing Notice on _____. Two copies of this Notice, both signed, are returned herewith.

_____
(*Name of Contractor*)
By _____
_____
(*Title*)

(c) The following form of notice of termination is approved for use where a contract for architect-engineer services

is being terminated for the convenience of the Government:

Date _____

NOTICE OF TERMINATION

A-B and Associates
New York, N.Y.
Gentlemen:

1. *Effective date of termination.* You are notified that your Contract No. _____ covering _____ is hereby terminated [in part] for the convenience of the Government in accordance with the clause hereof entitled "Termination for the Convenience of the Government." Such termination will be effective immediately upon receipt of this notice.

2. *Cessation of work.* You shall stop all work under the contract except (1) to the extent necessary to perform any portion thereof not terminated by this notice or (2) to the extent necessary to perform any work directed by the contracting officer.

3. *Submission of settlement proposal.* To assist you in the prompt submission of your settlement proposal, there is inclosed a supply of the standard form.

4. The office named below will be in charge of the settlement of your claim. As to any matters not covered by this Notice, you should consult the office named below.

5. Please acknowledge receipt of this Notice as shown below.

_____
(Contracting Officer)

_____
(Name of Office)

_____
(Address)

Acknowledgment of Notice

The undersigned hereby acknowledges receipt of a signed copy of the foregoing Notice on _____. Two copies of this Notice, both signed, are returned herewith.

_____
(Architect-Engineer)

By _____
(Name)

_____
(Title)

PART 9—PATENTS, DATA, AND COPYRIGHTS

34. Sections 9.104, 9.107–3(d), and 9.107–4(c)(1) are revised to read as follows:

§ 9.104 Notice and assistance.

The Government should be notified by the contractor of all claims of infringement in connection with the performance of a Government contract which come to the contractor's attention. The contractor should also assist the Government, to the extent of evidence and information in the possession of the contractor, in connection with any suit against the Government, or any claims against the Government made before suit has been instituted, on account of any alleged patent or copyright infringement arising out of or resulting from the performance of the contract. Accordingly, the clause set forth below shall be included in all contracts in excess of $10,000 for supplies, construction, or experimental, developmental, or research work: *Provided*, That the clause set forth below shall not be included in contracts:

(a) Where both performance and delivery are to be outside the United States, its possessions, or Puerto Rico, unless the contract indicates that the supplies are ultimately to be shipped into the United States, its possessions, or Puerto Rico; or

(b) Of $10,000 or less, except that as a matter of administrative convenience, the clause need not be deleted when it is a part of a standard form being used for such contracts, since it is self-deleting:

NOTICE AND ASSISTANCE REGARDING PATENT AND COPYRIGHT INFRINGEMENT JANUARY 1965)

The provisions of this clause shall be applicable only if the amount of this contract exceeds $10,000.

(a) The Contractor shall report to the Contracting Officer, promptly and in reasonable written detail, each notice or claim of patent or copyright infringement based on the performance of this contract of which the Contractor has knowledge.

(b) In the event of any claim or suit against the Government on account of any alleged patent or copyright infringement arising out of the performance of this contract or out of the use of any supplies furnished or work or services performed hereunder, the Contractor shall furnish to the Government, when requested by the Contracting Officer, all evidence and information in possession of the Contractor pertaining to such suit or claim. Such evidence and information shall be furnished at the expense of the Government except where the Contractor has agreed to indemnify the Government.

(c) This clause shall be included in all subcontracts.

For proper action to be taken by the contracting officer with respect to reports of notices or claims of patent infringement received by him under the provisions of this section, see § 9.105.

§ 9.107–3 Policy.

* * * * *

(d) In the Category II and Category III situations, when two or more potential contractors are judged to have presented proposals of equivalent merit, willingness to grant the Government principal or exclusive rights in resulting inventions will be an additional factor in the evaluation of the proposals. In no event will contractors be asked to state their willingness to grant the Government principal or exclusive patent rights prior to a determination that proposals of equivalent merit have been presented.

* * * * *

§ 9.107–4 Procedures.

* * * * *

(c) * * *

(1) In determining whether such work falls within Category II, the contracting officer shall first determine whether the work is in a field of technology directly related to an area in which the contractor has an "established nongovernmental commercial position." In making this determination, the contracting officer should recognize that the ultimate goal of the policy is to move inventions into the stream of commerce through domestic sales or exports or through domestic and foreign licensing programs. Therefore, to be considered as having an established nongovernmental commercial position, the contractor should ordinarily:

(i) Be known in the trade as a manufacturer or source of products or services in the area involved;

(ii) Be regularly engaged in the sale or licensing, whether domestic or foreign, of such products or services to the general public (including business concerns); to both the general public including business concerns and the U.S. Government, or to foreign governments; and

(iii) Have a record of developing nongovernmental commercial markets for inventions in the area involved. A nongovernmental commercial position shall be deemed to include sales of military items to foreign governments or multinational organizations or licensing programs with respect thereto, as well as the export of nonmilitary items to foreign governments or foreign nationals or foreign licensing programs in connection therewith.

* * * * *

PART 12—LABOR

35. Section 12.101–1 is revised; new paragraph (d) is added to § 12.101–2; and new §§ 12.101–3, 12.101–4, 12.101–5, and 12.101–6 are added, as follows:

§ 12.101–1 General.

(a) Military procurement depends on industry and labor for uninterrupted performance of contracts to meet defense objectives. Each Military Department must establish and maintain sound working relationships with industry and labor to assure prompt receipt of information involving labor relations matters which may affect adversely military procurement and to assure that procurement actions are carried on without delay and at reasonable costs to the Government.

(b) All problems arising out of the labor relations of contractors and all communications with labor organizations or Federal agencies relative thereto shall be handled in accordance with the procedures prescribed in this part. Industrial security matters concerning contractor employees are governed by the Armed Forces Industrial Security Regulation (AR 380–130, OPNAV Instructions 5540.8c, AFR 205–4).

(c) With respect to labor relations matters in general, no Department shall take any independent action whose result would have the effect of establishing major policy, or unless approval of the Office of the Assistant Secretary of Defense (Manpower) has been obtained. Each Department must determine for itself what actions involve major policy. Recommendations for plant seizure or for injunctive action against labor or management would be examples of actions establishing major policy.

(d) Heads of procuring activities or subordinate commands or their representatives shall obtain authorization from the responsible Departmental headquarters office prior to initiating any contact on labor relations matters with a national office of any labor organization, Government department, agency or other governmental organization and shall promptly notify such headquarters office of each contact by the national office of any of these organizations.

(e) Military Departments shall remain impartial in, and refrain from tak-

ing a position on the merits of, any labor dispute, and shall refrain from the conciliation, mediation or arbitration of any such dispute. They shall, however, act to avoid or minimize the impact of labor disputes on important procurement by assuring, to the extent praticable, that the parties to the dispute utilize all available methods for resolving the dispute, including the services of the National Labor Relations Board, Federal Mediation and Conciliation Service, National Mediation Board and other appropriate Federal, state, local, or private agencies.

(f) Each Department shall take other action in connection with labor relations problems which is consistent with its procurement responsibilties, as for example:

(1) Giving notice of the existence of a labor dispute, which affects, or threatens to affect, procurement of supplies or services, to the Government agency which has responsibility for conciliation, mediation, arbitration, or other action with respect thereto;

(2) Advising the Government agency responsible for action with respect to labor disputes, or the parties to a labor dispute, of factual information pertaining to procurement of the supplies or services involved, to the extent consistent with security regulations; or

(3) Seeking to obtain such voluntary agreement between management and labor as will permit, notwithstanding the general continuance of the dispute, uninterrupted procurement of military supplies and services, provided such activity does not involve the Department in the merits of a labor difference or dispute.

§ 12.101–2 Contract pricing and administration.

* * * * *

(d) The normal and regular functions of inspection at the plant of a military supplier, as required during the performance of a contract, shall be continued without regard to the existence at such plant of a labor dispute, strike, or picket line. Inspection should not be performed if there is reason to believe that the physical safety of the individual inspector may be endangered thereby. It is emphasized that inspection personnel in the discharge of their duties, consistent with the policy of § 12.101–1(e), shall refrain from taking or expressing a position upon the merits of any dispute between labor and private management.

§ 12.101–3 Reporting of labor disputes.

(a) The responsible military commander or contracting officer or the representative of either shall obtain and transmit information relating to potential or actual labor disputes which may interfere with performance of any contract within his cognizance.

(b) Whenever it is determined that such an interference is likely to occur, he shall notify all offices listed below for the affected Department, except as provided in paragraph (d) of this section:

(1) *Reports involving Army contracts.* Reports shall be submitted to the head of the procuring activity concerned with information copies to intermediate procurement offices. Simultaneously, copies of each report shall be sent directly to the Assistant Secretary of the Army (Installations and Logistics), Attn: Labor Advisor, and to ODCSLOG, Attn: Chief, Industrial Division.

(2) *Reports involving Navy contracts.* Reports shall be submitted simultaneously to the Chief of Naval Material, Attn: Labor Relations Advisor (MAT 02C); head of the procuring activity concerned; cognizant contracting officers; inspection offices concerned; status control activities; and the Assistant Chief for Transportation (Code OH), BuSandA (when a transportation facility is affected).

(3) *Reports involving Air Force contracts.* The responsible military commander, the contracting officer, or the representative of either, shall submit reports as follows:

(i) Reports relating to any missile or test site or other high-priority Air Force program as designated by Headquarters, USAF, or Headquarters AFSC shall be submitted daily by electrical transmission to Headquarters AFSC (SCKML), with copies to BSD, SSD, and WCMR, Air Force Unit Post Office, Los Angeles, Calif., 90045; Headquarters, SAC, Offutt Air Force Base, Omaha, Nebr., 68113; and Headquarters, USAF (AFSPPDB), Washington, D.C., 20330.

(ii) Reports of disputes not directly affecting missile or test sites or other high-priority programs shall be submitted when the dispute arises and weekly thereafter to the major air command responsible for the program, contract, or activity affected. (Exception: When strikes affect AFLC programs, contracts, or activities, a copy of the report shall be sent directly to the AFLC buying activity. No copies shall be sent to Headquarters AFLC unless specifically requested.) An information copy of initial and weekly reports shall be sent to Headquarters, AFSC (SCKML), Andrews Air Force Base, Washington, D.C., 20331. Consolidated weekly reports shall be submitted by AFSC to Headquarters USAF (AFSPPDB). Initial and subsequent reports containing all the information immediately available shall be submitted promptly after a work stoppage occurs.

(4) *Reports involving Defense Supply Agency contracts.* Reports shall be submitted to the head of the procuring activity concerned. Only those disputes, stoppages, or threatened stoppages which, in the opinion of the head of the procuring activity, are of sufficient importance to warrant attention of higher authority shall be reported, in duplicate, to the labor advisor, Defense Supply Agency, as prescribed in § 12.101–4.

(c) Labor disputes should be reported on DD Form 1507, Work Stoppage Report. An initial report should be submitted when a dispute occurs and not less than weekly thereafter for the duration of the dispute, showing only new or changed information. Where a more rapid means of transmission is required the report shall follow the order indicated by DD Form 1507. The final report shall include important terms of agreement, strike settlement date, and date of resumption of work. Where the work stoppage involves a missile or test site or Army Corps of Engineers contract, the approximate number of man-days lost shall be reported.

(d) In cases where the responsible individual originating the report is outside the Military Department which placed the contract, he shall give notice to the procuring office (which shall process the notice in accordance with paragraph (b) of this section) and to the appropriate Departmental headquarters labor relations office (for the Army, the Labor Advisor, OASA (I&L); for the Navy, Chief of Naval Material, ATTN: Labor Relations Advisor (MAT O2C); for the Air Force, Headquarters USAF, AFSPPDB; for Defense Supply Agency, Labor Advisor, DSA).

(e) Reports shall be made to the Office of the Secretary of Defense:

(1) *Individual cases.* In any case where a Military Department determines that a labor dispute significantly affects, or threatens to affect, an important procurement, the Department concerned shall notify the Director, Industrial Relations, OASD (Manpower) by furnishing an information copy of DD Form 1507.

(2) *Weekly reports.* A weekly report shall be made by each Military Department to the Director, Industrial Relations, OASD (Manpower) briefly indicating those disputes which threaten important military programs and any actions taken in connection therewith. Negative reports are not required.

§ 12.101–4 Impact of labor disputes on defense programs.

(a) Each Military Department shall determine the degree of impact of potential or actual labor disputes on its own programs and requirements, considering among others the following factors:

(1) Whether the dispute involves a product, project, or service which must be obtained in order to meet schedules for urgently needed military programs or requirements; or

(2) Whether alternative sources of supply for the product, project, or service involved are reasonably available to fulfill the requirement or program in time to maintain essential military schedules.

(b) Within each Military Department, the procuring activity involved shall obtain and develop data reflecting the impact of a dispute on requirements and programs. Upon determining the impact, the head of the procuring activity shall submit through appropriate channels a report of his findings, together with recommendations, to the headquarters labor relations office originally notified pursuant to § 12.101–3 (b). Such reports shall be in narrative form and shall include the following information:

(1) Location of dispute and name of contractor or subcontractor involved;

(2) A statement indicating the degree of impact, relating specific items or construction involved to the programs or requirements affected;

(3) Identity of alternate sources available to furnish supply or service within the time required;

(4) A description of any action taken to reduce impact;

(5) Where need for removal of material is indicated, the report should include the following information:

(i) How soon the material can be obtained;

(ii) Description of items to be moved (nature of items, amount, approximate weight and cubic feet, purchase order number, shop order number, etc.);

(iii) Amount of work required to move items (include need for finishing work, and crating and shipping preparations);

(iv) Mode of transportation by which items are to be moved and whether by government or commercial bill of lading; and

(v) Destination of items.

§ 12.101–5 Movement and removal of items from facilities affected by work stoppage.

(a) It is the policy of the Department of Defense with respect to the movement of items from facilities affected by work stoppages to avoid the use of force or the appearance of force and to prevent the occurrence of incidents which will detrimentally affect relations with labor and management.

(b) Materials which the contractor is unable to deliver because of a work stoppage at the plant, and the delivery of which is necessary to an important program, may be obtained in accordance with procedures set forth below:

(1) Subject to § 12.101–1(d), the contracting officer or his representative may work out an arrangement agreeable to both management and the labor representatives involved for shipment by normal means of urgently required material.

(2) If an arrangement in accord with subparagraph (1) of this paragraph cannot be made, the contracting officer or his representative, after obtaining approval from the responsible Departmental headquarters labor relations office, may seek the concurrence of parties to the dispute to permit movement of the required material by military vehicles with military personnel to the extent needed. On receipt of such concurrence, he may proceed to make necessary arrangements to move the material.

(3) If satisfactory arrangements under subparagraphs (1) or (2) of this paragraph cannot be made, the matter shall be referred to the responsible Departmental headquarters labor relations office with the information required by § 12.101–4(b). If that office is unsuccessful in obtaining the voluntary concurrences of the parties for movement of the material involved and further action to obtain the material is deemed necessary, the matter shall be referred to the Director, Industrial Relations, OASD (Manpower).

(4) If after consultation between OASD (Manpower) and the Military Department concerned, it appears that the items involved are critically needed and cannot be moved with the consent of the parties, the case shall be returned to the Secretary of the Military Department, who may order removal of the material.

(c) Where two or more Military Departments are or may become involved in the movement or removal of the material, the departments concerned, where practicable, shall designate a single department to make arrangements in accord with paragraph (b) of this section.

§ 12.101–6 Procurement of stevedoring services during labor disputes.

Where stevedoring services are furnished by a contractor to a Military Department, and the performance under the contract, although urgently required, is delayed through a labor dispute, the following procedures shall be utilized in the order of priority listed. Each successive procedure shall be used only when the preceding steps are inadequate.

(a) An attempt shall be made to have management and labor voluntarily agree to exempt military supplies from the labor dispute by continuing the movement of such material.

(b) Vessels shall be diverted to alternate ports able to provide necessary stevedoring services.

(c) Consideration shall be given to contracting with reliable alternative sources of supply within the stevedoring industry.

(d) Civil Service stevedores shall be utilized to perform the work theretofore performed by contract stevedores.

(e) Military personnel shall be utilized to handle the cargo which was being handled by contract stevedores prior to the labor dispute.

(f) Where the exigencies of a situation require deviation from the procedures outlined above, Departmental labor relations headquarters offices set forth in § 12.101–3(d) shall be notified promptly. Such offices shall report the action taken to the Director, Industrial Relations, OASD (Manpower).

36. The introductory text of § 12.102–4(a) is revised; §§ 12.102–6 and 12.103 are revised; new §§ 12.103–1 and 12.103–2 are added; § 12.104 is revised; and new § 12.106 is added, as follows:

§ 12.102–4 Approvals.

(a) Overtime premiums at Government expense may be approved under the clause set forth in § 12.102–3 by an official designated as provided in paragraph (b) of this section when he determines in writing that such approval:

* * * * *

§ 12.102–6 Construction contracts.

See § 18.111 of this chapter regarding expediting actions involving additional costs.

§ 12.103 Federal and State labor requirements.

§ 12.103–1 General.

The Department of Defense shall cooperate and encourage contractors to cooperate, to the fullest extent practicable, with Federal and State agencies responsible for enforcing labor requirements with respect to such matters as safety, health and sanitation, maximum hours and minimum wages, equal pay for women, and child and convict labor.

§ 12.103–2 Applications for relaxation of requirements.

(a) Military Departments shall not initiate applications of any kind for suspension or relaxation of labor requirements. They may, however, support such applications by contractors or suppliers when all of the following circumstances and conditions have been met:

(1) The interested contractor or supplier has filed his application for relaxation of the laws, orders or regulations involved with the appropriate Governmental official charged with the enforcement of such labor requirements applicable to the contract involved;

(2) The required products or services are in short supply and unless the application is granted, production schedules for critically needed military material cannot be met;

(3) There is no alternative source of supply reasonably available to furnish the products or services within the period of time delivery is required;

(4) There is no practicable possibility of taking remedial action (such as recruiting, training, and more effective utilization of manpower) as an alternative to relaxation of applicable Governmental labor requirements;

(5) The apparent supply of labor, and in particular of critical skills, is limited, and it is not practicable to set up new production lines or to use additional facilities as an alternative to the relief requested; and

(6) The granting of the application will not result in an excessive increase in hours or work, an unreasonable curtailment of rest and lunch periods, an undesirable impairment of working conditions, or otherwise adversely affect the productivity of the facility involved.

(b) Requests for authority to support an application on behalf of a contractor or supplier shall be submitted to the Labor Advisor, OASA (I&L) for the Army; Chief of Naval Material for the Navy; HQUSAF (AFSPPDB) for the Air Force; and Directorate, Procurement and Production DSAH–P, for the Defense Supply Agency. Such requests shall contain the following information:

(1) The facilities and services involved and affected;

(2) Provision(s) of law which require relaxation;

(3) Criticality or relative scarcity of the material;

(4) Circumstances necessitating the relaxation (for example, a shortage in the local supply of skilled labor);

(5) Remedial action being taken by the manufacturer (e.g., training, recruiting, more effective utilization of manpower);

(6) The most limited relaxation of the requirement necessary for completion of the specific work; and

(7) The approximate period of time required for completion of the work.

(c) Consistent with the limitations of security and the foregoing requirements, contract information may be furnished to the appropriate governmental official, upon his request, in connection with an application of a contractor or supplier for relaxation of a labor requirement as to the execution of a contract in pursuance of a military procurement program.

§ 12.104 Meeting manpower requirements.

The Department of Defense shall cooperate with and encourage contractors to utilize to the fullest extent practicable the United States Employment Service (USES) and its affiliated Local State Employment Service Offices in meeting contractor's manpower (labor supply) requirements to staff new or expanding plant facilities, including the recruitment of workers in all occupations and skills both from local labor market areas and through the Federal-State manpower clearance system. Local State Employment Offices are operated throughout the United States, Puerto Rico, Guam, and the Virgin Islands. In addition to providing recruitment assistance to contractors who need and desire it, cooperation with the Local State Employment Service Offices will further the national program of maintaining continuous assessment of manpower requirements and resources on a national and local basis.

§ 12.106 Supply, services, or maintenance contracts involving construction work.

When any construction work is involved in a contract for supplies, services, or maintenance work, the contracting officer should consider the requirements of § 12.402–2.

37. Sections 12.300 and 12.301 are revised; in § 12.302, the introductory text and paragraph (f) are revised; § 12.303–1 is revised; and new § 12.304 is added, as follows:

§ 12.300 Scope of subpart.

This subpart deals with the requirements of the Contract Work Hours Standards Act (40 U.S.C. 327–330) applicable to contracts other than construction contracts as defined and covered in Subpart D of this part.

§ 12.301 Statutory requirement.

In accordance with the requirement of the Contract Work Hours Standards Act (40 U.S. Code 327–330), certain contracts entered into by any Department shall contain a clause to the effect that no laborer or mechanic doing any part of the work contemplated by the contract shall be required or permitted to work more than eight hours in any one calendar day or 40 hours in any work week unless such laborer or mechanic is compensated for all hours worked in excess of eight hours in any one calendar day or 40 hours in any work week at not less than one and one-half times the basic rate of pay.

§ 12.302 Applicability.

The requirement set forth in § 12.301 applies, except as stated below, to all contracts which may require or involve the employment of laborers or mechanics, including guards and watchmen, either by a contractor or by any subcontractor. The requirement does not apply to the following kinds of contracts:

* * * * *

(f) Contracts of $2,500 or less in aggregate amount. In arriving at the aggregate amount involved, there must be included all property and services which would normally be grouped together in a single transaction.

§ 12.303–1 Clause for general use.

Except for those kinds of contracts referred to in § 12.303–2 the contract clause required by this subpart shall be as follows:

CONTRACT WORK HOURS STANDARDS ACT—OVERTIME COMPENSATION (JUNE 1964)

This contract, to the extent that it is of a character specified in the Contract Work Hours Standards Act (40 U.S.C. 327–330), is subject to the following provisions and to all other applicable provisions and exceptions of such Act and the regulations of the Secretary of Labor thereunder.

(a) *Overtime requirements.* No contractor or subcontractor contracting for any part of the contract work which may require or involve the employment of laborers or mechanics shall require or permit any laborer or mechanic in any workweek in which he is employed on such work to work in excess of eight hours in any calendar day or in excess of forty hours in such workweek or work subject to the provisions of the Contract Work Hours Standards Act unless such laborer or mechanic receives compensation at a rate not less than one and one-half times his basic rate of pay for all such hours worked in excess of eight hours in any calendar day or in excess of forty hours in such workweek, whichever is the greater number of overtime hours.

(b) *Violation; liability for unpaid wages; liquidated damages.* In the event of any violation of the provisions of paragraph (a), the Contractor and any subcontractor responsible therefor shall be liable to any affected employee for his unpaid wages. In addition, such Contractor and subcontractor shall be liable to the United States for liquidated damages. Such liquidated damages shall be computed with respect to each individual laborer or mechanic employed in violation of the provisions of paragraph (a) in the sum of $10 for each calendar day on which such employee was required or permitted to be employed on such work in excess of eight hours or in excess of his standard workweek of forty hours without payment of the overtime wages required by paragraph (a).

(c) *Withholding for unpaid wages and liquidated damages.* The Contracting Officer may withhold from the Government Prime Contractor, from any moneys payable on account of work performed by the Contractor or subcontractor, such sums as may administratively be determined to be necessary to satisfy any liabilities of such Contractor or subcontractor for unpaid wages and liquidated damages as provided in the provisions of paragraph (b).

(d) *Subcontracts.* The Contractor shall insert paragraphs (a) through (d) of this clause in all subcontracts, and shall require their inclusion in all subcontracts of any tier.

(e) *Records.* The Contractor shall maintain payroll records containing the information specified in 29 CFR 516.2(a). Such records shall be preserved for three years from the completion of the contract.

§ 12.304 Administration and enforcement.

In investigating allegations of violations of the Contract Work Hours Standards Act on other than construction contracts, the same procedures shall be followed and the same reports made as set forth in § 12.404–7 and 12.404–8.

38. Sections 12.401 (c), (d), and (e) and 12.403–1 are revised; § 12.403–2 is revoked; and §§ 12.403–3, 12.403–4, 12.403–5, 12.404–1 and 12.404–2(b) are revised, as follows:

§ 12.401 Statutes, regulations, and determinations.

* * * * *

(c) *Contract Work Hours Standards Act.* See § 12.301.

(d) *Department of Labor Regulations.* Pursuant to the foregoing statutes and Reorganization Plan No. 14 of 1950, the Secretary of Labor has issued Regulations Part 3, Title 29, Subtitle A, Code of Federal Regulations and Regulations Part 5, Title 29, Subtitle A, Code of Federal Regulations, providing for the administration and enforcement of these statutes in construction contracts. Each Department shall comply with the regulations, rulings, interpretations and decisions of the Department of Labor issued pursuant to the above provisions unless other action is specifically authorized in advance by OASD (Manpower). In any case where resolution of a question by higher authority is deemed appropriate, such question shall be submitted, in the case of the Army, to the Labor Advisor, Office of the Assistant Secretary of the Army (Installations and Logistics); in the case of the Navy, to the Office of Naval Material, Attn: MAT 02C; in the case of the Air Force, to the Deputy Chief of Staff, Systems and Logistics, Attn: AFSPM; and, in the case of the Defense Supply Agency, to the Executive Director for Procurement and Production, Attn: DSAH–PL.

(e) *Standard compensation at Cape Kennedy, Patrick Air Force Base, and Merritt Island Launch Area.* The Project Stabilization Agreement for Cape Kennedy, Patrick Air Force Base, and Merritt Island Launch Area is an agreement between contractors and labor unions designed to further the orderly and uninterrupted prosecution of construction work at Cape Kennedy, Patrick Air Force Base, and Merritt Island Launch Area. The agreement applies to work subject to the Davis-Bacon Act that is performed at Cape Kennedy, Patrick Air Force Base, Merritt Island Launch Area, or, in some circumstances, elsewhere in Brevard County, Fla. The Deputy Secretary of Defense determined on September 21, 1962, pursuant to Public Law 85–804, that it is necessary in order to facilitate the national defense to include a clause in all contracts and modifications thereto, for the performance of construction work at the Cape Kennedy—Patrick Air Force Base complex, requiring all contractors and subcontractors performing such work to abide by the money provisions of the Project Stabilization Agreement (see § 12.403–5).

§ 12.403–1 Clauses for general use.

Except as provided in § 12.403–4 every construction contract in excess of $2,000 for work within the United States shall include the following clauses:

(1) *Davis-Bacon Act (40 U.S.C. 276a–276a–7).*

DAVIS-BACON ACT (40 U.S.C. 276a–a(7)) (JUNE 1964)

(a) All mechanics and laborers employed or working directly upon the site of the work shall be paid unconditionally and not less often than once a week, and

without subsequent deduction or rebate on any account (except such payroll deductions as are permitted by the Copeland Regulations (29 CFR Part 3)), the full amounts due at the time of payment computed at wage rates not less than those contained in the wage determination decision of the Secretary of Labor which is attached hereto and made a part hereof, regardless of any contractual relationship which may be alleged to exist between the Contractor or subcontractor and such laborers and mechanics. A copy of such wage determination decision shall be kept posted by the Contractor at the site of the work in a prominent place where it can be easily seen by the workers.

(b) The Contracting Officer shall require that any class of laborers or mechanics which is not listed in the wage determination decision and which is to be employed under the contract shall be classified or reclassified conformably to the wage determination decision, and shall report the action taken to the Secretary of Labor. If the interested parties cannot agree on the proper classification or reclassification of a particular class of laborers or mechanics to be used, the Contracting Officer shall submit the question, together with his recommendation, to the Secretary of Labor for final determination.

(c) In the event it is found by the Contracting Officer that any laborer or mechanic employed by the Contractor or any subcontractor directly on the site of the work covered by this contract has been or is being paid at a rate of wages less than the rate of wages required by paragraph (a) of this clause, the Contracting Officer may (1) by written notice to the Government Prime Contractor terminate his right to proceed with the work, or such part of the work as to which there has been a failure to pay said required wages, and (2) prosecute the work to completion by contract or otherwise, whereupon such Contractor and his sureties shall be liable to the Government for any excess costs occasioned the Government thereby.

(d) Paragraphs (a), (b), and (c) of the clause shall apply to this contract to the extent that it is (1) a prime contract with the Government subject to the Davis-Bacon Act or (2) a subcontract also subject to the Davis-Bacon Act under such prime contract.

(2) *Contract Work Hours Standards Act—Overtime Compensation (40 U.S.C. 327–330).*

CONTRACT WORK HOURS STANDARDS ACT—OVERTIME COMPENSATION (40 U.S.C. 327–330) (JUNE 1964)

(a) The Contractor shall not require or permit any laborer or mechanic in any workweek in which he is employed on any work under this contract to work in excess of eight hours in any calendar day or in excess of forty hours in such workweek on work subject to the provisions of the Contract Work Hours Standards Act unless such laborer or mechanic receives compensation at a rate not less than one and one-half times his basic rate of pay for all such hours worked in excess of eight hours in any calendar day or in excess of forty hours in such workweek, whichever is the greater number of overtime hours.

(b) In the event of any violation of the provisions of paragraph (a), the Contractor shall be liable to any affected employee for any amounts due, and to the United States for liquidated damages. Such liquidated damages shall be computed with respect to each individual laborer or mechanic employed in violation of the provisions of paragraph (a) in the sum of $10 for each calendar day on which such employee was required or permitted to be employed on such work in excess of eight hours or in excess of the standard workweek of forty hours without payment of the overtime wages required by paragraph (a).

(3) *Apprentices.*

APPRENTICES (JUNE 1964)

(a) Apprentices will be permitted to work as such only when they are registered, individually, under a bona fide apprenticeship program registered with a State apprenticeship agency which is recognized by the Bureau of Apprenticeship and Training, United States Department of Labor; or, if no such recognized agency exists in a State, under a program registered with the aforesaid Bureau of Apprenticeship and Training. The allowable ratio of apprentices to journeymen in any craft classification shall not be greater than the ratio permitted to the Contractor as to his entire work force under the registered program. Any employee listed on a payroll at an apprentice wage rate, who is not registered as above, shall be paid the wage rate determined by the Secretary of Labor for the classification of work he actually performed.

(b) The Contractor shall furnish written evidence of the registration of his program and apprentices as well as of the appropriate ratio and wage rates, prior to using any apprentices in the contract work.

(4) *Payrolls and payroll records.*

PAYROLLS AND PAYROLL RECORDS (JUNE 1964)

(a) The Contractor shall maintain payrolls and basic payroll records during the course of the work and shall preserve them for a period of three years thereafter for all laborers and mechanics working at the site of the work. Such records shall contain the name and address of each such employee, his correct classification, rate of pay, daily and weekly number of hours worked, deductions made and actual wages paid.

(b) The Contractor shall submit weekly a copy of all payrolls to the Contracting Officer. The Government Prime Contractor shall be responsible for the submission of copies of payrolls of all subcontractors. The copy shall be accompanied by a statement signed by the Contractor indicating that the payrolls are correct and complete, that the wage rates contained therein are not less than those determined by the Secretary of Labor, and that the classifications set forth for each laborer or mechanic conform with the work he performed. Submission of the "Weekly Statement of Compliance" required under this contract and the Copeland Regulations of the Secretary of Labor (29 CFR, Part 3) shall satisfy the requirement for submission of the above statement.

(c) The Contractor shall make his employment records available for inspection by authorized representatives of the Contracting Officer and the Department of Labor, and shall permit such representatives to interview employees during working hours on the job.

(5) *Compliance with Copeland Regulations.*

COMPLIANCE WITH COPELAND REGULATIONS (JUNE 1964)

The Contractor shall comply with the Copeland Regulations of the Secretary of Labor (29 CFR, Part 3) which are incorporated herein by reference.

(6) *Withholding of funds.*

WITHHOLDING OF FUNDS (JUNE 1964)

(a) The Contracting Officer may withhold or cause to be withheld from the Government Prime Contractor so much of the accrued payments or advances as may be considered necessary (1) to pay laborers and mechanics employed by the Contractor or any subcontractor on the work the full amount of wages required by the contract, and (2) to satisfy any liability of any Contractor for liquidated damages under clause 2, paragraph (b), hereof.

(b) If any Contractor fails to pay any laborer or mechanic employed or working on the site of the work, all or part of the wages required by the contract, the Contracting Officer may, after written notice to the Government Prime Contractor, take such action as may be necessary to cause suspension of any further payments or advances until such violations have ceased.

(7) *Subcontracts.*

SUBCONTRACTS (JUNE 1964)

The Contractor agrees to insert the clauses hereof entitled "Davis-Bacon Act", "Contract Work Hours Standards Act—Overtime Compensation", "Apprentices", "Payrolls and Payroll Records", "Compliance with Copeland Regulations", "Withholding of Funds", "Subcontracts" and "Contract Termination—Debarment" in all subcontracts. The term "Contractor" as used in such clauses in any subcontract shall be deemed to refer to the subcontractor except in the phrase "Government Prime Contractor".

When Standard Form 19–A is used, the "Subcontracts" clause therein shall be used in lieu of the above clause.

(8) *Contract termination—debarment.*

CONTRACT TERMINATION—DEBARMENT (JUNE 1964)

A breach of the clauses hereof entitled "Davis-Bacon Act", "Contract Work Hours Standards Act—Overtime Compensation", "Apprentices", "Payrolls and Payroll Records", "Compliance with Copeland Regulations", "Withholding of Funds" and "Subcontracts" may be grounds for termination of the contract, and for debarment as provided in 29 FCR 5.6.

When Standard Form 19–A, is used the "Contract Termination—Debarment" clause therein shall be used in lieu of the above clause.

§ 12.403–2 Contracts for $2,000 or less. [Revoked]

§ 12.403–3 Overseas contracts.

Every construction contract for work outside the United States but within any area within United States jurisdiction as stated in § 12.302 shall include (a) the clause entitled "Contract Work Hours Standards Act—Overtime Compensation" set forth in § 12.403–1(2), (b) the "Subcontracts" clause set forth in § 12.403–1(7) except that the first sentence thereof shall be modified to refer only to the clauses entitled "Contract Work Hours Standards Act—Overtime Compensation," "Subcontracts" and "Contract Termination—Debarment," and (c) the clause entitled "Contract Termination—Debarment" set forth in § 12.403–1(8).

§ 12.403–4 Contracts with a State or political subdivision.

In the case of construction contracts in excess of $2,000 with a State or political subdivision thereof, the contract clauses required by § 12.403–1 shall be inserted therein and each clause shall be prefaced by the following provision:

The Contractor agrees to insert the following in all subcontracts hereunder with private persons or firms.

§ 12.403–5 Contracts for work at Cape Kennedy, Patrick Air Force Base, and Merritt Island Launch Area.

The following clause shall be included in every construction contract (subject to the Davis-Bacon Act) for work to be performed at Cape Kennedy, Patrick Air Force Base, Merritt Island Launch Area, or in Brevard County, Fla., when such work is "directly upon the site of the work" at Cape Kennedy, Patrick Air Force Base, or Merritt Island Launch Area within the meaning of the Davis-Bacon Act.

EMPLOYEE COMPENSATION—CAPE KENNEDY, PATRICK AIR FORCE BASE AND MERRITT ISLAND LAUNCH AREA (JANUARY 1965)

(a) The Contractor shall pay to laborers and mechanics wages and other compensation, including but not limited to fringe benefits, overtime premiums, shift premiums, holiday pay, and travel pay, at the rates and in the amounts set forth in the attached Table of Employee Compensation and any amendments thereto. The Table, based upon the Project Stabilization Agreement for Cape Kennedy, Patrick Air Force Base and Merritt Island Launch Area, dated February 20, 1962, as amended August 1, 1962 including Schedule A thereof, may be revised to reflect amendments to that agreement which the Secretary or his authorized representative determines to be reasonable. The obligation of the Contractor to pay fringe benefits shall be discharged by making payments to a fund or funds established for the purpose of providing one or more fringe benefits; or by paying their monetary equivalent directly to the laborers and mechanics to whom such benefits are applicable; or by a combination of the foregoing.

(b) Amounts for wages, and other compensation of the kinds described in paragraph (a) above, which are in excess of the rates and amounts required by this contract will not be recognized in any contract negotiations or pricing actions under a fixed-price type contract, and will not be recognized as an allowable cost under any cost-reimbursement type contract.

(c) This clause applies to all work under this contract (including subcontracts) which:

(i) is covered by the Davis-Bacon Act; and

(ii) is performed (A) at Cape Kennedy, Patrick Air Force Base, or Merritt Island Launch Area, or (B) in Brevard County, Fla., and which, because of its relationship to work described in (A) above, is "directly upon the site of the work" at Patrick Air Force Base, Cape Kennedy, or Merritt Island Launch Area within the meaning of the Davis-Bacon Act.

(d) (1) In the event of failure to pay any laborer or mechanic the compensation required by this clause, the Contracting Officer may suspend any payments to the Contractor, in whole or in part, until such violation has ceased. Furthermore, this contract may be terminated for default for breach of any requirement under this clause.

(2) The rights and remedies of the Government provided in this clause shall not be exclusive and are in addition to any other rights and remedies provided by law or under this contract.

(e) The Contractor agrees to insert the substance of this clause, including this paragraph (e), in any subcontract for the performance of any work described in paragraph (c) hereof.

(f) The requirements of this clause are in addition to, and shall not relieve the Contractor of, any obligation imposed by any other clauses of this contract, including those entitled "Davis-Bacon Act", "Contract Work Hours Standards Act—Overtime Compensation", "Apprentices", "Payrolls and Payroll Records", "Compliance With Copeland Regulations", "Withholding of Funds", "Subcontracts", and "Contract Termination—Debarment".

(g) The Contractor agrees to maintain payroll and personnel records during the course of work subject to this clause, and to preserve such records for a period of three years thereafter, for all laborers and mechanics performing such work. Such records will contain the name and address of each such employee, his correct classification, rate of pay, daily and weekly number of hours worked, and the dates and hours of the day within which such work was performed, deductions made and amounts for wages and other compensation of the kinds described in paragraph (a) hereof. The Contractor agrees to make these records available for inspection by the Contracting Officer and will permit him to interview employees during working hours on the job.

A current Table of Employee Compensation shall also be included in contracts utilizing this clause. Because use of this clause is based on a determination pursuant to Public Law 85–804, the contracting officer shall cite such statute in an appropriate place in the contract and shall assure compliance with the requirements of § 17.206 of this chapter with respect to all contracts which include this clause.

§ 12.404–1 General.

The contracting officer shall ascertain that the contractor is fully informed of the labor standards provisions of the contract and of his responsibilities thereunder. Unless it is clear that the contractor is otherwise fully informed, the contractor shall be so informed either by conference or by letter as soon as possible after award of the contract. Whenever the clauses under § 12.403–1 are applicable, the following action shall be taken or required in accordance with procedures prescribed by each respective Department. Whenever the clauses under §§ 12.403–3 and 12.403–4 are applicable, the following action shall be taken or required, in accordance with procedures prescribed by each respective Department, to the extent pertinent to the applicable clauses.

§ 12.404–2 Wage determinations.

* * * * *

(b) *Limitations.* Wage determinations initially issued shall be effective for 120 calendar days from the date of such determinations. If such a wage determination is not used in the period of its effectiveness, it is void. If it appears that a wage determination may expire between bid opening and award, a new wage determination should be requested sufficiently in advance of the bid opening to assure receipt prior thereto. However, when due to unavoidable circumstances a determination expires before award and after bid opening, the Solicitor of Labor upon a written finding to that effect by the Secretary of the Department concerned or his designee at a level no lower than that of the head of the procuring activity in individual cases may extend the expiration date of a determination whenever he finds it necessary and proper in the public interest to prevent injustice or undue hardship or to avoid serious impairment in the conduct of Government business.

* * * * *

39. Sections 12.602–3 and 12.604 are revised; new §§ 12.606 and 12.607 are added; § 12.802 is revised; and in § 12.803 (a), subparagraphs (1), (2), (3), (4), and (5) are revised and new subparagraph (8) is added, as follows:

§ 12.602–3 Department of Labor regulations and interpretations.

Pursuant to the Walsh-Healey Act, the Secretary of Labor has issued detailed regulations and interpretations as to the coverage of said Act, and exemptions and procedures thereunder. These regulations and interpretations are compiled in a document entitled "Walsh-Healey Public Contracts Act, Rulings and Interpretations," which may be obtained from the Department of Labor Regional Offices listed in § 12.607. In addition to the interpretations stated in that document, attention is directed to an opinion of the Department of Labor that contracts which are originally $10,000 or less, but are subsequently modified to increase the price to an amount in excess of $10,000, are subject to the Walsh-Healey Act; and that contracts in an amount exceeding $10,000, which are subsequently modified to a figure of $10,000 or less, are not subject to said Act with respect to work performed after such modification if modification is effected by mutual agreement.

§ 12.604 Responsibilities of contracting officers.

The responsibility for applying the eligibility requirements set forth in §§ 12.601 and 12.603 rests, in the first instance, with the contracting officer. The Department of Labor does not conduct pre-award investigations, nor render final determinations of eligibility until the contracting officer has initially determined whether the eligibility requirements have been met. When the eligibility of a bidder or offeror is challenged before award, it should be treated in a manner similar to a protest before award (see §§ 2.407–9 and 3.508 of this chapter). The contracting officer should make an initial determination and should process the protest in accordance with applicable procedures for submission to the Department of Labor for a final determination. Whenever the Walsh-Healey Public Contracts Act is applicable, the contracting officer shall, pursuant to regulations or instructions issued by the Secretary of Labor and in accordance with procedures prescribed by each respective Military Department:

(a) Inform prospective contractors of the applicability of minimum wage determinations;

(b) Furnish to the contractor a poster (Form PC–13) and a form letter (Form PC–12) explaining the Walsh-Healey Act (forms are available through normal publication supply channels);

(c) Prepare and transmit three copies of DD Form 350 as provided in § 16.803–2(c) and other pertinent regulations; when a contract of $10,000 or less is modified to exceed $10,000, the report

on DD Form 350 shall be prepared and transmitted in accordance with pertinent regulations;

(d) Report to the Department of Labor any violation of the representations or stipulations required by the Walsh-Healey Act.

§ 12.606 Procedure for obtaining exemptions with respect to stipulations required by the Act.

Section 7 of the Act permits the Secretary of Labor to make exceptions to the requirement that the representations and stipulations of Section 1 of the Act be included in contracts which are subject to the Act. Applications for such exceptions shall be submitted through procurement channels with pertinent data and recommendation to the Labor Advisor, OASA (I&L) for the Army; Chief of Naval Material for the Navy; Hq., USAF (AFSPPDB) for the Air Force; Directorate, Procurement and Production, DSAH-P, for the Defense Supply Agency.

§ 12.607 Wage and Hour and Public Contracts Divisions of the United States Department of Labor Regional Offices—geographical jurisdictions and addresses of Regional Directors.

Region I: Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, Vermont—18 Oliver Street, Boston, Mass., 02110.

Region II: New Jersey and New York—341 Ninth Avenue, New York, N.Y., 10001.

Region III: Delaware, District of Columbia, Maryland, Pennsylvania—Wolf Avenue and Commerce Street, Chambersburg, Pa., 17201.

Region IV: Alabama, Arkansas, Louisiana, Mississippi—American Liberty Insurance Co. Building, 1401 South 20th Street, Birmingham, Ala., 35205.

Region V: Michigan, Ohio—216 Engineers Building, 1365 Ontario Street, Cleveland, Ohio, 44114.

Region VI: Illinois, Indiana, Minnesota, Wisconsin—11th Floor, Bankers Building, 105 West Adams Street, Chicago, Ill., 60603.

Region VII: Colorado, Iowa, Kansas, Missouri, Nebraska, North Dakota, South Dakota, Wyoming—2000 Federal Office Building, 911 Walnut Street, Kansas City, Mo., 64106.

Region VIII: New Mexico, Oklahoma, Texas—Room 222, 1114 Commerce Street, Dallas, Tex., 75201.

Region IX: Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, Utah, Washington—329 Appraisers Building, 630 Sansome Street, San Francisco, Calif., 94111.

Region X: Kentucky, Tennessee, Virginia, West Virginia—U.S. Court House Building, 801 Broad Street, Nashville, Tenn., 37203.

Region XI: Florida, Georgia, North Carolina, South Carolina—Room 300, 1365 Peachtree Street NE., Atlanta, Ga., 30309.

Puerto Rico: 7th Floor, Concominio San Alberto Building, 1200 Ponce De Leon, Stop 17, Post Office Box 9092, Santurce, Puerto Rico, 00908.

District of Columbia: 14th Street and Constitution Avenue NW., Washington, D.C., 20210.

§ 12.802 Basic requirement.

(a) Except as set forth in paragraph (d) of this section and in § 12.803, each Department shall include in each of its contracts the following clause:

EQUAL OPPORTUNITY (APR. 1964)

(The following clause is applicable unless this contract is exempt under the rules and regulations of the President's Committee on Equal Employment Opportunity (41 CFR Chapter 60). Exemptions include contracts and subcontracts (i) not exceeding $10,000, (ii) not exceeding $100,000 for standard commercial supplies or raw materials, and (iii) under which work is performed outside the United States and no recruitment of workers within the United States is involved.

During the performance of this contract, the Contractor agrees as follows:

(a) The Contractor will not discriminate against any employee or applicant for employment because of race, creed, color, or national origin. The Contractor will take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, creed, color, or national origin. Such action shall include but not be limited to, the following: employment, upgrading, demotion, or transfer; recruitment or recruitment advertising; lay-off or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship. The Contractor agrees to post in conspicuous places, available to employees and applicants for employment, notices to be provided by the Contracting Officer setting forth the provisions of this nondiscrimination clause.

(b) The Contractor will, in all solicitations or advertisements for employees placed by or on behalf of the Contractor, state that all qualified applicants will receive consideration for employment without regard to race, creed, color, or national origin.

(c) The Contractor will send to each labor union or representative of workers with which he has a collective bargaining agreement or other contract or understanding, a notice, to be provided by the Agency Contracting Officer, advising the said labor union or workers' representative of the Contractor's commitments under this nondiscrimination clause, and shall post copies of the notice in conspicuous places available to employees and applicants for employment.

(d) The Contractor will comply with all provisions of Executive Order No. 10924 of March 6, 1961, as amended, and of the rules, regulations, and relevant orders of the President's Committee on Equal Employment Opportunity created thereby.

(e) The Contractor will furnish all information and reports required by Executive Order No. 10925 of March 6, 1961, as amended, and by the rules, regulations, and orders of the said Committee, or pursuant thereto, and will permit access to his books, records, and accounts by the contracting agency and the Committee for purposes of investigation to ascertain compliance with such rules, regulations, and orders.

(f) In the event of the Contractor's noncompliance with the nondiscrimination clause of this contract or with any of the said rules, regulations, or orders, this contract may be cancelled, terminated, or suspended in whole or in part and the Contractor may be declared ineligible for further Government contracts in accordance with procedures authorized in Executive Order No. 10925 of March 6, 1961, as amended, and such other sanctions may be imposed and remedies invoked as provided in the said Executive Order or by rule, regulation, or order of the President's Committee on Equal Employment Opportunity, or as otherwise provided by law.

(g) The Contractor will include the provisions of paragraphs (a) through (g) in every subcontract or purchase order unless exempted by rules, regulations, or orders of the President's Committee on Equal Employment Opportunity issued pursuant to section 303 of Executive Order No. 10925 of March 6, 1961, as amended, so that such provisions will be binding upon each subcontractor or vendor.* The Contractor will take such action with respect to any subcontract or purchase order as the contracting agency may direct as a means of enforcing such provisions, including sanctions for noncompliance: *Provided, however,* That in the event the Contractor becomes involved in, or is threatened with, litigation with a subcontractor or vendor as a result of such direction by the contracting agency, the Contractor may request the United States to enter into such litigation to protect the interest of the United States.

(b) Supplemental agreements that increase the scope of the contract work shall include the clause set forth above, unless exempt in accordance with § 12.803 or unless the clause is contained in the existing contract. Change orders, price redeterminations, and unilateral contract modifications are not included in this requirement.

(c) Prime contractors and subcontractors may make necessary modifications in language in the clause as shall be appropriate to identify properly the parties and their undertakings. Subcontractors may incorporate by reference the above contract clause.

(d) All indefinite quantity contracts, requirements contracts, and basic ordering agreements, which are to extend for more than one year or continue indefinitely; unless exempt under § 12.803, shall, in addition to the clause set forth in paragraph (a) of this section, contain the following statement:

The Equal Opportunity clause contained in this contract shall be applicable upon written notice by the Contracting Officer.

§ 12.803 Applicability and exemptions.

(a) The clause set forth in § 12.802 shall not be included in the following:

(1) Contracts or subcontracts not involving the employment of persons.

(2) Contracts, or subcontracts for $10,000 or less, except Government bills of lading.

(3) Contracts or subcontracts for standard commercial supplies or raw materials not in excess of $100,000, except when the Executive Vice Chairman, to achieve the purposes of the Executive Orders, has withdrawn such exemption in whole or in part with regard to any specified articles or raw materials, and except that contracts or subcontracts shall not be awarded for less than usual quantities to avoid applicability of the equal opportunity clause.

(4) Contracts or subcontracts to be performed outside the United States where no recruitment of workers within the United States is involved (where a contract involves performance of work

*Unless otherwise provided, the "Equal Opportunity" clause is not required to be inserted in subcontracts below the second tier, except for subcontracts involving the performance of "construction work" at the "site of construction" (as those terms are defined in the Committee's rules and regulations) in which case the clause must be inserted in all such subcontracts. Subcontracts may incorporate by reference the "Equal Opportunity" clause.

or recruitment of workers both within and outside the United States, the Equal Opportunity clause shall be included in the contract but shall be applicable only to work and recruitment within the United States); *United States* as used herein includes the Commonwealth of Puerto Rico, the Panama Canal Zone, and the possessions of the United States.

(5) Contracts for the sale of Government real or personal property, where no appreciable amount of work is involved.

* * * * *

(8) Federally-assisted construction contracts; in lieu of the clause in § 12.802 (a), include in each Federally-assisted construction contract the clause set forth in Part 60–1.3(b)(1) of the Rules and Regulations of the President's Committee on Equal Employment Opportunity, as amended September 7, 1963, or as later amended, except that the asterisked footnote that follows the clause in § 12.802(a) shall be added to the substitute clause in the same way. With respect to construction work where it is not clear which clause is appropriate, the determination as to which clause applies shall be made by the Contracts Compliance Officer of the appropriate Department. The Federally-assisted construction contract clause shall be interpreted and administered in accordance with the Rules and Regulations of the President's Committee.

* * * * *

40. Sections 12.804, 12.805, 12.806–1, 12.806–2, 12.806–3, 12.806–4, 12.806–5, 12.806–6, 12.806–7, and 12.806–8 are revised, as follows:

§ 12.804 Requests for exemptions.

Where special circumstances indicate that use of the clause set forth in § 12.802 in a contract, subcontract or purchase order would not be in the national interest, the contracting officer should submit a request to the Secretary of the Department for authority to omit or modify the clause. The Secretary of the Department may request an exemption of any specific contract, subcontract or purchase order from the requirements of the clause. Such requests will be directed through the Office of the Director, Equal Employment Opportunity Program to the Executive Vice Chairman of the President's Committee, who will rule upon the request in accordance with the Committee's regulations. Prior to the submission of such requests, the Secretary or his designee for the purpose will, in appropriate cases, personally discuss with the head of the company concerned the inclusion of the clause in the pending contract, subcontract, or purchase order.

§ 12.805 Interpretations.

In the application and enforcement of the provisions of Executive Order 10925, as amended, and of the Rules and Regulations of the President's Committee, the following interpretations are applicable:

(a) "Standard commercial supplies" means an article:

(1) Which in the normal course of business is customarily maintained in stock by the manufacturer or any dealer, distributor, or other commercial dealer for the marketing of such article; or

(2) Which is manufactured and sold by two or more persons for general commercial or industrial use or which is identical in every material respect with an article so manufactured and sold.

(b) A bidder or prospective contractor, and any contractor or subcontractor holding a contract or subcontract containing the Equal Opportunity clause, who owns, operates or controls one or more plants or facilities in addition to those engaged in the performance of work upon such contract or subcontract may request a ruling by the Executive Vice Chairman as to the applicability of the clause to any plant or facility which he deems to be outside the scope of the clause: *Provided*, That such an exemption will not interfere with or impede the effectuation of the purposes of the Executive Orders, and provided that, in the absence of such an exemption all such facilities shall be covered by the provisions of the Executive Orders.

(c) The obligation to include the Equal Opportunity clause exists even though the contract is required to be awarded to the lowest responsible bidder.

(d) The obligation to include the Equal Opportunity clause exists even though the contract is between the Federal Government and a State, or a subdivision or agency thereof.

(e) "Federally-assisted construction contract" means any binding legal agreement or modification thereof between an applicant and a contractor for construction work which is paid for in whole or in part with funds obtained from the Federal Government or borrowed on the credit of the Federal Government pursuant to any Federal program involving a grant, contract, loan, insurance or guarantee, or undertaken pursuant to any Federal program involving such grant, contract, loan, insurance or guarantee; or any approved application or modification thereof for a grant, contract, loan, insurance or guarantee under which the applicant itself performs construction work other than through the permanent work force directly employed by an agency of Government.

(f) "Construction work" means the construction, rehabilitation, alteration, conversion, extension, demolition or repair of buildings, highways or other changes or improvements to real property, including facilities providing utility services.

(g) "Site of construction" means the physical location of any building, highway, or other change or improvement to real property which is undergoing construction, rehabilitation, alteration, conversion, extension, demolition, or repair and any temporary location or facility established by a contractor or subcontractor specifically to meet the demands of his contract or subcontract.

§ 12.806–1 General.

The Secretary of each Department shall be primarily responsible for obtaining compliance with the provisions of the Equal Opportunity clause set forth in § 12.802, and the rules and regulations and orders promulgated by the President's Committee. Each Department shall furnish the Committee such information and assistance as it may require in the performance of its functions under the Executive Order.

§ 12.806–2 Educational responsibility.

(a) Contracting officers and other personnel concerned with procurement shall be apprised of their responsibility in obtaining compliance with the clause.

(b) The Departments shall publicize the equal opportunity policy to prospective bidders and contractors, and shall make available to contractors information concerning their responsibilities under the Equal Opportunity clause.

§ 12.806–3 Posting of notices.

In the case of each contract containing the clause, the contracting officer shall furnish to contractors an appropriate number of copies of the notice entitled "Equal Employment Opportunity" (listed in the GSA Stores Stock Catalog as Item No. 7530–338–5437 for the 12½ x 18¼-inch size, and as Item No. 7530–338–5448 for the 8½ x 12-inch size) and Standard Form 38, entitled "Notice to Labor Unions or Other Organizations of Workers," for notification to labor unions or other organizations of workers. Contracting officers shall obtain these documents in accordance with Departmental procedures; contractors shall obtain from the contracting officers, copies for first-and-other-tier subcontractors as necessary.

§ 12.806–4 Compliance reports.

(a) The contracting officer shall require each contractor having a contract subject to the provisions of Section 301 of Executive Order 10925, as amended, to file, and each contractor shall cause each of his first-tier subcontractors not exempted under the provisions of § 12.803 to file, compliance reports in accordance with instructions attached to the official Compliance Report, Standard Form 40. Subsequent reporting shall be accomplished as indicated in those instructions. Whenever a contractor or subcontractor is currently engaged in the performance of any part or all of another contract or subcontract subject to the Equal Opportunity clause with any Government agency, and has filed within a current reporting period, a compliance report covering the plants, facilities, and activities which will be involved in the performance of a new contract, this requirement shall be satisfied by the filing, with the contracting officer, of the Certificate of Submission of Compliance Report, Standard Form 40–A.

(b) Standard Form 41 (Compliance Report-Construction) is required to be filed by employers subject to the provisions of Executive Order 10925, as amended, not otherwise exempt, who have contracts or subcontracts for construction, repair or alteration in connection with which they perform construction work at the site of construction. The Construction Compliance Report is divided into three parts. Part I pertains to employment at the employer's principal office and branch establishments; while Parts II and III pertain to employment at the site of construction. Prime contractors having

such a contract for $100,000 or more, and any subcontractors having such a contract for $50,000 or more shall file Standard Form 41 in accordance with the instructions attached to the official report forms. Employers having contracts or subcontracts for construction, repair or alteration, or for materials to be used therein, but who themselves perform no construction work at the site of construction, shall not file Standard Form 41, but shall submit Standard Form 40 (Compliance Reports) in accordance with instructions attached thereto. (Note: Standard Form 40 is to be filed with the President's Committee on Equal Employment Opportunity, while Standard Form 41 is to be filed with the contracting agency.) It is the obligation of contractors and subcontractors subject to Executive Order 10925, as amended, to cause all other subcontractors and suppliers subject to the reporting requirements of Standard Form 41 or of Standard Form 40, and performing construction work at the site of construction, or furnishing materials therefor, to file the appropriate report form.

(c) The contracting officer shall furnish the contractor a sufficient number of report forms (Standard Forms 40, 40–A and 41 (Parts I, II and III)) to satisfy the requirements of paragraphs (a) and (b) of this section.

(d) Compliance reports shall be filed at the times specified by the instructions attached to such forms or at such times as may be required by the agency or the Executive Vice Chairman. The designated times for filing compliance reports may be extended with the approval of the Executive Vice Chairman. Requests by contractors or subcontractors for such an extension shall be directed to the contracting officer for forwarding to the Executive Vice Chairman.

(e) The contracting officer shall require any bidder or prospective contractor, or any of their proposed subcontractors, to state as an initial part of the bid or negotiations of the contract whether they have participated in any previous contract or subcontract subject to the provisions of Section 301 of the Executive Order, as amended; and, if so, whether they have filed all required compliance reports. The statement shall be in the form of the following representation which shall be inserted in all solicitations which contain the clause set forth in § 12.802(a) or provided for in § 12.803(a)(8).

> The bidder (or offeror) represents that he [ ] has, [ ] has not, participated in a previous contract or subcontract subject to either the Equal Opportunity clause herein or the clause originally contained in Section 301 of Executive Order 10925; that he [ ] has, [ ] has not, filed all required compliance reports; and that representations indicating submission of required compliance reports, signed by proposed subcontractors will be obtained prior to subcontract awards. (The above representation need not be submitted in connection with contracts or subcontracts which are exempt from the clause.)

(f) In any case in which a bidder or prospective contractor or proposed subcontractor which has participated in a previous contract or subcontract subject to the Equal Opportunity clause has not filed a required compliance report, the contracting officer shall require submission thereof prior to the award of the proposed contract or subcontract. In all other cases, upon the direction of the Executive Vice Chairman, the contracting officer shall require the submission of a compliance report by any bidder or prospective contractor or subcontractor prior to the award of the proposed contractor subcontract. When a determination has been made to award a contract to a specific contractor, such contractor may be required, prior to award, to furnish such other pertinent information regarding its own employment policies and practices as well as of its subcontractors as the Departmental Contracts Compliance Officer or the Executive Vice Chairman may require.

(g) Failure to file timely, complete, and accurate compliance reports as required constitutes noncompliance with the contractor's obligations under the Equal Opportunity clause and is ground for the imposition by the Department or the President's Committee on Equal Employment Opportunity of any of the sanctions available under the Executive Orders.

(h) Whenever directed by the Executive Vice Chairman, the contracting officer will, as a part of the bid or negotiation of a contract, direct a bidder, proposed contractor, or any proposed subcontractor to file a statement in writing (signed by an authorized officer or agent of any labor union or other workers' representative with which the bidder or prospective contractor or subcontractor deals or has reason to believe he will deal in connection with performance of the proposed contract), together with supporting information, to the effect that the said labor union's or other workers' representative's practices and policies do not discriminate on the grounds of race, color, creed or national origin, and that the labor union or other worker's representative either will affirmatively cooperate, within the limits of its legal and contractual authority, in the implementation of the policy and provisions of the Executive Order, as amended, or that it consents and agrees that recruitment, employment, and the terms and conditions of employment under the proposed contract shall be in accordance with the purposes and provisions of the Executive Order, as amended. If the union or other workers' representative fails or refuses to execute such a statement, the bidder or proposed contractor or subcontractor shall so certify, and state what efforts have been made to obtain such a statement. Upon receipt of such certification, the Executive Vice Chairman will be notified. However, nonreceipt of such certification shall not be a ground for withholding an award.

(i) The Departments and the President's Committee on Equal Employment Opportunity shall use compliance reports only in connection with the administration of the Executive Order, as amended, or the furtherance of its purposes.

§ 12.806–5 Compliance review.

(a) Both routine and special compliance reviews shall be conducted to ascertain the extent to which contractors and subcontractors are complying with the provisions of the Equal Opportunity clause and to furnish educational data in connection with the program.

(b) A routine compliance review consists of a general review of the practices of the contractor or subcontractor to ascertain compliance with the requirements of the clause. This type of review shall include a verification that the notices are appropriately posted and that the clause is included in subcontracts where required. A routine compliance review shall be considered a normal part of contract administration.

(c) A special compliance review consists of a comprehensive review of the employment practices of the contractor or subcontractor with respect to the requirements of the clause. In addition to discussions with management, personnel conducting special compliance reviews should, when appropriate, discuss the contractor's or subcontractor's employment practices with employment sources, minority groups, and interested civic groups. Special compliance reviews shall be conducted (1) from time to time, (2) when special circumstances, including complaints which are processed under § 12.806–6 warrant, and (3) when requested by proper authority. The Department shall report the results of any special compliance reviews to the Executive Vice Chairman in accordance with departmental procedures.

§ 12.806–6 Complaints.

(a) Complaints may be submitted in writing to the President's Committee, the Secretary of Defense, or the Departments. The Departments will investigate promptly complaints based upon alleged non-compliance with the provisions of the Equal Opportunity clause. Where a complaint is filed directly with a Department, it will be forwarded to the Departmental Contracts Compliance Officer, who will transmit a copy of the complaint directly to the Executive Vice Chairman within ten days after receipt thereof. The Department shall proceed with a prompt investigation of the complaint, provided the complaint is submitted not later than 90 days from the date of the alleged discrimination, unless the time is extended by the Department or the Executive Vice Chairman for good cause shown.

(b) Complaints will be required to be signed by the complainants or their authorized representatives and to contain the following information:

(1) Name and address (including telephone number) of the complainant;

(2) Name and address of the contractor or subcontractor who committed the alleged act of discrimination;

(3) A description of the act or acts considered to be discriminatory; and

(4) Other pertinent information which will assist in the investigation and resolution of the complaint.

(c) Where a complaint contains incomplete information, the Department will request promptly the needed information from the complainant. In the event such information is not furnished within 60 days of the date of such request, the case may be closed.

§ 12.806–7 Processing of complaints.

Complaints submitted or referred to a Department and determined to involve a Government contract or subcontract and matters involving possible violations of the Equal Opportunity clause as indicated by a compliance review, report, or other procedure, shall be processed in accordance with Departmental procedures which will assure:

(a) Prompt investigation of complaints, and, as necessary, of other indications of possible violations of the Equal Opportunity clause, and the development of a complete case record. Such investigations should include, where necessary, (1) a review of the pertinent personnel practice of the contractor or subcontractor concerned, (2) the circumstance under which the discriminatory action is alleged to have taken place, and (3) other factors which may determine whether the contractor or subcontractor in the particular case complied with the provisions of the Equal Opportunity clause set forth in the contract or subcontract concerned;

(b) Resolution of complaints by conciliatory means whenever possible;

(c) With respect to the investigation of a complaint, the preparation and submission, within 60 days from receipt of the complaint by the Department, or within such additional time as may be allowed by the Executive Vice Chairman for good cause shown, of a case record and a summary report to the Executive Vice Chairman. The summary report shall set forth (1) the name and address of the complainant, (2) a brief summary of the findings including a statement as to the Department's conclusions regarding the contractor's compliance or noncompliance with the requirements of Executive Order 10925 dated 6 March 1961, as amended, (3) a statement of the disposition of the case, including any corrective action taken or sanction imposed, or (4) whenever appropriate, the recommended corrective action and sanctions or penalties;

(d) With respect to the investigation of a matter other than a complaint, the preparation and submission of a summary report containing the information required by paragraph (c) (1), (2), (3) and (4) of this section.

(e) Prompt notification to the complainant, if any, and appropriate contractor or subcontractor, of the closing of the case in those cases wherein the investigative findings by the Department concerned, upon review and concurrence by the Executive Vice Chairman, show no violation of the Equal Opportunity clause; and

(f) Further investigation, as requested, when the Executive Vice Chairman does not concur in the findings of the Department.

§ 12.806–8 Sanctions.

(a) *General.* In every case where investigation indicates the existence of an apparent violation of the provisions of the clause, the matter should be resolved by informal means whenever possible. This will include, where appropriate, establishing a program for future compliance approved by the Secretary of the Department. If a contractor or subcontractor, without a hearing, has complied with the recommendations or orders of a Department and believes such orders or recommendations to be erroneous, he shall upon filing a request therefor within 10 days of such compliance be afforded an opportunity for a hearing and review of the alleged erroneous action under § 12.808.

(b) *Termination.* No contract or subcontract will be terminated in whole or in part for failure to comply with the provisions of the Equal Opportunity clause, without the approval of the Secretary. Whenever it is proposed to terminate a contract or a subcontract, the contractor or subcontractor will be notified in writing of such proposed action and given ten days (or such longer period as the Secretary may consider appropriate) from the receipt of the notice either to comply with the provisions of the contract or to mail a request for a hearing under § 12.808.

(c) *Debarment and suspension.* No contractor or subcontractor will be debarred or suspended from receiving Government contracts for failure to comply with the provisions of the clause except under the recommendations of the Secretary and the approval of the Executive Vice Chairman. In every case where debarment or suspension is being proposed, the contractor or subcontractor will be notified by the Secretary in writing, of the proposed recommendation and given 10 days from the receipt of such notice in which to mail a request for a hearing under § 12.808 or for one before the President's Committee.

(d) *Referral to the Department of Justice.* Each Department, after coordination with the Assistant Secretary of Defense (Manpower), and with the approval of the Executive Vice Chairman, may recommend to the Department of Justice that, in cases where there is substantial or material violation or the threat of substantial or material violation of the provisions set forth in § 12.802, appropriate proceedings be brought to enforce those provisions, including the enjoining, within the limitations of applicable law, of organizations, individuals, or groups which prevent directly or indirectly, compliance with the aforesaid provisions: *Provided, however*, That no such case shall be referred to the Department of Justice until the expiration of 10 days (unless a longer period is fixed by the Department) from the mailing of notice of such proposed referral by the Department to the contractor or subcontractor involved, affording him an opportunity to comply with the provisions of the Executive order, as amended. The Department may also recommend to the Department of Justice that criminal proceedings be brought for the furnishing of false information to the Department.

41. Sections 12.808–1(a) and 12.808–2 are revised; in § 12.809, paragraph (b) is revised and paragraph (c) is revoked; new § 12.810 is added; Subpart I is revised; and Subpart J is revoked, as follows:

§ 12.808–1 General.

* * * * *

(a) A contractor or subcontractor who has complied with the recommendations or orders of the Department, but believes such recommendations or orders to be erroneous, and requests a hearing thereon within 10 days of such compliance; or

* * * * *

§ 12.808–2 Delegation of authority.

The Secretary may delegate to any person, military or civilian, or board of such persons within his department, all the authority of the Secretary conferred by the Executive order, as amended, or the rules and regulations of the President's Committee to give notice of hearings, to conduct hearings, and to make findings of fact and recommendations with respect to determining whether a contractor or subcontractor is or has been in violation of the contract clause. If the Secretary delegates his authority to a board, one of the members thereof shall be a person trained in the law, and the Secretary shall designate one member to be the presiding officer of the board.

§ 12.809 Certificates of merit.

* * * * *

(b) *Suspension or revocation.* The Committee, acting through the Chairman or Vice Chairman, may at any time review the continued entitlement of any employer or employee organization to a Certificate of Merit, and may suspend or revoke the Certificate.

(c) [Revoked]

§ 12.810 Solicitations or advertisements for employees.

In solicitations or advertisements for employees placed by or on behalf of a contractor or subcontractor, the requirements of paragraph (b) of the Equal Opportunity clause shall be satisfied whenever the contractor or subcontractor complies with any of the following:

(a) States expressly in the solicitations or advertising that all qualified applicants will receive consideration for employment without regard to race, creed, color, or national origin;

(b) Uses display or other advertising, and the advertising includes an appropriate insignia prescribed by the Committee. The use of the insignia is considered subject to the provisions of 18 U.S.C. 701;

(c) Uses a single advertisement, and the advertisement is grouped with other advertisements under a caption which clearly states that all employers in the group assure all qualified applicants equal consideration for employment without regard to race, creed, color, or national origin;

(d) Uses a single advertisement in which appears in clearly distinguishable type the phrase "an equal opportunity employer."

Subpart I—Nondiscrimination Because of Age

§ 12.901 **Policy regarding nondiscrimination because of age.**

It is the policy of the Executive Branch of the Government (a) that contractors and subcontractors engaged in the performance of Federal contracts shall not, in connection with the employment, advancement, or discharge of employees or in connection with the terms, conditions, or privileges of their employment, discriminate against persons because of their age except upon the basis of a bona fide occupational qualification, retirement plan, or statutory requirement; and (b) that contractors and subcontractors, or persons acting on their behalf, shall not specify, in solicitations or advertisements for employees to work on Government contracts, a maximum age limit for such employment unless the specified maximum age limit is based upon a bona fide occupational qualification, retirement plan, or statutory requirement. This policy is stated in Executive Order No. 11141 dated February 12, 1964. Any complaint regarding a concern's compliance with the foregoing policy should be brought to the attention of the concern by a communication (in writing, if appropriate) which states the policy, indicates that the concern's compliance with the policy has been questioned, and requests that the concern take any appropriate steps which may be necessary to comply with the policy.

Subpart J—Nondiscrimination Because of Age [Revoked]

PART 13—GOVERNMENT PROPERTY

42. In § 13.702(a), clause paragraph (c) is revised; in § 13.704, clause paragraph (f)(iii) is revised; and in § 13.705, the clause heading and clause paragraph (a) are revised, as follows:

§ 13.702 **Government property clause for fixed-price contracts.**

(a) * * *

GOVERNMENT PROPERTY (FIXED-PRICE) (NOV. 1964)

* * * * *

(c) *Title.* Title to all property furnished by the Government shall remain in the Government. In order to define the obligations of the parties under this clause, title to each item of facilities, special test equipment, and special tooling (other than that subject to a "Special Tooling" clause) acquired by the Contractor for the Government pursuant to this contract shall pass to and vest in the Government when its use in the performance of this contract commences, or upon payment therefor by the Government, whichever is earlier, whether or not title previously vested. All Government-furnished property, together with all property acquired by the Contractor title to which vests in the Government under this paragraph, is subject to the provisions of this clause and is hereinafter collectively referred to as "Government property". Title to Government property shall not be affected by the incorporation or attachment thereof to any property not owned by the Government, nor shall such Government property, or any part thereof, be or become a fixture or lose its identity as personalty by reason of affixation to any realty.

* * * * *

§ 13.704 **Special tooling clause for fixed-price contracts.**

* * * * *

SPECIAL TOOLING (NOV. 1964)

* * * * *

(f) *Disposition of special tooling.* * * *

(iii) A direction to the contractor to sell, or to dispose of as scrap, for the account of the Government, any or all of the special tooling covered by such list;

* * * * *

§ 13.705 **Special test equipment clause for negotiated contracts.**

* * * * *

SPECIAL TEST EQUIPMENT (DECEMBER 1964)

(a) *Definition.* Special test equipment means electrical, electronic, hydraulic, pneumatic, mechanical or other items or assemblies of equipment, which are of such a specialized nature that, without modification or alteration, the use of such items (if they are to be used separately) or assemblies is limited to testing in the development or production of particular supplies or parts thereof, or in the performance of particular services. The term "special test equipment" includes all components of any assemblies of such equipment, but does not include:

(i) consumable property;

(ii) special tooling; or

(iii) buildings, nonseverable structures (except foundations and similar improvements necessary for the installation of special test equipment, general or special machine tools, or similar capital items).

* * * * *

PART 15—CONTRACT COST PRINCIPLES AND PROCEDURES

43. Section 15.205–6(b) is revised and § 15.205–25 is revoked, as follows:

§ 15.205–6 **Compensation for personal services.**

* * * * *

(b) *Salaries and wages.* Salaries and wages for current services include gross compensation paid to employees in the form of cash, products, or services, and are allowable.

* * * * *

§ 15.205–25 **Overtime premiums. [Revoked]**

PART 16—PROCUREMENT FORMS

44. Paragraph (e) of § 16.101–2 is revoked; paragraph (e) of § 16.102–2 is revoked; § 16.201–2 is revised; in § 16.202, subdivision (xiii) is added to paragraph (b)(2) and paragraph (c) is revised; and § 16.203–2(d) is revised, as follows:

§ 16.101–2 **Conditions for use.**

* * * * *

(e) [Revoked]

§ 16.102–2 **Conditions for use.**

* * * * *

(e) [Revoked]

§ 16.201–2 **Conditions for use.**

Standard Form 18 is authorized for use when it appears reasonably certain that the procurement will be consummated by (a) a fixed-price type contract involving extensive negotiation or, (b) a cost-reimbursement type contract. Standard Form 36 (Continuation Sheet), or DD Form 1155c (Continuation Sheet) may be used as required. Standard Form 18 may be used for negotiated procurements in excess of $2,500 and shall be used for negotiated procurements of $2,500 or less (including purchase orders) when written solicitations (other than by telegram) of quotations are used (see § 3.604 of this chapter). Two copies of Standard Form 18 shall be sent to each prospective supplier and he shall be requested to return only one signed copy. A quotation submitted on this form is not to be construed as an offer which can be accepted by the Government to form a binding contract. Therefore, issuance by the Government of a purchase order pursuant to a supplier's quotation does not constitute a contract, but the purchase order is an offer by the Government to the supplier to buy certain goods or services upon specified terms and conditions.

§ 16.202 **Negotiated Contract Forms (DD Forms 1261 and 1270).**

* * * * *

(b) * * *

(2) * * *

(xiii) Where Government property having an acquisition cost of more than $25,000 is to be furnished, the Government Property (Fixed-Price) clause in § 13.702 of this chapter shall be inserted in the Schedule; and where Government property having an acquisition cost of $25,000 or less is to be furnished, the Government-Furnished Property (Short Form) clause in § 13.710 of this chapter shall be inserted in the Schedule.

(c) *Long form negotiated supply contracts.* (1) Except as provided in paragraphs (a)(3) and (b) of this section, DD Form 1261 (Negotiated Contract) shall be used with Standard Form 32 (General Provisions (Supply Contract)), any other forms containing contract provisions which are prescribed by this subchapter or Departmental procedures, and Standard Form 36 (Continuation Sheet) for entering into negotiated fixed-price type supply contracts to which Subpart A, Part 12 of this chapter, is applicable.

(2) Except as provided in paragraph (a)(3) of this section, DD Form 1261 (Negotiated Contract) shall be used with DD–ASPR Form 748 (General Provisions-Cost-Reimbursement Supply Contracts, any other forms containing contract provisions which are prescribed by this subchapter or Departmental procedures, and Standard From 36 (Continuation Sheet) for entering into negotiated cost-reimbursement type contracts to which Subpart B, Part 12 of this chapter, is applicable.

* * * * *

§ 16.203–2 **Conditions for use.**

* * * * *

(d) Standard Form 32, if applicable, and any other general provisions may be attached to each copy of the Request for Proposals. Alternatively, one copy only of Standard Form 32 and any other general provisions need be furnished to

each supplier, for retention, if such provisions are specifically incorporated by reference, including each form name, number and date, in DD Form 746–1. Provisions which are inapplicable to a particular procurement, or to military procurements generally, may be deleted by appropriate reference in an "Alterations in Contract" clause.

* * * * *

45. Section 16.204 is revised; new §§ 16.204–1 and 16.204–2 are added; §§ 16.301, 16.302, and 16.303 are revised; §§ 16.303–1 and 16.303–2 are revoked; and § 16.304 is revised, as follows:

§ 16.204 General provisions—cost reimbursement supply contracts (DD–ASPR Form 748).

§ 16.204–1 Conditions for use.

DD–ASPR Form 748 shall be used in conjunction with any negotiated contract to be performed within the United States, its possessions or Puerto Rico and to which Subpart B, Part 12 of this chapter, is applicable. It may be used in conjunction with cost-sharing and cost-plus-incentive-fee contracts only when appropriately modified. It contains all of the clauses required by § 7.203 of this chapter and some of the clauses set forth in §§ 7.204 and 7.205. The addition of other clauses set forth in Subpart B, Part 12 of this chapter, or of other clauses not inconsistent with this subchapter shall be accomplished by appending such clauses as "Additional General Provisions", numbered consecutively. The deletion and modification of clauses contained in the form or in the "Additional General Provisions" shall be accomplished by appropriate reference or provision in an "Alterations in Contract" clause. These instructions must be read in conjunction with Subpart B, Part 12 of this chapter, to make certain that current clauses are in use at all times.

§ 16.204–2 Procedures.

DD–ASPR Form 748 and any "Additional General Provisions" may be attached to each copy of the Request for Quotations. Alternatively, only one copy of DD–ASPR Form 748 and any "Additional General Provisions" need be furnished to each offeror, for retention, if such provisions are specifically incorporated by reference, including each form name, number and date, in Standard Form 18. In either case, one copy of DD–ASPR Form 748 and any "Additional General Provisions" shall be attached to each executed contract.

§ 16.301 Receipt for cash—subvoucher (Standard form 1165).

Standard Form 1165 may be used in connection with procurements by the imprest fund (petty cash) method in accordance with § 3.607 of this chapter.

§ 16.302 Purchase order — invoice — voucher (standard form 44).

Standard Form 44 is authorized for use to accomplish small purchases in accordance with § 3.608–8 of this chapter.

§ 16.303 Order for supplies or services (DD Forms 1155, 1155r, 1155c, 1155c–1, and 1155s).

Order for supplies or services, DD Form 1155 series, shall be used to accomplish small purchases in accordance with § 3.608–1 of this chapter.

§ 16.303–1 General. [Revoked]

§ 16.303–2 Conditions for use. [Revoked]

§ 16.304 Blanket purchase order.

See Subpart F, Part 3 of this chapter, and particularly § 3.605.

46. Subpart D is revised to read as follows:

Subpart D—Construction and Architect-Engineer Contract Forms and Formats

Sec.

16.400 Scope of subpart.
16.401 Advertised construction contract forms.
16.401–1 General.
16.401–2 Conditions for use.
16.401–3 Terms, conditions and provisions.
16.402 Negotiated construction contract forms.
16.402–1 General.
16.402–2 Contracts not exceeding $2,000.
16.402–3 Cost-plus-a-fixed-fee contracts.
16.403 Architect-engineer contracts.
16.403–1 General.
16.403–2 Statement of services.
16.403–3 Requirements for registration of designers.
16.403–4 Inspection services.
16.403–5 Lump sum architect-engineer contract format.
16.404 Contracts for dismantling, demolition or removal of improvements.
16.404–1 General.
16.404–2 Contract format.
16.405 Miscellaneous forms.
16.405–1 [Reserved]
16.405–2 Experience data forms.
16.405–3 Contract modification forms.

AUTHORITY: The provisions of this Subpart D issued under sec. 2202, 70 A Stat. 120; 10 U.S.C. 2202. Interpret or apply secs. 2301–2314, 70A Stat. 127–133; 10 U.S.C. 2301–2314.

Subpart D—Construction and Architect-Engineer Contract Forms and Formats

§ 16.400 Scope of subpart.

This subpart prescribes forms and formats for use in construction and architect-engineer contracts and for dismantling, demolition and removal contracts.

§ 16.401 Advertised construction contract forms.

§ 16.401–1 General.

The following forms are prescribed for use in formally advertised construction contracts where the work is to be performed in the United States, its possessions, or Puerto Rico:

(a) Standard Form 19—Invitation, Bid and Award (Construction, Alteration, or Repair). Pending revision of the January 1959 edition of this form, (1) delete clauses 9 and 10 of the General Provisions on the reverse thereof; and (2) substitute the following small business representation for that in the Bid section of the form: "That he [ ] is, [ ] is not, a small business concern. (For this purpose, a small business concern is a business concern, including its affiliates, which (i) is independently owned and operated, (ii) is not dominant in the field of operation in which it is bidding on Government contracts, and (iii) had average annual receipts for the preceding three fiscal years not exceeding $7,500,000. For additional information, see governing regulations of the Small Business Administration.)"

(b) Standard Form 19–A—Labor Standards Provisions—Applicable to Contracts in excess of $2,000.

(c) Standard Form 20—Invitation for Bids (Construction Contract).

(d) Standard Form 21—Bid Form (Construction Contract).

(e) Standard Form 22—Instructions to Bidders (Construction Contract).

(f) Standard Form 23—Construction Contract.

(g) Standard Form 23–A—General Provisions (Construction Contract).

NOTE: The Federal, State, and Local Taxes clause in § 11.401–1 of this chapter shall be used as a part of Standard Form 23–A when that Standard Form is used in any advertised procurement or in any of the other circumstances set forth in § 11.401–1. When a Standard Form 23–A is used in a negotiated fixed-price contract in excess of $10,000 where the contracting officer is not satisfied that the contract price, by virtue of competition or otherwise, excludes contingencies for State and Local taxes, the Federal, State, and Local Taxes clause in § 11.401–2 shall be made a part of the contract.

(h) DD Form 1260—Amendment to Invitation for Bids, on an optional basis.

(i) *Continuation sheet.* There is no prescribed form of Continuation Sheet for construction contracts. A blank sheet, incorporating (1) the contract or invitation number, as appropriate; (2) page number and number of pages; and (3) name of bidder or contractor may be used for this purpose. Standard Form 36, Continuation Sheet (Supply Contract), shall not be used for construction contracts.

§ 16.401–2 Conditions for use.

(a) *Contracts not to exceed $2,000.* Standard Form 19 shall be used for construction contracts not in excess of $2,000 executed as a result of formal advertising. Standard Form 22 also may be used. When the contract may exceed $2,000, the following language shall be inserted in the space provided in the bid portion of Standard Form 19 prior to the issuance of the invitation:

If this bid exceeds $2,000, the bidder shall furnish with his bid a bid guaranty in an amount equal to ____ percent of his bid; failure to submit the guaranty on time is cause for rejection of the bid. The undersigned further agrees, if this bid exceeds $2,000 (i) to comply with the Labor Standards Provisions Applicable to Contracts in Excess of $2,000 (Standard Form 19–A); (ii) to pay not less than the minimum hourly rates of wages set forth in the specifications; (iii) to furnish a performance bond in an amount equal to ____ percent and a payment bond in an amount equal to 50 percent of the contract price with surety or sureties acceptable to the Government; and (iv) to furnish such additional amount of performance and payment bonds as may be required by the Contracting Officer in connection with any increase in the contract price. (January 1965)

When Standard Form 19 is used, progress payments may be made if the period of performance is greater than one month. However, if the period of performance is less than one month or the

total contract amount does not warrant progress payments, a single payment may be made, in which case the contracting officer may indicate completion and final acceptance of the contract work by a stamped and signed statement to that effect on the face of the standard form and forwarding it to the disbursing officer for payment. The following statement may be used for this purpose:

I certify that the work and services furnished hereunder have been completed, inspected, and accepted as conforming to the contract requirements, and the amount is correct and proper for payment.

(Signature and title of certifying officer)

(b) *Contracts estimated to exceed $2,000 but not to exceed $10,000.* Standard Forms 19 and 19–A shall be used for these construction contracts executed as a result of formal advertising. Standard Form 22 also may be used. The additional language set forth in paragraph (a) of this section shall be inserted in the bid portion of Standard Form 19 prior to issuance of the invitation.

(c) *Contracts estimated to exceed $10,000.* Standard Forms 19–A, 20, 21, 22, 23, and 23–A shall be used for these construction contracts executed as a result of formal advertising. Strict compliance with the following instructions is required.

(1) *Standard Form 119–A.* This form shall be attached to the contract file.

(2) *Standard Form 20 (invitation for bids).* Bidders shall be requested to return only two signed copies of their bids. This form shall be completed by inserting the appropriate data on the face of the form. See § 18.202 of this chapter and the following:

(i) *Information regarding bidding material, bid guarantee and bonds.* Insert the following paragraphs on the face of the form:

(A) *Bid bonds.* Each bidder shall submit with his bid a Bid Bond (Standard Form 24) with good and sufficient surety or sureties acceptable to the Government, or other security as provided in paragraph 4 of Instructions to Bidders (Standard Form 22) in the form of twenty percent (20%) of the bid price or $3,000,000 whichever is lesser. The bid bond penalty may be expressed in terms of a percentage of the bid price or may be expressed in dollars and cents.

(B) *Performance and payment bonds.* Within ____ days after the prescribed forms are presented to the bidder to whom award is made for signature, a written contract on the form prescribed by the specifications shall be executed and two bonds, each with good and sufficient surety or sureties acceptable to the Government, furnished; namely a performance bond (Standard Form 25 or 27) and a payment bond (Standard Form 25A or 27A). The penal sums of such bonds will be as follows:

I. *Performance bond.* The penal sum of the performance bond shall equal ____ percent (____ %) of the contract price. (Insert the appropriate percent determined in accordance with the provisions of 10–103.1(a).)

II. *Payment bond.* a. When the contract price is $1,000,000 or less, the penal sum will be fifty percent (50%) of the contract price.

b. When the contract price is in excess of $1,000,000 but not more than $5,000,000, the penal sum shall be forty percent (40%) of the contract price.

c. When the contract price is more than $5,000,000, the penal sum shall be $2,500,000.

Any bonds furnished will be furnished by the contractor to the Government prior to commencement of contract performance.

(ii) *Additional information for bidders.*

(a) Additional information and instructions may be given to bidders by using the reverse side of Standard Form 20 or continuation sheets. If used, the reverse side of Standard Form 20, and each continuation sheet used, shall be headed: "Read the Following in Conjunction With the Instructions to Bidders, Standard Form 22."

(b) When required by the instructions pertaining to the various paragraphs or by the procuring activity, a paragraph shall be inserted advising prospective bidders where complete drawings and specifications may be examined or copies obtained, information as to the charge, if any, to be made for the drawings and specifications, and the conditions under which they may be obtained. If a charge is made for the drawings and specifications the following sentences shall be included: "Payment will be made by cash or check, or money order and delivered to the Finance and Accounting Officer, _____. Checks and money orders should be made payable to 'Treasurer of the United States'."

(c) Paragraph 10 of Standard Form 22, Instructions to Bidders reserves in the Government the right to 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. However, in unit price contracts, although the work is set out in "items" for pay purposes, the nature of the work is not normally such that multiple awards can be made on the basis of such items. Accordingly, for purposes of award, the work should be set up on the basis of such items. Accordingly, for purposes of award, the work should be set up on a basis of schedules, each schedule comprised of a group of items which by their nature must be performed under a single contract. Thus, if the entire project is not susceptible of division among several contractors, the work will be set up as a single schedule. Conversely, if the work is of a nature that lends itself to multiple awards, the items will be grouped in separate and distinct schedules, each capable of being awarded as a separate contract.

(d) Where DD Form 1260, Amendment to Invitation for Bids, is not used, each amendment to an invitation for bids shall contain a statement as follows:

NOTICE: Bidders are required to acknowledge receipt of this amendment on the bid form, in the space provided, or by separate letter or telegram prior to opening of bids. Failure to acknowledge all amendments may cause rejection of the bid.

(3) *Standard Form 21 (Bid Form).* This form shall be furnished to all bidders with the invitation for bids. If the work is divided into separate schedules a bidding schedule showing a breakdown for each such separate schedule should be attached to the invitation for bids and a statement referring thereto made on Standard Form 21.

BIDDING SCHEDULE

(To be attached to bid form when required by the invitation for bids)

Item No.	Description	Estimated quantity	Unit	Unit price	Estimated amount

(The following paragraphs shall be printed on the last page of the bidding schedule immediately below the schedule.)

NOTE: Use additional page if necessary. All extensions of the unit prices shown will be subject to verification by the Government. In case of variation between the unit price and the extension, the unit price will be considered to be the bid.

If a modification to a bid based on unit prices is submitted, which provides for a lump sum adjustment to the total estimated cost, the application of the lump sum adjustment to each unit price in the bid schedule must be stated. If it is not stated, the bidder agrees that the lump sum adjustment shall be applied on a pro rata basis to every unit price in the bid schedule.

(4) *Standard Form 22 (Instructions to Bidders).* A copy of this form should accompany each invitation for bids for the information of bidders.

(5) *Standard Form 23 (Construction Contract).* A copy of this form should be furnished bidders with the invitation for bids for information. The form shall be completed after award to the acceptable bidder and executed by the parties as the formal contract instrument.

(6) *Standard Form 23–A (General Provisions).* Additional general provisions or modifications to the General Provisions as authorized in Subpart F, Part 7 of this chapter, may be added to this form. Standard Form 23–A with any additional sheets necessary shall be attached to the executed contract.

(7) *Specifications.* Specifications consisting of technical and special provisions pertinent to the particular contract and contract drawings shall be attached to the above standard forms to complete the contract.

§ 16.401–3 Terms, conditions and provisions.

(a) The use of additional contract provisions consistent with those contained in the above forms is authorized, and, where required elsewhere in this subchapter, the use of such additional provisions is mandatory.

(b) Changes or additional provisions inconsistent with those contained in the standard forms shall be incorporated when required by this subchapter, and may be incorporated when authorized by this subchapter, or when approved pursuant to § 1.109 of this chapter. A copy of any such approval pursuant to § 1.109–2 shall be forwarded by the approving authority to the General Services Administration.

(c) The provisions of paragraphs (a) and (b) of this section shall not be con-

strued to authorize the reinstatement in Standard Form 19 of clauses which appear in Standard Form 23–A and which have either been condensed or omitted in the development of Standard Form 19 in the interests of simplification and uniformity. Where such reinstatement is deemed essential, the matter shall be handled as a deviation as provided in § 1.109 of this chapter. Deviations are not required for the use with Standard Form 19 of clauses which, although not properly a part of Standard Form 23–A may accompany it when printed for use within the Department of Defense (e.g., "Termination for Convenience of the Government" and "Gratuities").

(d) The "Disputes" clause of Standard Form 19 may be altered by inserting in the schedule or in the specifications, the following:

Alterations. As used in the "Disputes" clause of the General Provisions "head of the Federal Agency" means the "Secretary" of the (insert name of Military Department). (August 1959)

(e) During a period of national emeragency, paragraph (d) (1) of the "Termination for Default—Damages for Delay—Time Extensions" clause of Standard Form 23–A may be changed 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".

(f) Deletion or modification of provisions in the above forms shall be accomplished in the "Alterations" paragraph of Standard Form 23, or in an "Alterations" paragraph added in the schedule of Standard Form 19, or in the specifications, as may be appropriate.

(g) Whenever Standard Forms 19 and 19–A are used for formally advertised contracts the clause entitled "Covenant Against Contingent Fees" need not be included.

§ 16.402 Negotiated construction contract forms.

§ 16.402–1 General.

Use of the forms prescribed in § 16.401 is optional for negotiated construction contracts. When used for negotiated contracts, the forms shall be adapted by lining out or obliterating the words "sealed" and "publicly opened" and adding language to (a) indicate the authority for negotiation, and (b) provide that wherever the words "invitation" and "bid" occur they shall be deemed to refer to "solicitation" and "offer", respectively. The appropriate clauses required for negotiated contracts shall be added to the contract forms. For example, the "Examination of Records" clause § 7.104–15 of this chapter, must be added if the negotiated contract exceeds $2,500.

§ 16.402–2 Contracts not exceeding $2,000.

When procurements are negotiated in accordance with § 18.302 of this chapter, either DD Form 1155 or Standard Form 19 shall be used with the appropriate changes indicated in § 16.402–1.

§ 16.402–3 Cost-plus-a-fixed-fee contracts.

When the use of a cost-plus-a-fixed-fee contract is authorized (§ 18.112 of this chapter) and the appropriate determination has been made (§ 3.405 of this chapter), the format below shall be used, together with the clauses required by §§ 7.605 and 7.606 of this chapter. If the work is to be performed outside the United States, its possessions or Puerto Rico, such contract clauses shall be deleted or modified as necessary to reflect statutory requirements, agreements between the United States and the host foreign country, and agreements between the parties. For labor requirements applicable to overseas contracts, see § 12.403–3 of this chapter.

Contract _____
(Negotiated)

COST-PLUS-A-FIXED-FEE CONSTRUCTION CONTRACT
DEPARTMENT OF THE _____

Contractor and address _____
Contract for construction of _____
Location _____
Fixed fee _____
Estimated construction cost _____
Exclusive of fixed fee _____
Payment:
To be made by _____
At _____

The supplies and services to be obtained by this instrument are authorized by, are for the purposes set forth in, and are chargeable to the following procurement authorities, the available balances of which are sufficient to cover the cost of the same:

This contract is negotiated pursuant to:

COST-PLUS-A-FIXED-FEE CONSTRUCTION CONTRACT

This contract, entered into this _____ day of _____, 19__, by the United States of America (hereinafter called the Government), represented by the Contracting Officer executing this contract, and

*A joint venture consisting of _____.
*_____ a corporation organized and existing under the laws of the State of _____.
*A partnership consisting of _____.
*An individual trading as _____ in the City of _____ in the State of _____ (hereinafter called the Contractor).

In witness whereof, the parties hereto have executed this contract as of the day and year first above written.

UNITED STATES OF AMERICA
By _____
_____
(Title)
_____
(Contractor)
By _____
_____
(Title)

*Delete all lines which do not apply.

§ 16.403 Architect-engineer contracts.

§ 16.403–1 General.

Architect-Engineer services are professional services for the production of designs, plans, drawings, and specifications, from which the construction of a project will be accomplished. This phase of architect-engineer work is subject to statutory limitations as to the amount to be paid. Supervision and inspection services during construction may also be procured as a part of the professional services furnished by architect-engineers.

§ 16.403–2 Statement of services.

The services to be furnished by an architect-engineer should be carefully defined during negotiation of the contract and a statement of such services inserted in clause 2, under Title I of the following format in § 16.403–5. The statement should clearly state the nature and extent of the services in a concise form and include any special services such as the nature and extent of sub-surface exploration prior to designing foundations, etc., under Title I. A similar statement of services should be prepared for inclusion in clause 6 under Title II of the format if the optional supervision and inspection services are desired.

§ 16.403–3 Requirements for registration of designers.

The clause in the format, entitled "Requirements for Registration of Designers", may be deleted in any contract (a) where the design is to be performed outside the United States, its possessions, or Puerto Rico, or (b) where the design is to be performed in a State or possession which does not have registration requirements for the particular field involved.

§ 16.403–4 Inspection services.

(Title II of the format in § 16.403–5.) These services are on an optional basis. If at the time the contract is negotiated it is known that supervision and inspection by the architect-engineer will not be required, this title should be omitted entirely.

§ 16.403–5 Lump sum architect-engineer contract format.

A format for architect-engineer contracts is set forth below. It should be used with the appropriate contract clauses set forth in § 7.607 of this chapter.

LUMP SUM ARCHITECT-ENGINEER CONTRACT

Contract _____

LUMP SUM CONTRACT FOR ARCHITECT-ENGINEER SERVICES WITH OPTIONAL SUPERVISION

Department of the _____
Architect-engineer and address _____
Services in connection with _____
Location _____
Amount:
For Title I $_____
For Title II $_____
Payment:
To be made by _____
At _____

The supplies and services to be obtained by this instrument are authorized by, are for the purposes set forth in, and are chargeable to the following allotments, the available balances of which are sufficient to cover the cost of same:

This contract was negotiated under and is authorized by the following laws:

This contract, entered into this _____ day of _____ 19__, by the United States of America (hereinafter called "The Govern-

ment") represented by the Contracting Officer executing this Contract, and

*A Joint Venture consisting of _____

*_____ a corporation organized and existing under the laws of the State of _____

_____

*A partnership consisting of _____

*An individual trading as _____

in the city of _____

in the State of _____

(hereinafter called the "Architect-Engineer"), Witnesseth that:

Whereas, the Government desires to engage the Architect-Engineer to render services as hereinafter set forth for the preparation of necessary reports, designs, drawings, specifications, and other documents pertaining to facilities estimated to cost approximately _____ dollars; and, at the option of the Government, to furnish technical supervision of the construction of the project described in Title I, Clause 1 hereof;

Now, therefore, the parties hereto do mutually agree as follows:

*Delete all lines which do not apply.

TITLE I

1. Description of the project.

The Architect-Engineer shall, upon receipt of notice to proceed perform all the services required under this contract for the project generally described as follows: (hereinafter referred to as the "Project") located at or in the vicinity of _____ and more specifically described in Appendix "A" which is attached hereto and made a part hereof.

2. Statement of Architect-Engineer services.

The Architect-Engineer shall perform the following services: (Insert Statement of Work agreed upon during negotiations).

3. Period of service.

The Architect-Engineer shall complete all work and services under Title I of this contract within _____ months after receipt of notice to proceed.

4. Payment.

In consideration of the performance of his undertakings under this Title I, the Architect-Engineer shall be paid the sum of _____ Dollars ($_____), which shall constitute complete payment for all services required to be performed under this Title I and all expenditures which may be made and expenses incurred except as are otherwise expressly provided herein.

5. Requirements for registration of designers.

The design of architectural, structural, mechanical, electrical, civil or other engineering features of the work shall be accomplished or reviewed and approved by architects or engineers registered to practice in the particular professional field involved in a State or possession of the United States, in Puerto Rico, or in the District of Columbia.

TITLE II

At any time prior to six months after satisfactory completion and acceptance of the work to be furnished under Title I the Government at its option, may direct, by a written order, the Architect-Engineer to perform any part or all of the work and services provided under this Title II. Upon receipt of such direction, the Architect-Engineer shall proceed with such work and services.

6. Services to be furnished by Architect-Engineer.

The Architect-Engineer shall perform the following services: (Insert Statement of Work agreed upon during negotiations).

7. Period of service.

The period of service of the Architect-Engineer under Title II of this contract shall be _____ months from receipt of the order to proceed, but the Government may extend such period as provided in the Changes clause of this contract.

8. Payment.

In consideration of the performance of his undertakings under this Title II the Architect-Engineer shall be paid the sum of _____ Dollars ($_____), which shall constitute complete payment for all services required to be performed under this Title II and all expenditures which may be made and expenses incurred except as are otherwise provided herein.

The United States of America, represented by the Contracting Officer executing this contract, and the individual, partnership, joint venture, or corporation named above, mutually agree to perform this contract in strict accordance with the above conditions and with the General Provisions of this contract.

In witness whereof, the parties hereto have executed this contract as of the day and year first above written:

UNITED STATES OF AMERICA

By _____
(Contracting Officer)

_____
(Architect-Engineer)

By _____

_____
(Title)

§ 16.404 Contracts for dismantling, demolition or removal of improvements.

The format in § 16.404–2 shall be used in contracting for the dismantling, demolition or removal of improvements. It shall be completed in accordance with the following instructions and shall contain the clauses set forth below.

§ 16.404–1 General.

(a) The provisions of the Davis-Bacon Act relating to the predetermination of minimum wages for mechanics and laborers does not apply to contracts for dismantling, demolition or removal of improvements.

(b) The format set forth in § 16.404–2 contains alternate provisions regarding payment for the work to be performed. The first alternate covers a situation when the Government is to pay the contractor for the demolition of structures and the conditioning of materials. Normally this provision will be used as it appears in the format. However, if it is determined that all the material resulting from the demolition work is to be retained by the Government and the contractor is to be entirely compensated by payments received under the contract, subparagraph (b) of the first alternate provisions shall be deleted. The second alternate covers the situation under which the contractor will pay to the Government compensation in consideration of the right to salvage and remove, for his own use, the materials resulting from the demolition operation. The contracting officer should carefully consider the usefulness of salvageable property to the Government. Any items more useful to the Government than the value to the Contractor as salvage should be expressly designated for retention by the Government. Title to any property not specifically designated for retention by the Government will vest in the contractor.

(c) The provisions of the Miller Act regarding performance and payment bonds do not apply to contracts for dismantling, demolition or removal of improvements. The contractor, however, shall be required to furnish a performance bond in a penal amount deemed adequate to assure completion of the work and to protect the Government against damage to adjoining property during its performance, irrespective of the fact that complete payment under the contract may be made to the Government by the Contractor prior to inception of the work. The amount shall be determined in advance of bidding and shall be set forth in the invitation for bids.

(d) In special circumstances where it will be advantageous to the Government, the payment provision, Alternate 2, may be modified to provide for payments by the Contractor to the Government in increments and for transfer of title to the contractor for increments of property only upon receipt of such payment.

(e) A copy of the contract format shall be furnished to bidders with the invitation for bids.

§ 16.404–2 Contract format.

Contract No. _____

CONTRACT FOR DISMANTLING, DEMOLITION OR REMOVAL OF IMPROVEMENTS

DEPARTMENT OF _____

Contractor and address _____
Contract for _____
Location _____

*Payment will be made to:	*Payment will be made by:
_____	_____
_____	Appropriation data:
_____	_____
_____	_____

This Contract, entered into this _____ day of _____ 19__, by the United States of America (hereinafter called the Government), and

**a joint venture consisting of _____

**_____, a corporation organized and existing under the laws of the State of _____,

**a partnership consisting of _____,

**an individual trading as _____

of the city of _____

_____ in the State of _____

(hereinafter called the Contractor).

1. *Statement of Work.*

(a) The Contractor shall furnish all labor, material and equipment and perform all work required for the dismantling, demolition and removal, or both, of (identify property).

(b) The work shall be commenced _____ and shall be completed not later than _____.

(c) A performance bond in the penal sum of _____ dollars ($_____) shall be furnished by the Contractor.

(d) All property retained by the Government will be conditioned, handled and stored by the Contractor in such manner and place as prescribed in the specifications.

2. *Payments.* (Alternate 1 shall apply unless otherwise specified in the Schedule)

*Delete inapplicable phrase.

**Delete all lines which do not apply.

ALTERNATE 1. PAYMENT BY GOVERNMENT TO CONTRACTOR (JANUARY 1965)

(a) In (full) (part) (delete one) consideration of the performance of the work called for in the Statement of Work, the Government will pay to the Contractor _____ (words) _____ _____(figures)_____. Unless otherwise provided in the specifications, progress payments will be made monthly as the work proceeds, or at more frequent intervals as determined by the Contracting Officer, on estimates approved by the Contracting Officer. 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. Furthermore, on completion and acceptance of each separate unit 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.

*(b) In further consideration of the faithful performance hereof, the Contractor shall receive title to all property to be demolished which is not specifically designated as being retained by the Government, said title to vest in the Contractor immediately upon the Contractor's receipt of the notice of award and furnishing of performance bond. The Government will not be responsible for the condition of or any loss or damage to such property from any cause whatsoever. In the event the Contractor does not wish to remove from the site any part of the property he has acquired hereunder, the Contracting Officer may, upon written request, grant the Contractor permission to leave such property on the premises. The Contractor agrees as a condition of the granting of such permission to waive any right, title, claim or interest in and to such property.

(c) Upon completion and acceptance of all work required hereunder, final payment of the amount due the Contractor under this contract will be made upon the presentation of a properly executed and duly certified voucher therefor, and in addition, if requested, a release of all claims against the Government arising under and by virtue of this contract, other than such claims, if any, in stated amounts as may be specifically excepted by the Contractor from the operation of the release.

*Delete, if inapplicable.

ALTERNATE 2. PAYMENT BY CONTRACTOR TO GOVERNMENT (JANUARY 1965)

(a) The Contractor shall receive title to all property covered by this contract not specifically designated in the specifications as being retained by the Government, said title to vest in the Contractor immediately upon receipt of the notice of award and furnishing of performance bond. The Government will not be responsible for the condition of or any loss or damage to such property from any cause whatsoever. All property acquired by the Contractor hereunder shall be removed from the site by the Contractor promptly, as the storage of such property on the site will not be permitted beyond the completion date hereof. In the event the Contractor does not wish to remove from the site any part of the property he has acquired hereunder, the Contracting Officer may, upon written request, grant the Contractor permission to leave such property on the premises. The Contractor agrees as a condition of the granting of such permission to waive any right, title, claim or interest in and to such property.

(b) The Contractor shall perform the work called for in Clause 1 and, unless otherwise provided in the specifications, within _____ days of the receipt of notice of award and before proceeding with demolition, shall pay _____(words)_____ _____(figures)_____. Checks shall be made payable to the Treasurer of the United States and shall be forwarded to the Contracting Officer.

3. *Specifications and Drawings.* (Insert the clause set forth in 7-602.2.)

4. *Changes.* (Insert the clause set forth in 7-602.3.)

5. *Termination for Default—Damages for Delay—Time Extensions.* (Insert the clause set forth in 8-709.)

6. *Termination for Convenience of the Government.* (In accordance with 8-701 (a) and (c), insert the termination clause in contracts exceeding $10,000 in value. In contracts not exceeding $10,000 the clause in 8-705.2 may be inserted.)

7. *Disputes.* (Insert the appropriate clause set forth in 7-602.6.)

8. *Assignment of Claims.* (Insert the clause set forth in 7-602.8.)

9. *Workmanship.*

WORKMANSHIP (JANUARY 1965)

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.* (Insert the clause set forth in 7-602.11.)

11. *Superintendence by Contractor.* (Insert the clause set forth in 7-602.12.)

12. *Permits and Responsibilities.* (Insert the clause set forth in 7-602.13 except the last sentence shall be omitted.)

13. *Conditions Affecting the Work.* (Insert the clause set forth in 7-602.14.)

14. *Other Contracts.* (Insert the clause set forth in 7-602.15.)

15. *Gratuities.* (In accordance with 7-104.16 insert the contract clause set forth therein.)

16. *Additional Bond Security.* (Insert the clause set forth in 7-103.9.)

17. *Covenant Against Contingent Fees.* (Insert the clause set forth in 7-103.20.)

18. *Officials Not to Benefit.* (Insert the clause set forth in 7-602.19.)

19. *Contract Work Hours Standards Act—Overtime Compensation.* (Insert the clause set forth in 12-403.1(2).)

20. *Convict Labor.* (Insert the clause set forth in 12-203.)

21. *Equal Opportunity.* (In accordance with 12-802, insert the contract clause set forth therein.)

22. *Federal, State and Local Taxes.* (Insert the clause set forth in 11-401.1.)

23. *Liability for Government Retained Property.*

LIABILITY FOR GOVERNMENT RETAINED PROPERTY (JANUARY 1965)

As to items of property, title to which remains in the Government and which are to be delivered to the Government by the Contractor in the performance of the work, the Contractor assumes the risk of and shall be responsible for any loss thereof or damage thereto except for reasonable wear and tear incident to removal and delivery to the Government.

24. *Site Investigation.* (Insert the clause set forth in 7-602.33.)

25. *Operation and Storage Area.* (Insert the clause set forth in 7-602.35.)

26. *Cleaning Up.* (Insert the clause set forth in 7-602.40.)

27. *Accident Prevention.* (Insert the clause set forth in 7-602.42.)

28. *Availability of Utility Services.* (Insert the clause set forth in 7-603.30.)

29. *Misplaced Material.* (If the contract involves work on or adjacent to a navigable stream, insert the clause set forth in 7-603.32.)

30. *Signal Lights.* (If the contract involves the use of marine equipment, insert the clause set forth in 7-603.33.)

31. *Military Security.* (In accordance with 7-104.12, insert the contract clause set forth therein in contracts involving classified facilities except in those contracts to be performed outside the United States, its possessions and Puerto Rico.)

32. *Identification of Employees.* (In accordance with 7-603.34, insert the clause set forth therein where identification is required for security or other reasons.)

33. *Composition of Contractor.* (Insert the clause set forth in 7-602.32.)

34. *Renegotiation.* (In accordance with 7-103.13, insert the appropriate contract clause set forth therein.)

35. *Interest.* (Insert the clause set forth in E-620.)

36. *Definitions.* (Insert the clause set forth in 7-602.1.)

37. *Liquidated Damages.* (Insert the clause set forth in 7-603 39. The rate of liquidated damages will be determined in accordance with 18-113.)

38. *Alterations in Contract.* (Insert the clause set forth in 7-604.1.)

In witness whereof, the parties hereto have executed this contract as of the day and year first above written.

UNITED STATES OF AMERICA

By _____
(Contracting Officer)

_____
(Contractor)

By _____

_____
(Title)

§ 16.405 Miscellaneous forms.

§ 16.405-1 [Reserved]

§ 16.405-2 Experience data forms.

(a) U.S. Government Architect-Engineer Questionnaire (Standard Form 251, June 1961 Edition). This form is designed to assure the uniform submission of experience and organizational data by Architect-Engineer firms and shall be used in lieu of any corresponding Departmental form.

(b) Construction Contractor Experience Data (DD Form 1072). This form is designed to assure the uniform submission of experience and organizational data by construction contractors and shall be used in lieu of any corresponding Departmental form.

§ 16.405-3 Contract modification forms.

(a) *Modifications pursuant to provisions of contract.* Modifications affecting the price or time for performance of a construction contract may be made pursuant to the "Changes", "Changed Conditions" and "Termination for Default—Damages for Delay—Time Extensions" clauses of the contract. Although such modifications may be issued unilaterally by the contracting officer, usually an agreement with the contractor is obtained prior to the issuance of the formal contract modification. Where such agreement is had, the following format shall be used:

CHANGE ORDER

_____
(Name of Contractor)

_____
(Address)

Contract No. _____
Modification No. _____
Date _____
Page No. 1—No. of Pages _____

Gentlemen:

Reference is made to clause _____ of your contract No. _____ dated _____ 19__.

It has been determined that, in view of (here state reason for proposed modification e.g., reasons for changes, existence of changed conditions, causes of delay and excusability), it is in the best interests of the Government to modify this contract. (If the modification is pursuant to the "Changes" clause, set forth the details of the change.)

It is understood and agreed that, pursuant to the above, the time for performance is increased (state the extension definitely) /is

decreased (state the decrease definitely)/ remains unchanged, and that the contract price is increased (state the increase definitely)/ is decreased (state the decrease definitely)/remains unchanged.

Except as hereby modified, all terms and conditions of said contract as heretofore modified remain unchanged and in full force and effect.

If the foregoing modification of said contract is satisfactory, please indicate your acceptance thereof in the space provided below and return the original and one copy to this office (Attention: _____). The triplicate copy is for your records.

UNITED STATES OF AMERICA
By _____
(Contracting Officer)

The foregoing modification of said contract is hereby accepted.

_____
(Name of Contractor)
By _____
(Title)

(b) *Supplemental agreements.* DD Form 1330 shall be used to formalize contract modifications providing for work not within the scope of the contract except that provision will be made for consent of surety as follows:

CONSENT OF SURETY

Consent of surety is hereby given to the foregoing supplemental agreement and the surety agrees that its bond or bonds shall apply and extend to the contract as modified or amended thereby. In the presence of:
(SEAL)
_____
(Individual Surety)
(SEAL)
_____
(Individual Surety)
_____
(Corporate Surety)
By _____
_____
(Title)
_____
_____
_____

Attest:
_____
_____

47. Section 16.802 is revised; in § 16.803–1(c) subparagraph (2) is revised and subparagraph (3) is revoked; new § 16.807 is added; §§ 16.814, 16.814–1, and 16.814–2 are revoked; and new paragraph (c) is added to § 16.815–1, as follows:

§ 16.802 Contractor's Statement of Contingent or Other Fees (Standard Form 119).

Standard Form 119 is prescribed for use in accordance with § 1.507 through § 1.510 of this chapter.

§ 16.803–1 Construction contracts.

* * * * *

(c) * * *

(2) A supply of DD Forms 879 may be furnished to the contractors for their use. Forms SOL–184 may be purchased from the Government Printing Office.

(3) [Revoked]

§ 16.807 Document Control Data—R&D (DD Form 1473).

This form shall be used in connection with scientific and technical reports under research and development contracts pursuant to § 4.211 of this chapter.

§ 16.814 Experience data forms. [Revoked]

§ 16.814–1 U.S. Government Architect-Engineer Questionnaire (Standard Form 251, June 1961, Edition). [Revoked]

§ 16.814–2 Construction Contractor Experience Data (DD Form 1072). [Revoked]

§ 16.815–1 Change Order (DD Form 1319).

* * * * *

(c) When used to modify a contract for construction, this form may be altered to provide for the contractor's written acknowledgment of the modification. See § 16.405–3(a) for a format to be used for change orders where the contractor has agreed to the contract modification before issuance of the formal change order or similar modification.

PART 17—EXTRAORDINARY CONTRACTUAL ACTIONS TO FACILITATE THE NATIONAL DEFENSE

48. In § 17.206, paragraphs (f) and (h) are revised; in § 17.207–1, paragraph (a) is revised as follows:

§ 17.206 Contractual requirements.

* * * * *

(f) The contract clause entitled "Equal Opportunity" as set forth in § 12.802 of this chapter, wherever required under Subpart H, Part 12 of this chapter;

* * * * *

(h) If otherwise applicable, the contract clause entitled "Walsh-Healey Public Contracts Act," "Davis-Bacon Act," "Copeland ('Anti-Kickback') Act—Nonrebate of Wages," and "Contract Work Hours Standards Act—Overtime Compensation," as set forth respectively in §§ 12.605 and 12.403 of this chapter.

* * * * *

§ 17.207–1 Filing requests.

* * * * *

(a) In the Army:

Director of Procurement, Office of the Assistant Secretary of the Army (Installations and Logistics), Washington, D.C., 20310;

* * * * *

PART 18—PROCUREMENT OF CONSTRUCTION AND CONTRACTING FOR ARCHITECT-ENGINEER SERVICES

49. A new Part 18 is added, as follows:

Subpart A—General Provisions

Sec.
18.100 Scope of part.
18.101 Definitions.
18.101–1 Construction.
18.101–2 Construction activity.
18.102 Methods of procurement.
18.103 Sources of construction services.
18.104 Subcontracting.
18.105 Time of performance.
18.106 Minimum standards for responsible prospective contractors.
18.107 Mandatory specifications.
18.108 Government estimates.
18.108–1 Construction contracts.
18.108–2 Architect-engineer contracts.
18.109 Disclosure of magnitude of construction projects.
18.110 Statutory cost limitations.
18.111 Expediting construction contracts.
18.112 Cost-plus-a-fixed-fee contracts.
18.113 Liquidated damages.
18.114 Concurrent firm fixed price and cost type construction contracts.
18.115 Construction contracts with design architect-engineers.
18.116 Contracts for dismantling, demolition or removal of improvements.

Subpart B—Formal Advertising

18.201 Types of contracts.
18.202 Preparation of invitation for bids.
18.203 Inspection of site and of data affecting the work.
18.204 Prebid conferences.
18.205 Preinvitation notices.
18.206 Amendment of invitation for bids.
18.207 Opening of bids.
18.208 Cancellation of invitations for bids.
18.209 Prequalification of bidders.
18.210 Award.
18.211 Notice of award.

Subpart C—Negotiations

18.301 Limitation on authority to negotiate contracts.
18.301–1 Work in the United States.
18.301–2 Work outside the United States.
18.302 Small purchases.
18.303 Profit or fee.
18.303–1 Fixed-price construction contracts.
18.303–2 Fixed-price architect-engineer contracts.
18.303–3 Cost-reimbursement type contracts.
18.303–4 Cost-reimbursement type architect-engineer contracts.
18.304 Subcontracting programs.
18.305 Preparation for negotiation.
18.305–1 Fixed-price type contracts.
18.305–2 Cost-reimbursement type contracts.
18.306 Negotiations.
18.306–1 Fixed price construction contracts.
18.306–2 Fixed-price architect-engineer contracts.
18.306–3 Cost-reimbursement contracts.
18.307 Additional work under fixed-price architect-engineer contracts.
18.308 Audit as a pricing aid.
18.309 Record of price negotiations.

Subpart D—Architect-Engineer Selection Procedures

18.401 Scope of subpart.
18.402 Selection.
18.402–1 Selection policy.
18.402–2 Selection procedures.
18.402–3 Special approval of selections.
18.403 Architect-engineer qualifications and performance data.
18.403–1 General.
18.403–2 Architect-engineer regions and areas.
18.403–3 Qualifications data.
18.403–4 Performance data.
18.404 Contractural reports.
18.404–1 Field offices.
18.404–2 Washington headquarters.
18.405 Release of information on architect-engineer selections.

Subpart E—Foreign Purchases and Construction in Foreign Countries

18.501 Buy-American Act.
18.502 Construction in foreign countries.

Sec.
18.502–1 General.
18.502–2 Technical agreements.
18.503 Labor.
18.503–1 The Defense Base Act.
18.503–2 Labor laws of host country.
18.504 Materials.
18.505 Cargo Preference Act.

Subpart F—Termination of Contracts

18.600 Scope.
18.601 Definitions.
18.602 Final payment.
18.603 Allowance for profit.
18.604 Completed end items.
18.605 Submission of settlement proposals.
18.606 Bases for settlement proposals.
18.607 Adjustment of fee.
18.608 Contractor inventory.
18.609 Separate schedules.
18.610 Return of materials to stock.
18.611 Allocability of contractor-acquired property on inventory schedules.
18.612 Contractor's certificate—property incorporated in work.
18.613 Inventory at construction site.
18.614 Clean-up of site.
18.615 Scope of screening.
18.616 Contracts for other departments or agencies.
18.617 Transfer of property.
18.618 Termination of fixed-price construction contracts.
18.618–1 Termination of the contractor's right to proceed.
18.618–2 Effect of termination for default.
18.618–3 Preliminary notice to surety.
18.618–4 Procedure in cast of default.
18.618–5 Dealings with surety—take over agreements.
18.618–6 Completion by another contractor.
18.618–7 Procedure in lieu of termination for default.
18.618–8 Documentation in contract file.
18.618–9 Withholding for labor violations.
18.618–10 Liquidation of liability.
18.618–11 Excusable default.
18.619 Termination of fixed-price architect-engineer contracts for default.
18.620 Termination for convenience of Government clause for fixed-price construction contracts.
18.621 Termination clause for cost-reimbursement type construction contracts.
18.622 Short form termination for convenience clause for fixed-price construction contracts.
18.623 Default clause for fixed-price construction contracts.
18.624 Excusable delays clause for cost-reimbursement type construction contracts.
18.625 Termination for convenience of Government clause for fixed-price architect-engineer contracts.
18.626 Termination clause for cost-reimbursement type architect-engineer contracts.
18.627 Short form termination for convenience clause for fixed-price architect-engineer contracts.
18.628 Default clause for fixed-price architect-engineer contracts.
18.629 Excusable delays clause for cost-reimbursement type architect-engineer contracts.
18.630 Approved forms of telegraphic and letter notices of termination for construction and architect-engineer contracts.
18.630–1 Telegraphic notices of termination for construction contracts.
18.630–2 Letter notice of termination for construction contracts.
18.630–3 Letter notice of termination for architect-engineer contracts.
18.631 Forms of settlement agreement—architect-engineer contracts.

Subpart G—[Reserved]

Subpart H—Bonds

18.800 Scope.
18.801 Bid guarantees.
18.802 Performance bonds in connection with construction contracts.
18.803 Payment bonds in connection with construction contracts.
18.803–1 Furnishing information to subcontractors and suppliers.
18.804 Default procedure.
18.805 Consent of surety.
18.806 Expediter plan.

Subpart I—[Reserved]

Subpart J—Taxes

18.1001 Federal excise taxes.
18.1001–1 Special fuels.
18.1001–2 Motor vehicles.
18.1001–3 Tires and tubes.
18.1001–4 Gasoline.

AUTHORITY: The provisions of this Part 18 issued under sec. 2202, 70A Stat. 120; 10 U.S.C. 2202. Interpret or apply secs. 2301–2314, 70A Stat. 127–133; 10 U.S.C. 2301–2314.

Subpart A—General Provisions

§ 18.100 Scope of part.

This part sets forth contracting procedures peculiar to construction contracts. Where a contract covers the procurement of both construction and supplies or services, the contract shall include provisions applicable to the predominant part of the work, or shall be divided into parts, and include the provisions appropriate for each part, but see § 12.402–2. It does not contain or cross-reference all provisions of this subchapter which apply to such contracts. Other provisions of this subchapter are also applicable to construction contracts and shall be adhered to where applicable. All contracts mentioned in this part shall be deemed to mean construction contracts unless specifically described otherwise. Where a provision in this part is clearly inconsistent with a provision in another part of this subchapter, the provision of this part shall apply, where construction is involved.

§ 18.101 Definitions.

See § 1.201 of this chapter.

§ 18.101–1 Construction.

"Construction" means construction, alteration or repair (including dredging, excavating, and painting) of buildings, structures or other real property. For purposes of this definition, the terms "buildings, structures or other real property" include but are not limited to buildings, structures, and improvements of all types, such as bridges, dams, plants, highways, parkways, streets, subways, tunnels, sewers, mains, power lines, pumping stations, railways, airport facilities, terminals, docks, piers, wharves, ways, lighthouses, buoys, jetties, breakwaters, levees, canals, and channels. Construction does not include the manufacture, production, furnishing, construction, alteration, repair, processing or assembling of vessels, aircraft or other kinds of personal property.

§ 18.101–2 Construction activity.

"Construction Activity" means an activity, at any organizational level of the Military Departments, which has responsibility for the architectural, engineering, and other related technical aspects of the planning, design, and construction of facilities, and which receives its technical guidance from the Army Office of the Chief of Engineers, Navy Bureau of Yards and Docks, or Air Force Directorate of Civil Engineering.

§ 18.102 Methods of procurement.

The requirements of this subchapter prescribing the use of the formal advertising method of procurement are, in the case of construction contracts, based not only on Chapter 137, Title 10 of the United States Code, but also on the provisions of other applicable legislation such as the annual Military Construction Appropriation Act. Except in special instances, such as overseas construction and construction of a highly classified or experimental nature, construction shall ordinarily be procured by means of formal advertising. Notwithstanding the provisions of § 3.206–2 of this chapter, overseas construction may be procured by means of formal advertising provided that the head of a procuring activity, or his designee, determines that the use of formal advertising in strict accordance with Part 2 of this subchapter is practicable and advantageous to the United States as to a specific country or other geographic area outside the United States, its possessions, and Puerto Rico.

§ 18.103 Sources of construction services.

Generally, military construction in the United States shall be performed by contract. The following exceptions to this policy are authorized:

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

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

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

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

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

(c) Military personnel, other than military construction units, may, in addition to paragraph (a) of this section:

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

(2) Perform repair incident to maintenance:

(i) When required for reasons of security.

(ii) For disciplinary action arising from military offenses.

(iii) For training and maintaining competence in recognized trade skills.

(iv) In and around the barracks which they themselves occupy or are about to occupy.

(d) Civil Service maintenance forces may, in addition to paragraph (a) of this section:

(1) Perform construction where the work is of a minor nature.

(2) Perform construction where conditions are such that it is impracticable to prepare plans and specifications.

(3) Perform construction where the work must be performed intermittently to avoid disrupting other important operations.

(4) Perform repair incident to maintenance.

§ 18.104 Subcontracting.

In construction work specialty items, such as plumbing, heating and electrical work are usually subcontracted. To assure adequate interest in, and supervision of, the entire project, the prime contractor shall be required to perform a significant part of the project work with his own forces. Therefore, all construction contracts estimated to exceed $1,000,000 shall contain the clause set forth in § 7.603–15 of this chapter, inserting therein the maximum percentage consistent with customary or necessary specialty subcontracting, and the complexity and magnitude of the work, but not less than 15 percent on housing and not less than 20 percent on other work. Where deemed appropriate, the clause may also be included in contracts estimated not to exceed $1,000,000.

§ 18.105 Time of performance.

In establishing the completion date of a contract, the contracting officer shall give due consideration to:

(a) The complexity of the project;

(b) The construction seasons involved;

(c) The required completion date; and

(d) The capacity of the contractors to perform.

Where economies to the Government would result by excluding certain specified periods of time from contractor performance in computing the completion date, the invitation for bids or request for proposals shall contain the clause set forth in § 7.603–38 of this chapter. In any given contract separate completion dates may be established for separable items of work. Where such dates are shown, requests for extensions of time for delays must be evaluated with respect to each item, and the affected completion dates modified where appropriate.

§ 18.106 Minimum standards for responsible prospective contractors.

In evaluating a prospective contractor's financial resources and ability to perform, the contracting officer, in addition to other pertinent factors (see § 1.903 of this chapter), shall consider the fact whether a bid bond has been furnished and performance and payment bonds are to be furnished. The mere ability to furnish bond, however, shall not be considered as complete and satisfactory evidence of adequate financial resources and ability to perform. Where the prospective contractor is a joint venture, the contracting officer shall consider the sum of its financial resources and the individual capacities of all its members in determining the responsibility of the joint venture.

§ 18.107 Mandatory specifications.

The technical provisions of construction specifications shall be in sufficient detail so that, when used with the applicable drawings, bids can be prepared by contractors, material suppliers, and manufacturers on a fair and competitive basis, and so that construction can be completed without additional specifications, except those necessary to deal with unforeseen conditions or to accomplish changes during construction. Materials and equipment shall be described, where possible, by documents generally known to the industry. Nationally-recognized industry and technical society specifications and standards shall be used to the maximum extent practicable to assure that requirements are compatible with current industrial practices and manufacturing resources. If industry documents are unsuitable, applicable Federal or Military specifications and standards shall be used to describe the requirements, provided the materials required are in sufficient quantity to make inspection practicable. Where use of nationally recognized industry standards or Federal and Military specifications is not practicable, contractors shall be required to use materials and equipment satisfying good commercial standards, available from local commercial sources.

§ 18.108 Government estimates.

§ 18.108–1 Construction contracts.

(a) An independent Government estimate in as great detail as if the Government were competing for the award shall be prepared for each proposed contract and modifications thereto, affecting price, anticipated to cost $10,000 or more. The contracting officer, at his discretion, may require the preparation of such an estimate where the anticipated cost is less than $10,000. Except as required below, access to or disclosure of information concerning the Government estimate shall be limited to Government personnel whose official duties require knowledge of the estimate.

(b) The Government estimate shall be designated "For Official Use Only" unless the nature of the information therein requires a security classification, in which event it shall be handled in accordance with applicable security regulations. The "For Official Use Only" designation shall be removed only when the estimate is made public in accordance with instructions below.

(c) If the procurement is by formal advertising, a sealed copy of the detailed Government estimate shall be filed with the bids until bid opening. After the bids are read and recorded, the "For Official Use Only" designation shall be removed and the estimate shall be read and recorded in the same detail as the bids.

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

§ 18.108–2 Architect-engineer contracts.

A Government estimate in accordance with the provisions of pertinent Department of Defense Directives shall be prepared for each proposed contract and modifications thereto affecting price. It shall be marked "For Official Use Only," unless the information therein requires a security classification in which case it shall be handled in accordance with applicable security regulations. The Government estimate shall at no time be disclosed even to the architect-engineer to whom award is made or in any other way be made public.

§ 18.109 Disclosure of magnitude of construction projects.

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

§ 18.110 Statutory cost limitations.

(a) Contracts for construction shall not be awarded at a price in excess of statutory cost limitations unless the limitations for the particular contract can be and have been waived and shall not be awarded at a price, which, with allowances for Government imposed contingencies and overhead, exceeds the statutory authorization for the project.

(b) Invitations for bids and requests for proposals containing one or more items subject to statutory cost limitations shall state in a separate schedule the applicable cost limitation for each item subject to a specific statutory cost limitation. Invitations for bids and requests for proposals shall state specifically that a bid or proposal which does not contain prices for the individual schedules will be considered non-responsive. Bids or proposals shall contain a certification that each such price includes an approximate apportionment of all estimated applicable costs, direct and indirect, as well as overhead and profit. The provision of the invitation for bids requiring such certification shall direct the attention of bidders to the statement made in the invitation for bids required by § 2.201(a)(11) of this chapter; requests for proposals shall contain a similar provision.

(c) A bid or proposal containing prices within statutory cost limitations only be-

cause such bid or proposal is materially unbalanced shall be rejected. An unbalanced bid or proposal is one which is based on prices significantly less than cost for some work, and prices which are overstated for other work. A bid or proposal containing prices that exceed applicable statutory cost limitations shall be rejected, unless for construction of cold storage or regular (general purpose) warehousing, barracks for enlisted personnel or bachelor officer's quarters, and the determination of the Secretary of Defense has been obtained that the limitations on construction costs in the annual Military Construction Act shall not apply as impracticable. In addition, where appropriate provision is made in the invitation for bids or request for proposals, separate award may be made on individual items whose price is within or not subject to any applicable cost limitation, and those items whose price is in excess of the limitations shall be rejected. Such a provision for separate award shall not be made unless determined to be in the best interest of the Government.

§ 18.111 Expediting construction contracts.

No expediting action, advancing the completion date and involving additional costs under a contract funded under the provisions of the annual Military Construction Appropriation Act or any similar legislations, shall be taken without the prior approval of the Assistant Secretary of Defense (Installations and Logistics).

§ 18.112 Cost-plus-a-fixed-fee contracts.

Annual Military Construction Appropriation Acts provide that cost-plus-a-fixed-fee construction or architect-engineer contracts estimated to exceed $25,000 to be performed within the United States, except Alaska, and to be charged to such appropriations shall not be executed unless the specific written approval of the Assistant Secretary of Defense (Installations and Logistics), setting forth the reasons therefor, is obtained.

§ 18.113 Liquidated damages.

A liquidated damages clause generally shall be included in all contracts except cost-plus-fixed-fee contracts or those where the contractor cannot control the pace of the work. Where such a provision is required, the clause set forth in § 7.603–39 of this chapter shall be included in the invitation for bids or request for proposals. Where different completion dates for separate parts or stages of the work are specified in the contract, this clause should be revised appropriately to provide for liquidated damages for delay of each separate part or stage of the work. The minimum amount of liquidated damages should be based on the estimated cost of inspection and superintendence for each day of delay in completion. Whenever the Government will suffer other specific losses due to the failure of the contractor to complete the work on time, such as the cost of substitute facilities, the rental of buildings, or the continued payment of quarters allowances, an amount for such items should also be included. Contracting officers shall take all reasonable steps to mitigate liquidated damages in accordance with § 1.310(c) and may propose remissions of such damages in accordance with § 1.310(d) of this chapter.

§ 18.114 Concurrent firm fixed price and cost type construction contracts.

In view of potential labor and administrative problems, contracts including cost-plus-a-fixed-fee, price-incentive or other cost variation or cost adjustment provisions shall not be awarded where performance is to be accomplished on the same project site where work on a firm fixed price construction contract is being performed, unless prior approval is obtained from the head of a procuring activity; nor should a contractor performing a fixed price contract be awarded any contract, to be performed concurrently at the same site, which contains cost variation or cost adjustment features other than the standard renegotiation clause or price escalation, price redetermination or price incentive features.

§ 18.115 Construction contracts with design architect-engineers.

No contract for construction of a project shall be awarded to a firm which designed the project, except with the approval of the Secretary of the Department concerned. (See Part 141 of this chapter.)

§ 18.116 Contracts for dismantling, demolition or removal of improvements.

See § 16.404 of this chapter.

Subpart B—Formal Advertising

§ 18.201 Types of contracts.

Generally, contracts for construction will be formally advertised and be of the firm fixed-price type. Fixed price contracts for such work may be either (a) lump sum contracts for the total work or for defined parts of the work, or (b) unit price contracts in which a unit price is paid for specified quantity units of work such as cubic yards of earth or concrete or square yards of pavement, or (c) a combination of both. Fixed price contracts with escalation may be used where escalation clauses are customary in contracts for particular items if the omission of the clause would preclude a significant number of firms from bidding, or would likely result in the inclusion of unwarranted contingencies, unreasonably increasing the cost to the Government. Escalation clauses set forth in § 7.106 of this chapter may be used and adapted to the particular procurement.

§ 18.202 Preparation of invitation for bids.

(a) Forms used to invite bids are prescribed in subpart D, Part 16 of this chapter and are set forth in Appendix F.[1] Invitations for bids shall contain the information required by § 2.201 (a) and (c) of this chapter.

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

§ 18.203 Inspection of site and of data affecting the work.

As appropriate, provisions should be made for bidders to inspect the construction site and have the opportunity to examine data available to the Government which may provide information affecting performance of the work, such as boring samples, original boring logs, records and plans of previous construction, etc. Such data should be assembled in one place and made available for inspection. The invitation for bids should notify bidders of the time and place for the site or data inspection and where such inspection by the bidders alone is not feasible, designate an individual, preferably the same one for all bidders, who will show the site or data to the bidders. Care shall be taken that all significant information regarding the site and the data is made available to all bidders in the same manner, including information regarding utilities, if any, to be furnished during construction. A record should be kept of the identity and affiliation of all bidders' representatives who inspect the site or examine the data.

§ 18.204 Prebid conferences.

Where the contracting officer considers that a prebid conference should be held in connection with a large construction project involving important or complex work, the invitation for bids shall provide for such conference to be held on a specified date, about midway during the bidding period. At the conference, the contracting officer or his representative shall explain the nature of the work and problems that can be expected. He shall answer questions which he may require to be submitted in advance. He shall, however, defer answer on questions which he considers require further study. The design architect-engineer should be available during the conference to assist in interpreting plans and specifications. Remarks and explanations at the conference shall not qualify the terms of the invitation and specifications. A complete record shall be made of the conference.

§ 18.205 Preinvitation notices.

(a) Unless the requirement is waived by the head of a procuring activity or his designee, preinvitation notices shall be sent to all prospective bidders on any construction procurement to be formally advertised, estimated to cost $100,000 or more. These notices shall be sufficiently in advance of the invitation for bids to stimulate interest on the part of the greatest number of contractors. Such notices may also be used where the procurement is estimated to cost less than $100,000. Preinvitation notices shall:

[1] Appendix F has been filed with the Office of the Federal Register; copies of forms may be obtained through the contracting officer in any of the military departments.

(1) Describe the proposed work in sufficient detail to disclose the nature and volume of work;

(2) State the location of the work;

(3) Include tentative dates of issuance of invitations, opening of bids and estimated time of completion;

(4) State where plans will be available for inspection without charge;

(5) Include a statement of the magnitude in terms of physical characteristics of the proposed construction in accordance with § 18.109, where the estimated value is $25,000 or more;

(6) Specify a date by which request for an invitation for bids should be submitted; and

(7) Expressly notify contractors that, if no bid is to be submitted, they should advise issuing office whether future advance notices are desired.

(b) Invitations for bids shall be sent to those bidders who have requested them pursuant to a preinvitation notice and may be sent to other bidders on specific request.

(c) In addition to compliance with § 2.203–1 of this chapter, on request, preinvitation notices and invitations for bids (with plans and specifications) for unclassified construction work will be furnished without charge to organizations which maintain plan display rooms for the benefit of contractors, subcontractors and material suppliers, without charge to the public. Requests from organizations in the United States may be honored on an annual or semi-annual basis for all or for a stated class of construction projects. The geographical extent of this distribution shall be as determined on a case by case basis by the contracting officer.

§ 18.206 Amendment of invitation for bids.

See §§ 2.207, 16.401–1(h) and 12.404–2 of this chapter. When an amendment will require additional time for bidders to prepare bids, the time for bidding shall be appropriately extended, except in emergencies, and consideration shall be given to notifying bidders by telephone or telegraph of the forthcoming amendment to minimize disruption of their bid preparations. Where such an amendment is issued within a period of 10 days prior to the date set for bid opening, a minimum of 10 days' leadtime, except in emergencies, shall be allowed prospective bidders to prepare new or revised bids. The nature of any emergency preventing a 10 day leadtime will be documented.

§ 18.207 Opening of bids.

See §§ 2.402 and 18.108–1(c) of this chapter.

§ 18.208 Cancellation of invitations for bids.

(a) Before opening, see § 2.208 of this chapter.

(b) After opening, see §§ 2.404–1 and 2.404–2 of this chapter.

§ 18.209 Prequalification of bidders.

Wherever a construction project is urgent or complex, the head of a procuring activity may authorize a contracting officer to invite bids from prequalified bidders only. Procedures used to prequalify bidders for such purposes shall be approved by the head of a procuring activity or his designee.

§ 18.210 Award.

No award shall be made at a price which, with allowances for Government imposed contingencies and overhead, exceeds the statutory authorization for the project unless the limitations for a particular contract can be and have been waived (see § 18.110(c)). The effect of changes in wage rate determinations on award is discussed in § 12.404–2 of this chapter.

§ 18.211 Notice of award.

A notice of award shall be furnished to the successful bidder as soon as possible and not later than the time set for acceptance in the invitation for bids or any extension to which the bidder has agreed. The notice of award shall:

(a) Identify the invitation;

(b) Identify the contractor's bid;

(c) Set forth the award price;

(d) Specify date of commencement of work, or advise contractor that a notice to proceed will be issued;

(e) Advise contractor that a formal contract must be executed before commencement of work; and

(f) Inform contractor that performance and payment bonds must be furnished.

Subpart C—Negotiations

§ 18.301 Limitation on authority to negotiate contracts.

Contracts for construction (see § 18.101–1) shall be formally advertised whenever such method is feasible and practicable (see § 18.102) under existing conditions and circumstances (but see § 1.706–8 of this chapter), even though negotiation may be authorized as indicated hereafter.

§ 18.301–1 Work in the United States.

Contracts for construction mentioned above, to be performed in the United States, its possessions and Puerto Rico shall not be negotiated unless authorized pursuant to the following subsections of 10 U.S.C. 2304(a): (1), (2), (3), (10), (11), (12), or (15). The appropriate code provision will be cited in the contract as authority for the negotiation. (See respectively, §§ 3.201, 3.202, 3.203, 3.210, 3.211, 3.212, and 3.215 of this chapter.) Contracts to be performed in the possessions of the United States and Puerto Rico may not be negotiated pursuant to 10 U.S.C. 2304(a)(6) (§ 3.206 of this chapter).

§ 18.301–2 Work outside the United States.

Contracts for construction to be performed outside the United States, its possessions or Puerto Rico shall be negotiated unless formal advertising is authorized in accordance with § 18.102. The appropriate subsection of the code will be cited in all contracts as authority for negotiation.

§ 18.302 Small purchases.

Notwithstanding § 3.603–1(a) of this chapter, procurements of construction of $2,000 or less may be formally advertised. Generally, procurements of construction in excess of $2,000 shall be formally advertised, however, where negotiation has commenced and the contract price proves to be more than $2,000 but less than $2,500, 3–203 may be used as authority to negotiate. Either Standard Form 19 or DD Form 1155, as appropriate, shall be used for contracts of $2,000 or less.

§ 18.303 Profit or fee.

§ 18.303–1 Fixed-price construction contracts.

The guidance set forth in § 3.808 of this chapter, while not required, may be used in considering profit as an element of price under fixed-price type construction contracts.

§ 18.303–2 Fixed-price architect-engineer contracts.

(See Subpart D of this part.) Where the overall price of the contract is not determined by the curve method in the applicable Department of Defense Directive, the margin of profit shall be computed in accordance with the applicable schedule of such Directive and applied to the detailed analysis of costs.

§ 18.303–3 Cost-reimbursement type contracts.

(a) The fees of prime contractors under cost-plus-a-fixed-fee construction contracts shall be established in accordance with Departmental procedures.

(b) The target fee of prime contractors in incentive fee contracts shall be established using the criteria and fee schedules provided for under Departmental procedures as a guide in conjunction with the reasonableness of the target cost, the maximum and minimum fees to be established and the fee adjustment formula.

(c) Statutory and administrative limitations on fees in both of the above type contracts are set forth in § 3.405–5 (c)(2) of this chapter.

§ 18.303–4 Cost-reimbursement type architect-engineer contracts.

(See Subpart D of this part.) The fees under cost reimbursement type architect-engineer contracts shall be established in accordance with applicable criteria and fee schedules provided in Departmental procedures.

§ 18.304 Subcontracting programs.

See Subpart I, Part 3 of this chapter.

§ 18.305 Preparation for negotiation.

§ 18.305–1 Fixed-price type contracts.

(a) On all fixed-price type construction procurement in excess of $10,000 and for all modifications involving $10,000 or more, whether by increase or decrease in price or a combination of both, a Government estimate shall be prepared (see § 18.107–1). The Government estimate for architect-engineer contracts shall be prepared in accordance with pertinent provisions of Department of Defense Directives.

(b) After preparation of the Government estimate in the appropriate manner indicated above, the proposals and cost or pricing data submitted by po-

tential contractors shall be evaluated, analyzed and compared with the Government estimate. (See § 3.807–3 of this chapter.)

(1) Where there are significant differences between the Government estimate in a construction procurement and the proposals submitted on any item, the contractors will be requested to submit cost or pricing data concerning such elements as wage rates or fringe benefits, significant materials and equipment allowances. Such data shall also be evaluated and analyzed, as shall cost or pricing data on subcontracts (§ 3.807–10 of this chapter) when requested by the contracting officer. (See § 3.903 of this chapter.)

(2) Where a proposal for an architect-engineer contract is less than the Government estimate, the contracting officer shall insure that there is a complete understanding of the scope of the work. Where the proposed price is considered unreasonable, additional data may be requested from the architect-engineer. If he refuses to furnish such data, negotiations with him will be terminated and a proposal requested from the architect-engineer selected next in preference.

(c) Where appropriate in the procurement of construction, additional pricing tools may be used, such as a comparison of current prices for similar features of work, adjusted for differences in site and specifications. In addition, rough yardsticks such as cost per cubic foot for structures, cost per linear foot for utilities, cost per cubic yard for excavation, concrete, etc., may be developed and compared with proposed prices which are questioned.

§ 18.305–2 Cost-reimbursement type contracts.

This type of contract may be used either in construction or in the architect-engineer field, only when its use is consistent with §§ 3.405 and 18.112 of this chapter. In either case, a Government estimate will be prepared.

§ 18.306 Negotiations.

§ 18.306–1 Fixed price construction contracts.

Except where an award is made on initial proposals without negotiations (see § 3.805 of this chapter), negotiations will be conducted with all offerors within a competitive price range of the Government estimate. Where negotiations disclose errors of fact or judgment in the Government estimate, the Government estimate will be revised to correct such error and the contract record adequately documented.

§ 18.306–2 Fixed-price architect-engineer contracts.

(a) Negotiations shall be conducted with the first selected architect-engineer until a price which is fair and reasonable and not in excess of the Government estimate, revised to correct errors of fact or judgment, if any, has been obtained. Where the negotiations result in a price in excess of the initial Government estimate or as revised, the contracting officer shall terminate the negotiations and request a proposal from the architect-engineer next in order of preference.

(b) In no event shall a firm fixed-price type contract for architect-engineer services for the preparation of designs, plans, drawings and specifications exceed the statutory limitation of six percent (6%) of the estimated construction costs of the project to which the architect-engineer services apply. If, however, the contract also covers any type services other than the preparation of designs, plans, drawings and specifications, that part of the contract price for such other services shall not be subject to the six percent (6%) limitation.

§ 18.306–3 Cost-reimbursement contracts.

Negotiation of the fee of such construction contracts and architect-engineer contracts shall be in accordance with §§ 18.303–3 and 18.303–4, respectively. Administrative and statutory limitations on fees charged on construction contracts are set forth in § 3.405–5 of this chapter. In negotiating an architect-engineer contract, the contract price, which includes the fee plus the estimated total reimbursable costs to be paid to the architect-engineer shall not exceed six percent (6%) of the estimated cost of the construction project to which such services apply. If, however, the contract also covers any type services other than the preparation of designs, plans, drawings and specifications, that part of the contract price for such other services shall not be subject to the six percent (6%) limitation.

§ 18.307 Additional work under fixed-price architect-engineer contracts.

(a) The principles set forth in §§ 18.305–1(b) and 18.306–2 are applicable to modifications of fixed-price architect-engineer contracts for additional work outside the scope of the contract.

(b) If the work to be performed under the modification is within the general scope of the contract, the contracting officer shall, under the provisions of the "Changes" clause (see § 7.607–5 of this chapter) by written order, with or without prior negotiation, direct that the changes be made, and where such action causes an increase or decrease in the contractor's cost or time required for performance of the contract, an equitable adjustment shall be made. Where there is a failure to agree as to the equitable adjustment, the provisions of the "Disputes" clause will be followed.

(c) Where the modification involves work not initially included in the contract, the limitation on the total contract price set forth in § 18.306–2(b) is applicable, as applied to the revised total estimated construction costs. Where redesign is required and the contract is modified, the following method shall be used to insure that the six percent (6%) statutory limitation is not exceeded.

(1) The estimated construction cost of the redesigned features will be added to the original estimated construction cost;

(2) The contract cost for the original design will be added to the contract cost for redesign;

(3) The total contract design cost obtained by subparagraph (2) of this paragraph will be divided by the total construction cost obtained by subparagraph (1) of this paragraph. The resulting percentage may not exceed the six percent (6%) statutory limitation.

§ 18.308 Audit as a pricing aid.

See § 3.809 of this chapter.

§ 18.309 Record of price negotiations.

See § 3.811 of this chapter.

Subpart D—Architect-engineer selection procedures

§ 18.401 Scope of subpart.

This subpart contains the general principles and procedures for the selection of architect-engineer firms for contracts for professional services, except for such services performed in connection with Army Civil Works projects. Discussion of specific areas affecting such services will be found under the sections of this part dealing with those areas.

§ 18.402 Selection.

§ 18.402–1 Selection policy.

The selection of architect-engineer firms for professional services contracts shall be accomplished in accordance with the procedures set forth in this subpart. Such selection shall not be based upon competitive bidding procedures, but rather upon the professional qualifications necessary for the satisfactory performance of the services required, subject to the following additional considerations:

(a) Specialized experience of the firm in the type of work required;

(b) Capacity of the firm to accomplish the work in the required time;

(c) Past experience, if any, of the firm with respect to performance on Department of Defense contracts;

(d) Location of the firm in the general geographical area of the project, provided that there is an appropriate number of qualified firms therein for consideration; and

(e) Volume of work previously awarded to the firm by the Department of Defense, with the object of effecting an equitable distribution of Department of Defense architect-engineer contracts among qualified architect-engineer firms.

§ 18.402–2 Selection procedures.

The following procedures shall be used in the selection of architect-engineer firms for all architect-engineer contracts to be awarded in the United States, less Alaska and Hawaii, and, to the extent practicable, in the rest of the world:

(a) All selection actions, including preselection, shall be under the cognizance of the construction activity responsible for the work;

(b) A preselection list of the maximum practicable number of qualified firms shall be prepared by a preselection board from data described in § 18.403 and other pertinent information which may be available, and the list shall be approved by the head of the construction activity, or his designee. Preselection lists for contracts estimated to cost more

than $6,000 shall be prepared by a formally constituted preselection board;

(c) Both preselection and selection boards shall consist primarily of senior staff architects or engineers, or military personnel having comprehensive experience in military construction;

(d) Preparation of preselection lists for contracts estimated to cost more than $6,000, and selections for contracts estimated to cost more than $2,500, shall be accomplished by formally constituted boards consisting of at least three members.

(e) The selection board shall review the qualifications and performance data (see § 18.403) of each of the firms on the preselection list, in accordance with the policy established in § 18.402–1, and shall recommend, in order of preference, a minimum of three firms for approval for contract negotiations to the head of the construction activity, or his designee;

(f) Upon approval of the selections by the head of the construction activity, or his designee, and such approval as may be required by § 18.402–3, negotiations shall be initiated in accordance with § 18.306–2; and

(g) All preselection and selection actions shall be fully documented.

§ 18.402–3 Special approval of selections.

Special approval shall be required for certain selections as indicated below. Dollar amounts cited shall include, where applicable, fees for planning and design, supervision and inspection of construction, and any other architect-engineer services related to construction.

(a) When the estimated cost of a contract to be awarded by a field activity exceeds $100,000, the selection shall require the approval of the next higher organizational level of the construction activity;

(b) When a firm, to which a field contracting office has previously awarded contracts totaling over $100,000 during the current calendar year, has been selected for an additional award to be made by the same contracting office, the selection shall require, prior to negotiation with the firm, the approval of the next higher organization level of the construction activity;

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

(d) When the estimated cost of a contract exceeds $500,000, the selection shall require the approval of the Secretary of the Department concerned, or his designee;

(e) When the estimated cost of a contract exceeds $1,000,000, the selection shall require the approval of the Assistant Secretary of Defense (Installations and Logistics), or his designee;

(f) When supplemental work to be added to an existing contract will bring the total contract cost to any of the various levels of approval noted above, the selection for such work shall require approval as indicated for the appropriate level (such approval is not required for supplemental work accomplished pursuant to the Changes clause of the contract);

(g) When approval of a selection for a contract has been obtained at a particular approval level, further approval shall not be required for the selection of the same firm to accomplish supplemental work under that contract, unless the total cost of the basic contract plus all supplemental work is an amount requiring approval of the selection at the next higher approval level or unless the supplemental awards meet the conditions described in paragraph (h) of this section;

(h) When a contract totaling over $1,000,000, for which selection approval has been granted in accordance with paragraphs (e) and (f) of this section is increased by supplemental awards, approval of the selection by the Assistant Secretary of Defense (Installations and Logistics), or his designee, shall be required for each increment of such supplemental awards totaling over $200,000; and

(i) When the award of more than one contract by a Department within a single region or area, see § 18.403–2, to a firm will cause that firm's total fees during a calendar year to exceed $1,000,000, the selection for the contract which will cause this excess shall require the approval of the Assistant Secretary of Defense (Installations and Logistics), or his designee.

§ 18.403 Architect-engineer qualifications and performance data.

§ 18.403–1 General.

Selection of architect-engineer firms shall be based on the effective utilization of qualifications and performance data, as described below.

§ 18.403–2 Architect-engineer regions and areas.

For the purposes of receiving and distributing architect-engineer qualification and performance data, the United States, less Alaska and Hawaii, has been divided into eight regions, and the rest of the world into five general geographic areas. These regions and areas are described and delineated in a booklet entitled, "How to Obtain Consideration for Architect-Engineer Contracts with the Department of Defense", which is published by the Office of the Assistant Secretary of Defense (Installations and Logistics) for distribution to architect-engineer firms through the various offices of the construction activities.

§ 18.403–3 Qualifications data.

(a) *Filing.* Firms desiring to be considered for architect-engineer contracts in a given region or area must file GSA Standard Form 251, "U.S. Government Architect-Engineer Questionnaire", with any one of the offices of the construction activities listed in the booklet for that region or area. Architect-engineer firms shall normally be selected from the region or area in which the project is to be accomplished; however, if sufficient qualified firms are not available in a region or area for consideration for a particular contract, firms from other regions or areas shall be considered. Firms desiring to be considered for architect-engineer contracts in connection with ballistics and space systems should file qualifications data with one of the offices administering this type of construction, as listed in the booklet.

(b) *Distribution, classification, and utilization.* Forms 251 filed by an architect-engineer firm with any office listed for a region or area shall be distributed to all other offices listed for that region or area, each of which shall maintain a complete architect-engineer qualifications data file for that region or area. Offices responsible for the construction of ballistics and space systems facilities, as listed in the booklet, shall cross-distribute qualifications data to each other, and shall maintain qualifications data files. Qualifications data for firms which normally are active in a number of regions or areas shall be forwarded to the Washington headquarters of the construction activities for file. Receiving offices shall review all Forms 251 and classify each firm with respect to:

(1) Location;

(2) Specialized experience;

(3) Professional capabilities; and

(4) Capacity with respect to scope of work that can be undertaken.

All offices which have a responsibility for selecting architect-engineer firms shall utilize these complete data files in the required selection procedures, either through maintaining files of their own or by arranging for convenient access to the files of another office.

§ 18.403–4 Performance data.

For each contract over $10,000 awarded, a performance evaluation report shall be prepared by the cognizant construction activity, utilizing DD Form 1413, "Performance Evaluation—Architect-Engineer Professional Services Contractor". Such reports may also be prepared for contracts of lesser amounts. For contracts of over $10,000, DD Forms 1413 shall be distributed, filed, and utilized in a manner similar to qualifications data (GSA Standard Forms 251), above, except that distribution also shall be made to the Washington headquarters of the respective construction activities.

§ 18.404 Contractual reports.

§ 18.404–1 Field offices.

Field offices of the construction activities within each region (see § 18.403–2) of the United States, less Alaska and Hawaii, shall furnish a quarterly report to each other and to their respective Washigton headquarters of all architect-engineer contracts over $25,000 (except contracts involving classified projects) awarded during the quarter. Field offices of the construction activities within the geographical areas (see § 18.403–2) of the rest of the world shall furnish such a quarterly report to their respective Washington headquarters only. Field offices resposible for the construction of ballistics and space systems facilities shall furnish similar reports to each other and to their respective Washington

headquarters. The above reports shall be due within 15 days after the end of the quarter concerned and shall be cumulative within the calendar year.

§ 18.404–2 Washington headquarters.

(a) *Quarterly reports.* Each Washington headquarters of the construction activities shall furnish to the Assistant Secretary of Defense (Installations and Logistics), utilizing the format shown below, quarterly reports, cumulative within each calendar year, of all architect-engineer contracts over $100,000 (except contracts involving classified projects) awarded world-wide by all offices of the activity. Report Control Symbol DD–I&L(Q) 559 has been assigned to this reporting requirement. This report shall be due within 30 days after the end of the quarter concerned.

DEPARTMENT OF THE.....

QUARTERLY REPORT OF ARCHITECT-ENGINEER CONTRACT AWARDS OVER $100,000

.... Quarter, current year, 19... (Cumulative for current year), Report Control Symbol DD–I&L(Q)559

Name and location of architect-engineer firm	Responsible office	Region or area	Location and brief description of project	Contract or modification	Number date of	Award amount of award	Cumulative amount of awards for calendar year

(b) *Instructions for preparation of reports.* Show each contract over $100,000 awarded during the current calendar year, and each supplemental award thereto. When supplemental awards to a contract of $100,000 or less awarded during the current calendar year cause the total of that contract to exceed $100,000, the contract and supplemental awards will be shown. Supplemental awards made during the current calendar year to contracts awarded in a previous calendar year will be shown if the total of these supplemental awards exceeds $100,000. Contracts awarded each firm, along with supplemental awards, will be grouped together regardless of the region or area in which awarded, and the total of the awards for each firm shown in the cumulative column. Firms will be listed alphabetically by surnames. Second, third, and fourth quarter reports will be cumulative in that contract awards and supplemental awards reported for previous quarters will be shown in addition to awards required to be reported for the current quarter. Supplemental awards will be grouped with the contracts to which they pertain, and the total amount of all awards for each firm for the calendar year to date will be shown in the cumulative column. Contracts undertaken for other than Department of Defense agencies, such as NASA, MAP, and AID, should be identified as such by an appropriate notation adjacent to the contract number.

§ 18.405 Release of information on architect-engineer selections.

After the required approvals for the selection have been obtained, information may be released by the contracting officer identifying only the architect-engineer firm selected, and describing the work in general terms, unless precluded by security considerations. If negotiations are teminated without consummating a contract, the contracting officer may release such information and state that negotiations will be undertaken with another (named) architect-engineer. When an award has been made, the contracting officer may release this information, but the estimated construction cost of the facilities involved shall not be divulged.

Subpart E—Foreign Purchases and Construction in Foreign Countries

§ 18.501 Buy-American Act. [Reserved]

§ 18.502 Construction in foreign countries.

§ 18.502–1 General.

Construction in foreign countries includes construction anywhere outside the United States (see § 6.201–4 of this chapter). In contracts which are entered into with foreign contractors or are for performance in foreign countries, the term "United States" will appear before the word "Government."

§ 18.502–2 Technical agreements.

When construction is contemplated in a foreign country, the Office of the Chief of Engineers, Department of the Army, or the Bureau of Yards and Docks, Department of the Navy, as appropriate should be invited to participate in the negotiations of any technical working agreement with a foreign government concerning the construction. This agreement negotiated between appropriate officials of the United States and the foreign government should, to the extent feasible and where not otherwise provided for in other agreements, cover all elements necessary for the construction required by the laws, regulations and customs of the United States and the foreign government, relating to:

(a) The acquisition of all necessary rights;

(b) The expeditious, duty free importation of labor, material and equipment;

(c) The payment of taxes applicable to contractors, personnel, materials and equipment;

(d) The applicability of workmen's compensation laws and other labor laws to citizens of the United States, citizens of the host country and citizens of other countries;

(e) The provision of utility services;

(f) The disposition of surplus materials and equipment;

(g) The handling of claims and litigation; and

(h) Any other problems which can be foreseen and appropriately resolved by such agreement.

§ 18.503 Labor.

§ 18.503–1 The Defense Base Act.

The Defense Base Act extends the applicability of the Longshoremen's and Harbor Workers' Compensation Act to certain classes of employees engaged in work outside the United States (see § 10.403(a) of this chapter). Where indigenous employees are subject to the compensation laws or comparable provisions of the host country for job-connected illness or injury, the contracting officer shall consider requesting a waiver of the Defense Base Act (see § 10.403(b)).

§ 18.503–2 Labor laws of host country.

Contractors shall comply with the applicable labors laws of the host country. Exemption from such laws shall be sought by means of treaty, executive agreement or express authorization from proper officials, where compliance with the laws is impractical or serves no useful purpose.

§ 18.504 Materials.

Purchase of materials, equipment and supplies for construction overseas shall generally be the responsibility of the contractor performing the work; but where necessary to comply with foreign law, or to avoid taxation, or to obtain other advantages, purchase may be by the United States. Contracting officers shall consider savings that may be obtained by exemptions from import and other taxes and, to the extent economical, shall take advantage of tax exemptions available under existing agreements. See § 11.403 of this chapter. In specifying materials, supplies, and equipment for construction in foreign countries, contracting officers shall make maximum use of foreign currencies available for the project, shall encourage the use of American materials, equipment, and supplies and shall obtain the maximum feasible competition from indigenous, other foreign and American suppliers.

§ 18.505 Cargo Preference Act.

See Subpart N, Part 1 of this chapter.

Subpart F—Termination of Contracts

§ 18.600 Scope.

This subpart sets forth policies and instructions and prescribes contract clauses for use in construction and architect-engineer contracts relating to termination of such contracts through default or for the convenience of the Government.

§ 18.601 Definitions.

See § 8.101 of this chapter. As used in this subpart, the following terms have the meanings set forth below.

(a) "Construction equipment" means automotive vehicles, earth movers, cranes, batching plants, crushers, pavers, mixers, generators, compressors, pumps, drills, welders, forms and other

items of equipment (other than hand tools) used or capable of being used in construction work.

(b) "Terminated portion of a construction contract" which has been completely terminated means the entire contract notwithstanding the completion of and payment for individual items of work prior to termination. (See § 18.604.)

§ 18.602 Final payment.

See § 8.212–2 of this chapter. Prior to presenting the final payment voucher to the disbursing officer, after termination action, the contracting officer shall ascertain whether there are any outstanding labor violations. If so, the contracting officer shall determine, pursuant to the criteria set forth in § 12.404–9 of this chapter, the amount to be withheld from the final payment voucher by reason of such violations.

§ 18.603 Allowance for profit.

See § 8.303 of this chapter. In a construction contract, for the purpose of computing profit, that portion of settlements by the prime contractor with construction subcontractors for actual work in place at the job site as distinguished from materials on hand and preparations made to complete the work, shall be considered compensation for services delivered to the prime contractor prior to the effective date of termination.

§ 18.604 Completed end items.

Work in place accepted by the Government under a construction contract is not to be considered a completed end item even though that work may have been paid for at unit prices set forth in the contract. In case of the complete termination of such contracts, the settlement proposal shall be submitted on the total cost basis and any progress or other payments shall be used to reduce the gross amount of the settlement.

§ 18.605 Submission of settlement proposals.

The settlement proposal forms prescribed in §§ 8.802 and 8.803 of this chapter shall be adopted and modified as construction contractors or architect-engineers consider necessary.

§ 18.606 Bases for settlement proposals.

See § 8.307–2 of this chapter.

(a) *Inventory basis.* The inventory basis of settlement is appropriate for use under the following circumstances:

(1) The partial termination of a construction or architect-engineer contract;

(2) The partial or complete termination of supply orders under any terminated construction contract;

(3) The complete termination of a unit-price (as distinguished from a lump sum) architect-engineer contract.

(b) *Total cost basis.* The total cost basis of settlement shall be used in all cases where a construction contract or a lump sum architect-engineer contract is completely terminated. Line 10, Section II of DD Form 541 (8–802.2) "Deduct-Finished Product Invoiced or To Be Invoiced" is not to be used. All progress and other payments shall be used to reduce the gross amount of the settlement.

§ 18.607 Adjustment of fee.

(a) The termination clauses in § 8.702 (a) as changed by § 8.702 (b) and (c) of this chapter provide that the contracting officer and the contractor may agree upon, i.e., negotiate, the adjustment in fee necessitated by a partial or complete termination of the contract. Where the parties are unable to agree, the fee is to be adjusted as prescribed in paragraph (e) of such clauses.

(b) Where the contract has been terminated for the convenience of the Government, the percentage of completion basis, generally, constitutes a fair and equitable method of adjusting the fee. The percentage of completion basis refers to the contractor's total effort and not solely to the actual construction work. Generally, the effort of a contractor under a cost-reimbursement type construction contract can be segregated into factors such as: mobilization including organization, use of finances, procurement and receipt of materials, placement of subcontracts, preparation of shop drawings, work in place performed by own forces, supervision of subcontractors' work, job administration and demobilization. In the case of architect-engineer contracts, the factors shall include such of the above as are appropriate. Each of the applicable factors will then be weighted, predicated upon a proper evaluation and sound judgment of the importance and difficulty of each factor under the circumstances of each individual contract. One method of weighting the applicable factors is to assign weighted values totaling 100. Next, the percentage of completion of each factor must be established based upon the specific facts of each contract. The application of the percentage of completion of each factor to the weighted value of each factor results, when totaled, in the overall percentage of contract completion. Such percentage of completion is then applied to the total contract fee or to the fee applicable to the terminated portion of the contract to arrive at the adjustment necessitated by the termination. Where agreement cannot be reached, the contracting officer shall determine the percentage of completion as above indicated. Where considered necessary, the contracting officer may consider and allow in the fee adjustment an amount to fairly compensate the contractor for work done, if any, in settling claims of subcontractors and disposing of termination inventory.

§ 18.608 Contractor inventory.

This subpart and subpart E, Part 8 of this chapter, cover the disposition of all contractor inventory (§ 8.101–5) generated under construction and architect-engineer contracts related to construction. It applies to termination inventory and to any other inventory which is:

(a) Excess because of a contract modification; or

(b) Excess under a price revision type contract;

and the cost thereof is included in the contractor's claim for an equitable adjustment or revision in price. It also applies to all property which is excess to the requirements of a cost-reimbursement type contract and includes excess Government-furnished property under any type contract.

§ 18.609 Separate schedules.

See § 8.503–2 of this chapter. Construction equipment shall be submitted on separate inventory schedules.

§ 18.610 Return of materials to stock.

Materials taken from stock and shipped to the construction site shall be considered common items (§§ 8.101–2 and 8.503–5) and shall be returned to stock unless the contractor establishes that such items cannot be utilized without loss. Contractors shall not include in their settlement proposals the cost of any materials so returned. Any costs in connection with the withdrawal, replacement or transportation of such materials may be included as "Other Costs." (Schedule B, Item 5 of DD Form 541 (§ 8.802–2)).

§ 18.611 Allocability of contractor-acquired property on inventory schedules.

It is the responsibility of the contracting officer to determine that all property listed on inventory schedules is qualitatively and quantitatively allocable to the terminated contract or the terminated portion thereof, taking into consideration any work in place. Also, where applicable, the contracting officer must determine that the difference between the cost of allocable property on the inventory schedules and the total cost of property included in the settlement has been incorporated in the work or consumed in the performance thereof.

§ 18.612 Contractor's certificate—property incorporated in work.

Each contractor whose settlement proposal includes the cost of property (materials, etc.) incorporated into the work shall execute a certificate to the effect that all property not accounted for on the inventory schedules has been incorporated into the work or consumed in the performance thereof.

§ 18.613 Inventory at construction site.

Every effort will be made by the contracting officer to relieve the contractor, as promptly as possible, of the responsibility for the preservation and protection of termination inventory located at the construction site. Property, including construction equipment, which is not to be included on inventory schedules shall be removed by the contractor as promptly as possible.

§ 18.614 Clean-up of site.

The contracting officer shall direct such action as will insure the clean-up of the site, protection of serviceable materials, removal of hazards and such other action as will leave a safe and healthful site.

§ 18.615 Scope of screening.

See § 8.505–1 of this chapter. Inventories of construction materials and equipment shall be screened in the Army, by the Chief of Engineers; in the Navy, by the Chief, Bureau of Yards & Docks; and in the Air Force, by the Director, Civil Engineering.

§ 18.616 Contracts for other departments or agencies.

Where a contract quotes funds of a department or agency other than the department administering the contract, such department or agency shall have first priority to all property listed on inventory schedules in accordance with any regulations issued by that department or agency.

§ 18.617 Transfer of property.

All transfers of property on inventory schedules to Department of Defense activities or to other Government agencies shall be on a non-reimbursable basis where the contract quotes funds from a Department of Defense activity. Handling, packing and transportation costs shall be borne by the receiving activity or agency. Where the contract cites funds other than the Department of Defense, any transfers shall be with or without reimbursement as such agency directs.

§ 18.618 Termination of fixed-price construction contracts for default.

§ 18.618–1 Termination of the contractor's right to proceed.

Under contracts containing the "Termination for Default—Damages for Delay—Time Extensions" clause set forth in § 8.709 of this chapter, the Government has the right, to the extent provided in such clause, to terminate the contractor's right to proceed with the work, or any separable part thereof, if the contractor does not prosecute the work required by the contract with such diligence as will insure its completion, or fails to complete it, within the time specified in the contract or any extension thereof.

§ 18.618–2 Effect of termination for default.

If a contractor's right to proceed is terminated for default, the Government may take over and complete the work or cause it to be completed, and the contractor and his sureties shall be liable to the Government for any increased costs caused thereby. The contractor and his sureties shall, in addition to increased costs in completing the work, be liable for liquidated damages, if liquidated damages are provided in the contract, or for actual damages, if liquidated damages are not so provided.

§ 18.618–3 Preliminary notice to surety.

(a) Whenever a termination for default appears imminent, a written notification of that fact (not an actual notice of default) may be given by the contracting officer to the surety at both its home and local offices.

(b) If it is requested by the surety, and agreed to by the contractor and his assignees, if any, arrangement may be made to have future checks mailed to the contractor in care of the surety. In such a case, the contractor must forward a written request to the designated disbursing officer specifically directing a change in address for mailing of checks.

§ 18.618–4 Procedure in case of default.

(a) The contracting officer shall consider the following factors in determining whether to terminate a contract for default:

(1) The provisions of the contract and applicable laws and regulations;

(2) The specific failure of the contractor and excuses, if any, made by the contractor for such failure;

(3) The period of time which would be required for the Government or another contractor to complete the work as compared to the time required for completion by the delinquent contractor;

(4) The effect of a termination for default on the ability of the contractor to liquidate guaranteed loans, progress payments, or advance payments; and

(5) Any other pertinent facts and circumstances.

(b) If the contracting officer determines that the contractor's failure to perform arises from causes which are excusable under the terms of the contract, the contracting officer shall not terminate the contractor's right to proceed, nor shall he charge the contractor with liquidated damages (or if no liquidated damages, then actual damages) because of any delays occasioned by such causes.

(c) If the contracting officer determines that termination for default is in the best interest of the Government, he shall promptly send a written notice to the contractor terminating his right to proceed. The notice shall:

(1) Set forth the contract number and date;

(2) Describe the act or omissions, and the extent of the resultant delay, constituting the default;

(3) State that the contractor's right to proceed further with performance of the contract (or of a specified portion of the contract) is terminated;

(4) State that the Government may cause the contract to be completed and that the contractor will be held liable for any increased costs;

(5) State that the Government reserves all rights and remedies provided by law or under the contract, in addition to charging increased costs;

(6) State that the notice constitutes a decision (see § 1.314 of this chapter), pursuant to the "Disputes" clause, that the contractor is in default as specified and that the contracting officer has determined that the delay is not excusable; and

(7) State that the contractor has the right to appeal as specified in the "Disputes" clause.

(d) The same distribution shall be made of the termination notice as was made of the contract. A copy thereof shall also be furnished to the contractor's surety at the same time that the notice is furnished to the contractor. The surety at the same time should be requested to advise if he desires to enter into any arrangement for completion of the work. In addition, the disbursing officer involved shall be notified to withhold further payments under the terminated contract pending further advice which should be furnished at the earliest practicable time.

(e) Promptly after issuance of the termination notice, the contracting officer shall determine the manner in which the work is to be completed and whether the materials, appliances and plant which are on the site will be needed.

§ 18.618–5 Dealings with surety—take over agreements.

(a) By reason of the surety's liability for damages resulting from the contractor's default, the surety has certain rights and interests in connection with the completion of the contract work and the application of the undisbursed funds available therefor. Because of such interests of the surety, proposals by the surety concerning the completion of the work should be given due consideration, and the decision as to the action to be taken shall be made on the basis of the best interest of the Government, including the possible effect of such action upon the Government's rights against the surety.

(b) Where the surety desires to complete the contract work, completion by the surety should normally be permitted unless the contracting officer has reason to believe that the persons, firms, or corporation by whom the surety proposes to have the work done are incompetent or unqualified so that the interests of the Government would be substantially prejudiced by their efforts.

(c) Because of the possibility of conflicting claims to unpaid prior earnings (retained percentages or amounts representing unpaid progress estimates) of the defaulting contractor, the surety may condition its offer of completion upon the execution by the Government of a "take over" agreement fixing the surety's rights to payment from such funds. In that event the contracting officer may in his discretion (but not before the effective date of termination) enter into a written agreement with the surety. Further, consideration should be given to having the agreement include both the surety and the defaulting contractor in order to eliminate any disagreement as to the contractor's residual rights, such as claims to unpaid prior earnings. The agreement shall provide that the surety will undertake to complete the work required by the contract in accordance with all the terms and conditions of the contract, and that the Government will pay the surety in the manner provided by the contract, but not in excess of the surety's costs and expenses, the balance of the contract price unpaid at the time of default; subject, however, to the following conditions:

(1) Any unpaid earnings of the defaulting contractor, including retained percentages and progress estimates for work accomplished prior to termination, shall be subject to claims by the Government against the contractor, except to the extent that such unpaid earnings may be required to permit payment to the completing surety of its actual costs and expenses incurred in the completion of the work, exclusive of its payments and obligations under the payment bond given in connection with the contract.

(2) Such agreement shall not waive or release the Government's right to liquidated damages for delays in completion of the work, except to the extent that such delays may be excused under the provisions of the contract.

(3) If the proceeds of the contract have been assigned to a financing institution, the surety may not be paid from retained percentages or amounts representing unpaid progress estimates earned by or payable to the contractor unless the assignee shall consent in writing to such payment.

(4) In no event shall the surety be entitled to be paid any amount in excess of its total expenditures necessarily made in completing the work and discharging its liabilities under the payment bond of the defaulting contractor. Furthermore, payments to the surety to reimburse it for discharging its liabilities under the payment bond of the defaulting contractor shall be only on authority of (i) mutual agreement between the Government, the defaulting contractor, and the surety, or (ii) determination of the Comptroller General as to payee and amount, or (iii) order of a court of competent jurisdiction.

§ 18.618–6 Completion by another contractor.

Where the surety does not complete performance of the contract, the contracting officer normally will complete the performance of work by awarding a new contract based on the same plans and specifications. Such award may be the result of competitive bidding or negotiation, whichever procedure is most appropriate under the circumstances. The contracting officer must use reasonable diligence to obtain the lowest price available for completion.

§ 18.618–7 Procedure in lieu of termination for default.

If, after due consideration, the contracting officer determines that termination is not in the best interest of the Government although the contractor is in default, the contracting officer may permit the contractor to continue the work, and the contractor and his sureties shall be liable to the Government for liquidated damages, as specified in the contract, or if liquidated damages are not so specified, for any actual damages occasioned by the failure of the contractor to complete the work in accordance with the terms of the contract.

§ 18.618–8 Documentation in contract file.

In all cases where a contractor's right to proceed is terminated for default or where the procedure authorized by § 18.618–7 is followed, the contract file shall be well documented to explain fully the reasons for the action taken.

§ 18.618–9 Withholding for labor violations.

Any amounts necessary to pay laborer and mechanic wages due under the contract shall be withheld until evidence of proper payment is given, or such amounts shall be transferred to the Comptroller General. See § 12.404–9 of this chapter.

§ 18.618–10 Liquidation of liability.

In accordance with the provisions of the contract, the contractor and his surety are liable to the Government for resultant damages. All retained percentages of progress payments previously made to the contractor and any progress payments due for work completed prior to the termination of the right to proceed shall be used for the purpose of liquidating the liability of the contractor and his surety to the Government for such damages. Where the retained and unpaid amounts are insufficient to liquidate such liability, steps shall be taken to recover the additional sum from the contractor and his surety.

§ 18.618–11 Excusable default.

Paragraph (e) of the clause in § 8.709 of this chapter provides that if, after the issuance of a notice of termination of the contractor's right to proceed, it is determined for any reason that the contractor was not in default or that the default was excusable, the rights and obligations of the parties shall be the same as if the notice of termination had been issued pursuant to the termination for the convenience of the Government clause.

§ 18.619 Termination of fixed-price architect-engineer contracts for default.

Under the "Termination for Default" clause set forth in § 8.711 of this chapter, the Government may terminate a fixed-price architect-engineer contract whenever the architect-engineer shall default in performance of the contract in accordance with its terms and has failed to cure such default within the applicable period after receipt of a notice specifying such default. The contracting officer shall consider the factors set forth in § 18.618–4(a) in determining whether to terminate an architect-engineer contract for default. If the contracting officer determines that it is in the best interest of the Government to terminate for default the notice described in § 18.618–4(c) shall be forwarded to the architect-engineer. If the contract is so terminated, the Government may take over the work and services and prosecute same to completion by contract or otherwise, and the architect-engineer shall be liable to the Government for any excess costs occassioned the Government thereby. Any such excess costs shall be liquidated by use of the retained percentages of progress payments previously made to the architect-engineer and any progress payments due for work completed prior to termination for default. If such retained funds are not sufficient to liquidate such liability, the contracting officer shall make a written demand upon the architect-engineer for the unliquidated balance thereof.

§ 18.620 Termination for convenience of Government clause for fixed-price construction contracts.

Insert the clause set forth in § 8.701(a) of this chapter, modified as provided therein, and in § 8.701(b), if appropriate, in each fixed-price type construction contract, as described in § 18.201, in excess of $10,000.

§ 18.621 Termination clause for cost-reimbursement type construction contracts.

The clause in § 8.702(a) shall be inserted in each cost-reimbursement type contract, as defined in § 3.405 of this chapter, for construction except that paragraph (e)(i)(D)(II) thereof shall be deleted and the paragraph in § 8.702(b) substituted.

§ 18.622 Short form termination for convenience clause for fixed-price construction contracts.

See § 8.705–2 of this chapter.

§ 18.623 Default clause for fixed-price construction contracts.

The clause in § 8.709 of this chapter shall be inserted in each fixed-price construction contract in excess of $10,000.

§ 18.624 Excusable delays clause for cost-reimbursement type construction contracts.

The clause in § 8.708 of this chapter shall be used in each cost-reimbursement type construction contract.

§ 18.625 Termination for convenience of Government clause for fixed-price architect-engineer contracts.

The clause in § 8.701(a) shall be inserted in each fixed-price type contract, as defined in § 3.404 of this chapter, for architect-engineer services in excess of $10,000 except that the clause shall be modified as provided in § 8.701(d).

§ 18.626 Termination clause for cost-reimbursement type architect-engineer contracts.

The clause in § 8.702(a) shall be inserted in each cost-reimbursement type contract, as defined in § 3.405, for architect-engineer services except that the clause shall be modified as provided in § 8.702(e).

§ 18.627 Short form termination for convenience clause for fixed-price architect-engineer contracts.

The clause in § 8.705–2 shall be used in each architect-engineer contract not in excess of $10,000.

§ 18.628 Default clause for fixed-price architect-engineer contracts.

See § 8.711 of this chapter.

§ 18.629 Excusable delays clause for cost-reimbursement type architect-engineer contracts.

Insert the clause in § 8.708(b) of this chapter in each cost-reimbursement type architect-engineer contract.

§ 18.630 Approved forms of telegraphic and letter notices of termination for construction and architect-engineer contracts.

§ 18.630–1 Telegraphic notices of termination for construction contracts.

See forms in § 8.801–1 (c) and (d) of this chapter.

§ 18.630–2 Letter notice of termination for construction contracts.

See form in § 8.801–2(b) of this chapter.

§ 18.630–3 Letter notice of termination for architect-engineer contracts.

See form in § 8.801–2(c) of this chapter.

§ 18.631 Forms of settlement agreement—architect-engineer contracts.

The forms of settlement agreements set forth in §§ 8.806–1, 8.806–2, 8.806–4, 8.806–5, 8.806–6, and 8.806–7 of this chapter are to be used except that "Architect-Engineer" is to be substituted for "Contractor" wherever it appears.

Subpart G—[Reserved]

Subpart H—Bonds

§ 18.800 Scope.

This subpart sets forth the requirements for bid guarantees and Miller Act Bonds in construction contracts or subcontracts.

§ 18.801 Bid guarantees.

See § 10.402 of this chapter. Where performance and payment bonds are required in the procurement of construction, the invitation for bids or request for proposals shall require bidders to furnish a bid bond or other security (see paragraph 4, Standard Form 22 and § 10.202 of this chapter), and such security shall be furnished prior to commencement of performance of the contract.

§ 18.802 Performance bonds in connection with construction contracts.

See § 10.103–1 of this chapter. Performance bonds shall be furnished prior commencement of contract performance.

§ 18.803 Payment bonds in connection with construction contracts.

See § 10.103–2 of this chapter. Payment bonds shall be furnished prior to commencement of contract performance.

§ 18.803–1 Furnishing information to subcontractors and suppliers.

See § 10.103–4 of this chapter.

§ 18.804 Default procedure.

See § 18.618.

§ 18.805 Consent of surety.

See § 10.111–2 of this chapter.

§ 18.806 Expediter plan. [Reserved]

Subpart I—[Reserved]

Subpart J—Taxes

§ 18.1001 Federal excise taxes.

Various provisions of the Internal Revenue Code of 1954 (26 U.S.C.) either provide for refunds or credits for taxes paid or specifically exclude construction equipment from the application of taxes levied, where the item is neither registered for nor employed or used on highways.

§ 18.1001–1 Special fuels.

See § 11.101–6 of this chapter.

§ 18.1001–2 Motor vehicles.

See § 11.102–2 of this chapter.

§ 18.1001–3 Tires and tubes.

See § 11.102–3 of this chapter.

§ 18.1001–4 Gasoline.

See § 11.102–4 of this chapter.

[Rev. 9, ASPR, Jan. 29, 1965] (Sec. 2202, 70A Stat. 120; 10 U.S.C. 2202. Interpret or apply secs. 2301–2314, 70A Stat. 127–133; 10 U.S.C. 2301–2314)

J. C. LAMBERT,
Major General, U.S. Army,
The Adjutant General.

[F.R. Doc. 65–4478; Filed, Apr. 28, 1965; 8:45 a.m.]

Title 26—INTERNAL REVENUE

Chapter I—Internal Revenue Service, Department of the Treasury

SUBCHAPTER A—INCOME TAX

[T.D. 6820]

PART 2—MARITIME CONSTRUCTION RESERVE FUND

Deposits in Construction Reserve Fund

On September 23, 1964, notice of proposed rule making with respect to regulations relating to deposits in a construction reserve fund under section 511 of the Merchant Marine Act, 1936, as added by the Act of October 10, 1940 (Public Law 840, 76th Cong., 57 Stat. 157) and as amended was published in the FEDERAL REGISTER (29 F.R. 13199). After consideration of all such relevant matter as was presented by interested persons regarding the rules proposed, the amendment of the regulations as proposed is hereby adopted, subject to the changes set forth below:

PARAGRAPH 1. Section 2.1, as set forth in the notice of proposed rule making, is changed by revising section 511(h) and the historical note following section 511(o).

PAR. 2. Paragraph (c) of § 2.1–2, as set forth in the notice of proposed rule making, is changed.

PAR. 3. Paragraph (d) of § 2.1–8, as set forth in the notice of proposed rule making, is changed.

PAR. 4. Paragraph (a), and that portion of paragraph (b)(1) preceding subdivision (i) thereof, of § 2.1–9, as set forth in the notice of proposed rule making, are changed.

PAR. 5. Paragraph (a) of § 2.1–23, as set forth in the notice of proposed rule making, is changed.

[SEAL] SHELDON S. COHEN,
Commissioner of Internal Revenue.

Approved: April 22, 1965.

STANLEY S. SURREY,
Assistant Secretary of the Treasury.

By order of the Acting Deputy Maritime Administrator.

JAMES S. DAWSON, Jr.,
Secretary.

The following regulations, relating to deposits in a construction reserve fund under section 511 of the Merchant Marine Act, 1936, as added by the Act of October 10, 1940 (Public Law 840, 76th Cong., 57 Stat. 157) and as amended and in effect on the date of filing of this notice of proposed rule making, are hereby prescribed. These regulations, with respect to the subject matter within the scope thereof, supersede Treasury Decision 5330, as amended (26 CFR (1939) Part 32).

Sec.

2.1 Statutory provisions; section 511, Merchant Marine Act, 1936, and related statutes.
2.1–1 Definitions.
2.1–2 Scope of section 511 of the Act and the regulations in this part.
2.1–3 Requirements as to vessel operations.
2.1–4 Application to establish fund.
2.1–5 Tentative authorization to establish fund.
2.1–6 Establishment of fund.
2.1–7 Circumstances permitting reimbursement from a construction reserve fund.
2.1–8 Investment of funds in securities.
2.1–9 Valuation of securities in fund.
2.1–10 Withdrawals from fund.
2.1–11 Time deposits.
2.1–12 Election as to nonrecognition of gain.
2.1–13 Deposit of proceeds of sales or indemnities.
2.1–14 Deposit of earnings and receipts.
2.1–15 Time for making deposits.
2.1–16 Tax liability as to earnings deposited.
2.1–17 Basis of new vessel.
2.1–18 Allocation of gain for tax purposes.
2.1–19 Requirements as to new vessels.
2.1–20 Obligation of deposits.
2.1–21 Period for construction of certain vessels.
2.1–22 Time extensions for expenditure or obligation.
2.1–23 Noncompliance with requirements.
2.1–24 Extent of tax liability.
2.1–25 Assessment and collection of deficiencies.
2.1–26 Reports by taxpayers.
2.1–27 Controlled corporation.
2.1–28 Administrative jurisdiction.

AUTHORITY: The provisions of this Part 2 issued under sec. 511(b) of Merchant Marine Act, 1936, as amended by Act of Oct. 10, 1940; Pub. Law 840, 76th Cong., 57 Stat. 157; sec. 7805 of the Internal Revenue Code of 1954; 68A Stat. 917, 26 U.S.C. 7805.

§ 2.1 Statutory provisions; sections 511 and 905, Merchant Marine Act, 1936, and related statutes.

Sec. 511. [Merchant Marine Act, 1936.] (a) When used in this section the term "new vessel" means any vessel (1) documented or agreed with the Commission to be documented under the laws of the United States; (2) constructed in the United States after December 31, 1939, or the construction of which has been financed under titles V or VII of this Act, as amended, or the construction of which has been aided by a mortgage insured under title XI of this Act as amended; and (3) either (A) of such type, size, and speed as the Commission shall determine to be suitable for use on the high seas or Great Lakes in carrying out the purposes of this Act, but not of less than 2,000 gross tons or of less speed than twelve knots, unless the Commission shall determine and certify in each case that a vessel of a specified lesser tonnage or speed is desirable for use by the United States in case of war or national emergency, or (B) constructed to replace a vessel or vessels requisitioned or purchased by the United States.

(b) For the purposes of promoting the construction, reconstruction, reconditioning, or acquisition of vessels, or for other purposes authorized in this section, necessary to carrying out the policy set forth in title I of this Act, any citizen of the United States who is operating a vessel or vessels in the foreign or domestic commerce of the United States or in the fisheries or owns in whole or in part a vessel or vessels being so operated, or who, at the time of purchase or requisition of the vessel by the Government, was operating a vessel or vessels so engaged or

owned in whole or in part a vessel or vessels being so operated or had acquired or was having constructed a vessel or vessels for the purpose of operation in such commerce or in the fisheries, may establish a construction reserve fund, for the construction, reconstruction, reconditioning, or acquisition of new vessels, or for other purposes authorized in this section, to be composed of deposits of proceeds from sales of vessels, indemnities on account of losses of vessels, earnings from the operation of vessels documented under the laws of the United States and from services incident thereto, and receipts, in the form of interest or otherwise, with respect to amounts previously deposited. Such construction reserve fund shall be established, maintained, expended, and used in accordance with the provisions of this section and rules or regulations to be prescribed jointly by the Commission and the Secretary of the Treasury.

(c) In the case of the sale or actual or constructive total loss of a vessel, if the taxpayer deposits an amount equal to the net proceeds of the sale or to the net indemnity with respect to the loss in a construction reserve fund established under subsection (b), then—

(1) If the taxpayer so elects in his income-tax return for the taxable year in which the gain was realized, or

(2) In case a vessel is purchased or requisitioned by the United States, or is lost, in any taxable year beginning after December 31, 1939, and the taxpayer receives payment for the vessel so purchased or requisitioned, or receives from the United States indemnity on account of such loss, subsequent to the end of such taxable year, if the taxpayer so elects prior to the expiration of sixty days after the receipt of the payment or indemnity, and in accordance with a form of election to be prescribed by the Commissioner of Internal Revenue with the approval of the Secretary of the Treasury, no gain shall be recognized to the taxpayer in respect of such sale or indemnification in the computation of net income for the purposes of Federal income or excess-profits taxes. If an election is made under subdivision (2) and if computation or recomputation in accordance with this subsection is otherwise allowable but is prevented, on the date of making such election or within six months thereafter, by any statute of limitation, such computation or recomputation nevertheless shall be made notwithstanding such statute if a claim therefor is filed within six months after the date of making such election.

For the purposes of this subsection no amount shall be considered as deposited in a construction reserve fund unless it is deposited within sixty days after it is received by the taxpayer.

As used in this subsection the term "net proceeds" and the term "net indemnity" mean the sum of (1) the adjusted basis of the vessel and (2) the amount of gain which would be recognized to the taxpayer without regard to this subsection.

(d) The basis for determining gain or loss and for depreciation, for the purposes of Federal income or excess profits taxes, of any new vessel constructed, reconstructed, reconditioned, or acquired by the taxpayer, or with respect to which purchase-money indebtedness is liquidated as provided in subsection (g), in whole or in part out of the construction reserve fund shall be reduced by that portion of the deposits in the fund expended in the construction, reconstruction, reconditioning, acquisition, or liquidation of purchase-money indebtedness of the new vessel which represents gain not recognized for tax purposes under subsection (c).

(e) For the purposes of this section, (1) if the net proceeds of a sale or the net indemnity in respect of a loss are deposited in more than one deposit, the amount consisting of the gain shall be considered as first deposited; (2) amounts expended, obligated, or otherwise withdrawn shall be applied against the amounts deposited in the fund in the order of deposit; and (3) if any deposit consists in part of gain not recognized under subsection (c), any expenditure, obligation, or withdrawal applied against such deposit shall be considered to consist of gain in the proportion that the part of the deposit consisting of gain bears to the total amount of the deposit.

(f) With respect to any taxable year, amounts on deposit on the last day of such year in a construction reserve fund in accordance with this section and with respect to which all the requirements of subsection (g) have been satisfied, to the extent that such requirements are applicable as of the last day of said taxable year, shall not constitute an accumulation of earnings or profits within the meaning of section 102 of the Internal Revenue Code [part I (section 531 and following), subchapter A, chapter 1 of the Internal Revenue Code of 1954].

(g) The provisions of subsections (c) and (f) shall apply to any deposit in the construcion reserve fund only to the extent that such deposit is expended or obligated for expenditure, in accordance with rules and regulations to be prescribed jointly by the Commission and the Secretary of the Treasury—

(1) Under a contract for the construction or acquisition of a new vessel or vessels (or in the discretion of the Commission, for a part interest therein), or, with the approval of the Commission, for the reconstruction or reconditioning of a new vessel or vessels, entered into within (i) two years from the date of deposit or the date of any extension thereof which may be granted by the Commission pursuant to the provisions of section 511(h), in the case of deposits made prior to the date [July 17, 1952] on which these amendatory provisions become effective, or (ii) three years from the date of such deposit in the case of a deposit made after such effective date, only if under such rules and regulations—

(A) Within such period not less than 12½ per centum of the construction or contract price of the vessel or vessels is paid or irrevocably committed on account thereof and the plans and specifications therefor are approved by the Commission to the extent by it deemed necessary; and

(B) In case of a vessel or vessels not constructed under the provisions of this title or not purchased from the Commission, (i) said construction is completed, within six months from the date of the construction contract, to the extent of not less than 5 per centum thereof (or in case the contract covers more than one vessel, the construction of the first vessel so contracted for is so completed to the extent of not less than 5 per centum) as estimated by the Commission and certified by it to the Secretary of the Treasury, and (ii) all construction under such contract is completed with reasonable dispatch thereafter;

(2) For the liquidation of existing or subsequently incurred purchase-money indebtedness to persons other than a parent company of, or a company affiliated or associated with, the mortgagor on a new vessel or vessels within (i) two years from the date of deposit or the date of any extension thereof which may be granted by the Commission pursuant to the provisions of section 511 (h), in the case of deposits made prior to the date [July 17, 1952] on which these amendatory provisions become effective, or (ii) three years from the date of such deposit in the case of a deposit made after such effective date.

(h) The Commission is authorized under rules and regulations to be prescribed jointly by the Secretary of the Treasury and the Commission to grant extensions of the period within which the deposits shall be expended or obligated or within which construction shall have progressed to the extent of 5 per centum of completion as provided herein, but such extension shall not be for an aggregate additional period in excess of two years with respect to the expenditure or obligation of such deposits or more than one year with respect to the progress of such construction: *Provided*, That until January 1, 1965, in addition to the extensions hereinbefore permitted, further extensions may be granted ending not later than December 31, 1965.

(i) Any such deposited gain or portion thereof which is not so expended or obligated within the period provided, or which is otherwise withdrawn before the expiration of such period, or with respect to which the construction has not progressed to the extent of 5 per centum of completion within the period provided, or with respect to which the Commission finds and certifies to the Secretary of the Treasury that, for causes within the control of the taxpayer, the entire construction is not completed with reasonable dispatch, if otherwise taxable income under the law applicable to the taxable year in which such gain was realized, shall be included in the gross income for such taxable year, except for the purpose of the declared value excess-profits tax and the capital stock tax. If any such deposited gain or portion thereof with respect to a deposit made in any taxable year ending on or before June 30, 1945, is so included in gross income for such taxable year, there shall (in addition to any other deficiency) be assessed, collected, and paid in the same manner as if it were a deficiency, an amount equal to 1.1 per centum of the amount of gain so included, such amount being in lieu of any adjustment with respect to the declared value excess-profits tax for such taxable year.

(j) Notwithstanding any other provision of law, any deficiency in tax for any taxable year resulting from the inclusion of any amount in gross income as provided by subsection (i), and the amount to be treated as a deficiency under such subsection in lieu of any adjustment with respect to the declared value excess-profits tax, may be assessed or a proceeding in court for the collection thereof may be begun without assessment, at any time: *Provided, however*, That interest on any such deficiency or amount to be treated as a deficiency shall not begin until the date the deposited gain or portion thereof in question is required under subsection (i) to be included in gross income.

(k) This section shall be applicable to a taxpayer only in respect of sales or indemnifications for losses occurring within a taxable year beginning after December 31, 1939, and only in respect of earnings derived during a taxable year beginning after December 31, 1939.

(l) For the purposes of this section a vessel shall be considered as constructed or acquired by the taxpayer if constructed or acquired by a corporation at a time when the taxpayer owns at least 95 per centum of the total number of shares of each class of stock of the corporation.

(m) The terms used in this section shall have the same meaning as in chapter 1 of the Internal Revenue Code.

(n) The terms "contract for the construction" and "construction contract", as used in this section, shall include, in the case of a taxpayer who constructs a new vessel in a shipyard owned by such taxpayer, an agreement between such taxpayer and the Commission with respect to such construction and containing provisions deemed necessary or advisable by the Commission to carry out the purposes and policy of this section.

(o) The terms "reconstruction and reconditioning", as used in this section, shall include the reconstruction, reconditioning, or modernization of a vessel for exclusive use on the Great Lakes, including the St. Lawrence

River and Gulf, if the Commission determines that the objectives of this Act will be promoted by such reconstruction, reconditioning, or modernization, and, nothwithstanding any other provisions of law, such vessel shall be deemed to be a "new vessel" within the meaning of this section for such reconstruction, reconditioning, or modernization.

[Sec. 511 as added by Act of October 10, 1940 (Pub. Law 840, 76th Cong., 54 Stat. 1106); as amended by Act of June 17, 1943 (Pub. Law 78, 78th Cong., 57 Stat. 157); Act of Dec. 23, 1944 (Pub. Law 552, 78th Cong., 58 Stat. 920); secs. 9–14, Act of July 17, 1952 (Pub. Law 586, 82d Cong., 66 Stat. 762); Act of Dec. 23, 1963 (Pub. Law 88–227, 77 Stat. 470)]

SEC. 905. [Merchant Marine Act, 1936.] When used in this Act—

(a) The words "foreign commerce" or "foreign trade" mean commerce or trade between the United States, its Territories or possessions, or the District of Columbia, and a foreign country.

* * * * *

(c) The words "citizen of the United States" include a corporation, partnership, or association only if it is a citizen of the United States within the meaning of section 2 of the Shipping Act, 1916, as amended (U.S.C., title 46, sec. 802), and with respect to a corporation under title VI of this Act, all directors of the corporation are citizens of the United States, and, in the case of a corporation, partnership, or association operating a vessel on the Great Lakes, or on bays, sounds, rivers, harbors, or inland lakes of the United States the amount of interest required to be owned by a citizen of the United States shall be not less than 75 per centum.

* * * * *

(e) The terms "United States Maritime Commission" and "Commission" shall mean the Secretary of Commerce, the Maritime Administrator, or the * * * [Maritime Subsidy Board] as the context may require * * *.

[Sec. 905 (a), (c), and (e) (49 Stat. 2016), amended by sec. 39 (a) and (b), Act of June 23, 1938 (Pub. Law 705, 75th Cong., 52 Stat. 964); Act of July 17, 1952 (Pub. Law 586, 82d Cong., 66 Stat. 765); sec. 4, Act of Sept. 21, 1959 (Pub. Law 86–327, 73 Stat. 597)]

SEC. 2. [Shipping Act, 1916.] (a) That within the meaning of this Act no corporation, partnership, or association shall be deemed a citizen of the United States unless the controlling interest therein is owned by citizens of the United States, and, in the case of a corporation, unless its president or other chief executive officer and the chairman of its board of directors are citizens of the United States and unless no more of its directors than a minority of the number necessary to constitute a quorum are noncitizens and the corporation itself is organized under the laws of the United States or of a State, Territory, District, or possession thereof, but in the case of a corporation, association, or partnership operating any vessel in the coastwise trade the amount of interest required to be owned by citizens of the United States shall be 75 per centum.

(b) The controlling interest in a corporation shall not be deemed to be owned by citizens of the United States (a) if the title to a majority of the stock thereof is not vested in such citizens free from any trust or fiduciary obligation in favor of any person not a citizen of the United States; or (b) if the majority of the voting power in such corporation is not vested in citizens of the United States; or (c) if through any contract or understanding it is so arranged that the majority of the voting power may be exercised, directly or indirectly, in behalf of any person who is not a citizen of the United States; or (d) if by any other means whatsoever control of the corporation is conferred upon or permitted to be exercised by any person who is not a citizen of the United States.

(c) Seventy-five per centum of the interest in a corporation shall not be deemed to be owned by citizens of the United States (a) if the title to 75 per centum of its stock is not vested in such citizens free from any trust or fiduciary obligation in favor of any person not a citizen of the United States; or (b) if 75 per centum of the voting power in such corporation is not vested in citizens of the United States; or (c) if, through any contract or understanding it is so arranged that more than 25 per centum of the voting power in such corporation may be exercised, directly or indirectly, in behalf of any person who is not a citizen of the United States; or (d) if by any other means whatsoever control of any interest in the corporation in excess of 25 per centum is conferred upon or permitted to be exercised by any person who is not a citizen of the United States.

(d) The provisions of this Act shall apply to receivers and trustees of all persons to whom the Act applies, and to the successors or assignees of such persons.

[Sec. 2 (39 Stat. 729) as amended by Act of July 15, 1918 (Pub. Law 198, 65th Cong., 40 Stat. 900); sec. 38, Merchant Marine Act, 1920 (41 Stat. 1008); sec. 3, Act of Sept. 21, 1959 (Pub. Law 86–327, 73 Stat. 597)]

§ 2.1–1 Definitions.

(a) As used in the regulations in this part, except as otherwise expressly provided—

(1) "Act" means the Merchant Marine Act, 1936, as amended (46 U.S.C. ch. 27).

(2) "Section" means one of the sections of the regulations in this part.

(3) "Administration" means the Maritime Administration of the Department of Commerce as created by Reorganization Plan No. 21 of 1950 (46 U.S.C. 1111 note).

(4) "Citizen" means a person who, if an individual, was born or naturalized as a citizen of the United States or, if other than an individual, meets the requirements of section 905(c) of the Act and section 2 of the Shipping Act, 1916, as amended (46 U.S.C. 802).

(5) "Taxpayer" means a citizen who has established or seeks to establish a construction reserve fund under the provisions of section 511 of the Act and the regulations in this part, and may include a partnership.

(6) "Corporation" includes associations, joint-stock companies and insurance companies.

(7) "Stock" includes the shares in an association, joint-stock company, or insurance company.

(8) "Affiliate" or "associate" means a person directly or indirectly controlling, controlled by, or under common control with, another person.

(9) "Control", as used in subparagraph (8) of this paragraph, means the possession of the power to direct in any manner the management and policies of a person, and the terms "controlling" and "controlled" shall have the meanings correlative to the foregoing.

(10) "Person" means an individual, a corporation, a partnership, an association, an estate, a trust, or a company.

(11) "Partnership" includes a syndicate, group, pool, joint venture, or other unincorporated organization.

(12) "Construction", if so determined by the Administration, shall include reconstruction and reconditioning.

(13) "Reconstruction and reconditioning" shall include the reconstruction, reconditioning, or modernization of a vessel for exclusive use on the Great Lakes, including the Saint Lawrence River and Gulf, if the Administration determines that the objectives of the Act will be promoted by such reconstruction, reconditioning, or modernization, and, notwithstanding any other provisions of law, such vessel shall be deemed to be a "new vessel" within the meaning of section 511 of the Act for such reconstruction, reconditioning, or modernization.

(14) "Purchase-money indebtedness" means any indebtedness, or evidence thereof, created as the result of the purchase of a vessel by the taxpayer.

(15) "Contract", "contract for the construction", and "construction contract" shall include, if so determined by the Administration, a contract for reconstruction or reconditioning and shall include, in the case of a taxpayer who constructs a new vessel in a shipyard owned by such taxpayer, an agreement, between such taxpayer and the Administration with respect to such construction, and containing provisions deemed necessary or advisable by the Administration to carry out the purposes and policy of section 511 of the Act.

(b) Insofar as the computation and collection of taxes are concerned, other terms used in the regulations in this part, except as otherwise provided, have the same meaning as in the Internal Revenue Code and the regulations thereunder.

§ 2.1–2 Scope of section 511 of the Act and the regulations in this part.

(a) *Applicability of regulations.* (1) The regulations prescribed in this part—

(i) Apply to gain realized from the sale or loss of vessels, earnings from the operation of vessels, and interest (or otherwise) with respect to amounts previously deposited in the construction reserve fund, for a taxable year beginning after December 31, 1964, and

(ii) Apply to the expenditure, obligation, or withdrawal, during a taxable year beginning after December 31, 1964, of any deposits of gain, earnings, and interest (or otherwise) of the character referred to in subdivision (i) of this subparagraph without regard to the taxable year in which the deposits were made.

(2) As to gain, earnings, or interest (or otherwise) described in subparagraph (1) (i) of this paragraph and as to an expenditure, obligation, or withdrawal described in subparagraph (1) (ii) of this paragraph, the regulations in this part supersede Treasury Decision 5330, as amended (26 CFR (1939) Part 32).

(b) *Nonrecognition and accumulation.* Section 511 of the Act provides, under conditions specified, for the nonrecognition, for income and excess-profits tax purposes, of the gain realized from the sale or indemnification for loss of certain vessels including certain vessels in the course of construction, or shares therein. It also permits the accumulation of the

proceeds of such sales or indemnification and of certain earnings without liability under part I (section 531 and following), subchapter G, chapter 1 of the Internal Revenue Code of 1954, and the regulations thereunder (§§ 1.531 through 1.537–3 of this chapter (Income Tax Regulations)).

(c) *Availability of benefits.* The benefits of section 511 of the Act are available to any citizen as defined in paragraph (a) (4) of § 2.1–1, who, during any taxable year owns, in whole or in part, a vessel or vessels within the scope of § 2.1–3. A citizen operating such a vessel or vessels owned by any other person or persons can derive no benefit from the provisions relating to the nonrecognition of gain from the sale or loss of such vessel or vessels so owned, but may establish a construction reserve fund in which he may deposit earnings from the operation of such vessel or vessels.

(d) *Applicability of section 511.* Section 511 of the Act applies only with respect to sales or losses of vessels within the scope of § 2.1–3 or in respect of earnings derived from the operation of such vessels. A loss to be within section 511 of the Act must be an actual or constructive total loss. Whether there is a total loss, actual or constructive, will be determined by the Administration.

§ 2.1–3 Requirements as to vessel operations.

Section 511 of the Act applies with respect to vessels operated in the foreign or domestic commerce of the United States or in the fisheries of the United States and vessels acquired or being constructed for the purpose of such operation. The foreign commerce of the United States includes commerce or trade between the United States (including the District of Columbia), the territories and possessions which are embraced within the coastwise laws, and a foreign country or other territories and possessions of the United States. The domestic commerce of the United States includes commerce or trade between ports of the United States and its territories and possessions, embraced within the coastwise laws and on inland rivers. The fisheries include the fisheries of the United States and its territories and possessions. Section 511 of the Act does not apply to vessels operated in the foreign commerce or fisheries of any country other than the United States.

§ 2.1–4 Application to establish fund.

Any person claiming to be entitled to the benefits of section 511 of the Act may make application, in writing, to the Administration for permission to establish a construction reserve fund. The application shall be in such form and substance as the Administration may prescribe and shall designate, among other things, the depository or depositories with which the taxpayer proposes to establish the said fund. The original application shall be executed and verified by the taxpayer, or if the taxpayer is a corporation, by one of its principal officers, in triplicate, and shall be accompanied by eight conformed copies when filed with the Administration.

§ 2.1–5 Tentative authorization to establish fund.

Where the time between the receipt by the Administration of the application for permission to establish a construction reserve fund and the date prior to which an amount received from the sale or loss of a vessel must be deposited to come within the scope of section 511 of the Act is insufficient to permit a determination of the eligibility of the applicant, the Administration may tentatively authorize the establishment of a construction reserve fund and the deposit of such amount therein. Such tentative authorization shall be subject to rescission by the Administration if subsequently it is determined that the applicant is not entitled to the benefits of section 511 of the Act, or has not complied with the statutory requirements. For example, a tentative authorization will be rescinded if the Administration ascertains that the applicant is not a citizen. Upon such determination, the fund shall be closed and all amounts on deposit therein shall be withdrawn.

§ 2.1–6 Establishment of fund.

(a) *Authorization by the Administration.* If the application is approved by the Administration, the Administration will adopt Orders authorizing the establishment of a construction reserve fund with the depository or depositories designated by the taxpayer and approved by the Administration. The Orders will provide for joint control by the Administration and the taxpayer over such fund, will set forth the conditions governing the establishment and maintenance of the fund and the making of deposits therein and withdrawals therefrom, and will designate the representatives authorized to execute instruments of withdrawal on behalf of the Administration.

(b) *Resolution or agreement of the taxpayer.* A certified copy of the Orders of the Administration will be furnished the taxpayer. If the taxpayer is a corporation, it shall promptly adopt, through its board of directors, a resolution satisfactory in form and substance to the Administration, authorizing the establishment and maintenance of the fund in conformity with the action of the Administration. If the taxpayer is not a corporation, it shall promptly execute an agreement with the depository satisfactory in form and substance to the Administration to conform to the action of the Administration as set forth in the Orders. Certified copies of the Orders of the Administration and of the resolution of the taxpayer (if it is a corporation) will be furnished to the depository by the Administartion and the taxpayer, respectively, for its guidance in maintaining the fund and honoring instruments of withdrawal. The taxpayer, if a corporation, shall also furnish the Administration with a certified copy of its resolution, or if not a corporation, a duplicate original of its agreement with the depository.

(c) *Constructive action not recognized.* Constructive deposits, substitutions or withdrawals will not be recognized by the Administration in the establishment and maintenance of the fund.

(d) *Failure to make deposits as basis for termination of fund.* In the event no deposit is made into the fund for more than five years, any amounts remaining in the fund shall be removed from the fund at the discretion of the Administration and, if so removed, the fund shall be terminated. In the event of such termination, see § 2.1–23 for recognition of gain.

§ 2.1–7 Circumstances permitting reimbursement from a construction reserve fund.

(a) *Payments prior to establishment of fund.* If, prior to the establishment of a construction reserve fund under the regulations in this part, a taxpayer has made necessary payments under a contract which satisfies the provisions of the regulations in this part and section 511 of the Act for the construction or acquisition of a new vessel, such taxpayer may, if subsequently authorized to establish a construction reserve fund under the regulations in this part, draw against such fund as reimbursement for the amount, if any, of other funds which, with the approval or ratification of the Administration, the taxpayer used for making such necessary payments prior to the establishment of the fund.

(b) *Payments subsequent to establishment of fund.* If, subsequent to the establishment of a construction reserve fund under the regulations in this part, the taxpayer has made necessary payments under a contract which satisfies the provisions of the regulations in this part and section 511 of the Act for the construction or acquisition of a new vessel, such taxpayer may draw against such fund as reimbursement for the amount, if any, of other funds which, with the approval or ratification of the Administration, the taxpayer had used for the purpose of making such necessary payments.

§ 2.1–8 Investment of funds in securities.

(a) *Obligations of or guaranteed by the United States.* Interest-bearing direct obligations of the United States, or obligations fully guaranteed as to principal and interest by the United States, may be deposited in the construction reserve fund in lieu of cash, may be purchased with cash on deposit in the fund, or may be substituted for securities or commitment to finance in the fund, subject to the provisions of paragraph (b) of this section.

(b) *Other securities.* In cases where the taxpayer desires to deposit any securities in the fund in lieu of cash other than those of or guaranteed by the United States or to purchase such other securities with cash on deposit in the fund, or to substitute such other securities for securities or commitment to finance in the fund, the taxpayer shall make written application to the Administration and shall not consummate the transaction until the written consent of the Administration shall have been received. The application shall describe the securities fully. Every approval by the Administration of such application shall be conditioned upon agreement by the taxpayer forthwith to dispose of such

securities upon subsequent request by the Administration. Immediately upon the purchase of any securities for deposit in the fund, the taxpayer shall advise the Administration, giving the date of purchase, a description of the securities, and the price paid therefor (net, brokerage and other charges, and gross). Ordinarily, the Administration will not approve the deposit in the fund in lieu of cash, or the purchase with cash on deposit in the fund or the substitution for securities in the fund of securities not actively traded in on exchanges registered under the Securities Exchange Act of 1934 (15 U.S.C. ch. 2B), or securities which are not legal for investment of trust funds. Whenever the Administration approves the substitution of other securities for securities in the fund, such substitution shall be effected only upon or after the deposit of the substituted securities into the fund.

(c) *Cash.* Cash may be substituted for amounts which are on deposit in the fund in any other form.

(d) *Devalued securities.* In the event the Administration determines that the market value at any date of any securities in the fund has decreased to a figure which is less than 90 percent of the market value at the time of deposit into the fund, then within 60 days after the taxpayer receives notice of such determination the taxpayer shall (except as otherwise provided in this paragraph) deposit into the fund cash or securities in an amount equal to the difference between the current market value of the devalued securities and the market value of such securities at the time of their original deposit. However, if any securities in the fund are valued at the time of their deposit at less than the market value of such securities at the time of their deposit the taxpayer shall be required to deposit only an amount equal to that portion of the difference between the current market value of the devalued securities and the market value of such securities at the time of their original deposit which bears the same ratio to such total difference as the amount at which the securities were valued at the time of their deposit bears to the market value at the time of such deposit.

§ 2.1–9 Valuation of securities in fund.

(a) *Equivalent values.* In cases where securities are deposited in the fund in lieu of cash, or are purchased with cash on deposit in the fund, or are substituted for securities in the fund, the value of such securities must not be less than the amount of cash in lieu of which they are so deposited or with which they are so purchased, or the value at the time of deposit of the securities for which they were so substituted. If the securities on deposit in the fund are replaced by cash from the general funds of the taxpayer, the amount of cash to be deposited in the fund in lieu thereof shall be not less than the amount at which such securities were valued at the time of their deposit in the fund.

(b) *Determination of value.* (1) For the purpose of determining the amount in the fund, the value of securities shall be their "market value" (which shall be the basis for determining value, unless otherwise agreed to by the administration) and shall be determined in the following manner:

(i) In instances where no actual purchase is involved, such as the initial deposit of securities in the fund in lieu of cash, the last sales price thereof on the principal exchange on the day the deposit was made shall be deemed to be the "market value" thereof, or, if no such sales were made, the "market value" thereof will be determined by the Administration on such basis as it may deem to be fair and reasonable in each case.

(ii) In instances where the purchase of securities with cash on deposit in the fund is involved, "market value" shall be the gross price paid (adjusted for accrued interest); *Provided*, That if such securities are purchased otherwise than upon a registered exchange the price shall be within the range of transactions on the exchange on the date of such purchase, or, if there were no such transactions, then the "market value" thereof will be determined by the Administration on such basis as it may deem to be fair and reasonable in each case.

(2) Purchase-money obligations secured by mortgages on vessels sold or irrevocable commitments to finance the construction or acquisition of new vessels which are deposited in the construction reserve fund as provided in § 2.1–13 ordinarily will be considered as equivalent to their face value.

§ 2.1–10 Withdrawals from fund.

(a) *Withdrawals for obligations or liquidation.* (1) Checks, drafts, or other instruments of withdrawal to meet obligations under a contract for the construction or acquisition of a new vessel or vessels or for the liquidation of existing or subsequently incurred purchase-money indebtedness, after having been executed by the taxpayer, shall be forwarded to the Administration in Washington, D.C., with appropriate explanation of the purpose of the proposed withdrawal, including properly certified invoices or other supporting papers. Such instruments of withdrawal, if payable to the Administration, will be deposited by the Administration for collection, and the proceeds thereof, upon collection, will be credited to the appropriate contract with the Administration; but if drawn to the order of payees other than the Administration, after countersignature on behalf of the Administration, will ordinarily be forwarded to the payees.

(2) An amount obligated under a contract for the construction or acquisition of a new vessel or vessels or for the liquidation of existing or subsequently incurred purchase-money indebtedness, whether the obligor has the entire or a partial interest therein within the scope of section 511 of the Act, may not, so long as the contract or indebtedness continues in full force and effect, be withdrawn except to meet payments due or to become due under such contract or for such liquidation.

(b) *Other withdrawals.* Checks, drafts, or other instruments of withdrawal executed by the taxpayer for purposes other than to meet obligations under a contract for the construction or acquisition of a new vessel or vessels or for the liquidation of existing or subsequently incurred purchase-money indebtedness, whether the taxpayer has the entire or a partial interest therein, shall be drawn by the taxpayer to its own order and forwarded to the Administration in Washington, D.C., with appropriate explanation of the purpose of the proposed withdrawal. Such withdrawals may occur by reason of a determination by the Administration that the taxpayer is not entitled to the benefits of section 511 of the Act (see § 2.1–5), or that a particular deposit has been improperly made (see § 2.1–13), or by reason of the election of the taxpayer to make such withdrawals. Upon receipt of such checks, drafts, or other instruments of withdrawal, the Administration will give notice thereof to the Commissioner of Internal Revenue. The Commissioner will advise the Administration of the receipt of the notice and the date it was received. The Administration shall not countersign such checks, drafts, or other instruments of withdrawal or transmit them to the taxpayer until the expiration of 30 days from the date of receipt of the notice by the Commissioner, unless the Commissioner or such official of the Internal Revenue Service as he may designate for the purpose consents in writing to earlier countersignature by the Administration and transmittal to the taxpayer. Upon the expiration of such 30-day period, or prior thereto if the aforesaid consent of the Commissioner has been obtained, the Administration will countersign the check, draft, or other instrument of withdrawal and forward it to the taxpayer.

(c) *Inapplicability to certain transactions.* The provisions of this section shall not be applicable to transactions deemed to be withdrawals by reason of the sale of securities held in the fund for an amount less than the market value thereof at the time of their deposit (see § 2.1–23), nor to the cancellation of an irrevocable commitment deposited in the fund, upon proof satisfactory to the Administration that the terms of such commitment have been fully satisfied.

§ 2.1–11 Time deposits.

Deposits in the construction reserve fund not invested in securities may be placed in time deposits when, in the judgment of the taxpayer, it is desirable and feasible so to do. The taxpayer shall promptly advise the Administration of any time deposit arrangements made with the depository. The Administration reserves the right at any time to require the termination or modification of any such arrangements. With prior approval of the Administration a time deposit may be made in a depository other than the one with which the construction reserve fund is established.

§ 2.1–12 Election as to nonrecognition of gain.

(a) *Election requirements.* As a prerequisite to the nonrecognition of gain on the sale or loss of a vessel (or of a part interest therein) for Federal income tax purposes, the taxpayer, after establishing a construction reserve fund, must make an election with respect to such vessel or interest in the manner set forth in this paragraph.

(1) *In general.* Except as provided in subparagraph (2) of this paragraph, the election must be made in the taxpayer's Federal income tax return (or, in the case of a partnership, in the partnership return of income) for the taxable year in which the gain with respect to the sale or loss of the vessel is realized. The election as to the nonrecognition of gain shall be shown by a statement to that effect, submitted as a part of, and attached to, the return. The statement, which need not be on any prescribed form, shall set forth a computation of the amount of the realized gain, the identity of the vessel, the nature and extent of the taxpayer's interest therein, whether such vessel was sold or lost and the date of sale or loss, the full sale price or full amount of indemnity, and the amount and date of each payment thereof, the basis for tax purposes and any other data affecting the determination of the realized gain.

(2) *Certain Government payments.* In case a vessel is purchased or requisitioned by the United States, or is lost, in any taxable year and the taxpayer receives payment for the vessel so purchased or requisitioned, or receives from the United States indemnity on account of such loss, subsequent to the end of such taxable year, the taxpayer shall make his election by filing notice thereof with the Commissioner of Internal Revenue, Washington, D.C., 20224, prior to the expiration of 60 days after receipt of the payment or indemnity. The taxpayer shall file a copy of the notice with the Secretary, Federal Maritime Board, Washington, D.C., 20573. The form of the notice of election shall be prepared by the taxpayer and shall be substantially as follows:

ELECTION RELATIVE TO NONRECOGNITION OF GAIN UNDER SECTION 511(c)(2), MERCHANT MARINE ACT, 1936

Pursuant to the provisions of section 511 (c)(2) of the Merchant Marine Act, 1936, as amended, notice is hereby given that the undersigned taxpayer elects that gain in respect of the sale to the United States, or indemnification received from the United States on account of the loss, of the vessel named below or share therein shall not be recognized. The circumstances involved in the computation of such gain are as follows:

Name and other identification of vessel ____
Nature and extent of the taxpayer's interest in the vessel ____
Nature of disposition, i.e., sale or loss ____
Date of disposition ____
Full sale price or full amount of indemnity received by taxpayer ____
Amount and date of each payment of sale price or indemnity received by taxpayer ____
Amount and date of each previous deposit of such payments in construction reserve fund ____
____
Identification of each check or other instrument by which payment made to taxpayer ____
Tax basis of taxpayer's interest in vessel ____
____
Any other data affecting the determination of the realized gain ____
Amount of gain (submit computation) ____
____
(Name of taxpayer)
By ____
(Date of execution)

No. 82——11

§ 2.1–13 Deposit of proceeds of sales or indemnities.

(a) *Manner of deposit.* The deposit required by section 511 of the Act must be made in a construction reserve fund established with a depository or depositories approved by the Administration and subject to the joint control of the Administration and the taxpayer. It is not necessary to establish a separate fund with respect to each vessel or share in a vessel sold or lost.

(b) *Amount of deposit.* With respect to any vessel sold or lost, or a share therein, the deposit must be in an amount equal to the "net proceeds" of the sale, or the "net indemnity" for the loss. By "net proceeds" and "net indemnity" is meant (1) the depositor's interest in the adjusted basis of the vessel plus (2) the amount of gain which would be recognized for tax purposes in the absence of section 511 of the Act. In determining "net proceeds", the amount necessarily paid or incurred for brokers' commissions is to be deducted from the gross amount of the sales price. In the event the taxpayer is an affiliate or associate of the buyer, the amount of the sales price shall not exceed the fair market value of the vessel or vessels sold as determined by the Administration. In such case the taxpayer shall furnish evidence sufficient, in the opinion of the Administration, to establish that the sales price is not in excess of the fair market value. In determining "net indemnity", the amount necessarily paid or incurred purely for collection, or rate of exchange discounts on the payment, of the indemnity is to be deducted from the gross amount of collectible indemnity. In case of the sale or loss of several vessels or share therein, a deposit of the "net proceeds" or "net indemnity" with respect to one or more of the vessels or shares is permissible. Where several vessels or shares are sold for a lump sum, the "net proceeds" allocated to each vessel or share shall be determined in accordance with any reasonable rule satisfactory to the Commissioner of Internal Revenue. The taxpayer must deposit the full amount of each payment (including cash, notes, or other evidences of indebtedness) as a single deposit in the construction reserve fund. A payment divided between two or more depositories will be regarded as a single deposit. Amounts received by the taxpayer prior to the date of consummation of the sale of the vessel shall be considered as having been received by the taxpayer at the time the sale is consummated.

(c) *Purchase-money obligations.* Where the proceeds from the sale of a vessel include purchase-money obligations, such obligations together with the entire collateral therefor, or, in the case of deposit of the proceeds of a share in the vessel, a proportionate part of the obligations and collateral as determined by the Administration, shall be deposited, with the remainder of the proceeds, in the construction reserve fund as a part of the "net proceeds". The depository shall receive payment of all amounts due on such purchase-money obligations and such amounts shall be placed in the fund in substitution for the portion of the obligations paid. All installments of purchase-money obligations shall be paid directly into the fund by the obligor. In the event any such installment is not so deposited, the Administration, at any time after the due date, may require the taxpayer to deposit an amount equal to such installment. If the taxpayer so desires, he may deposit in the construction reserve fund cash or approved securities in an amount equal to the face value of any purchase-money obligations in lieu of depositing such obligations.

(d) *Vessel subject to mortgage at time of sale or loss.* Where a vessel is subject to a mortgage or other encumbrance at the time of its sale or loss and the taxpayer actually receives only an amount representing the equity therein or a share in such equity corresponding to his share in the vessel, he shall deposit in the construction reserve fund such amount and concurrently therewith other funds in an amount equal to the difference between the amount received and the "net proceeds" or "net indemnity". Such other funds may be in the form of cash, or, subject to the approval of the Administration, (1) interest-bearing securities, or (2) an irrevocable and unconditional commitment to finance the construction or acquisition of a new vessel in whole or in part by an obligor approved by the Administration in an amount equal to the amount by which the "net proceeds" exceed the cash or securities deposited in the fund.

(e) *Unauthorized deposits.* A deposit which is not provided for by section 511 of the Act shall, without unreasonable delay, be withdrawn from the fund and tax liability will be determined as though such deposit had not been made. (See §§ 2.1–10 and 2.1–24.)

§ 2.1–14 Deposit of earnings and receipts.

(a) *Earnings.* A citizen may deposit all or any part of earnings derived from the operation, within the scope of § 2.1–3, of a vessel or vessels owned either by himself or any other person, if such earnings are intended for construction or acquisition of new vessels. Such earnings may include payments received by an owner, as compensation for use of his vessel, from other persons by whom it is so operated. Earnings from other sources may not be deposited. The earnings from operation of vessels which are eligible for deposit are the net earnings determined without regard to any deduction for depreciation, obsolescence, or amortization with respect to such vessels.

(b) *Receipts.* Receipts from deposited funds, in the form of interest or otherwise, may be deposited.

§ 2.1–15 Time for making deposits.

(a) *Proceeds of sale or indemnification.* Deposits of amounts representing proceeds of the sale or indemnification for loss of a vessel or share therein must be made within 60 days after receipt by the taxpayer.

(b) *Earnings and receipts.* Earnings and receipts for the taxable year may be deposited at any time. (See § 2.1–14.)

§ 2.1–16 Tax liability as to earnings deposited.

Deposit in the construction reserve fund of earnings from the operation of a vessel or vessels, or receipts, in the form of interest or otherwise, with respect to amounts previously deposited does not exempt the taxpayer from tax liability with respect thereto nor postpone the time such earnings or receipts are includible in gross income. Earnings and receipts deposited in a construction reserve fund established in accordance with the provisions of section 511 of the Act and the regulations in this part will be deemed to have been accumulated for the reasonable needs of the business within the meaning of part 1 (section 531 and following), subchapter G, chapter 1 of the Internal Revenue Code of 1954, so long as the requirements of section 511 of the Act and the regulations in this part are satisfied relative to the use of the fund in the construction, reconstruction, reconditioning, or acquisition of new vessels, or for the liquidation of purchase-money indebtedness on such vessels. For incurrence of tax liability due to noncompliance with the requirements of section 511 of the Act and the regulations in this part with respect to deposits in the construction reserve fund, see the provisions of § 2.1–23.

§ 2.1–17 Basis of new vessel.

The basis for determining gain or loss and for depreciation for the purpose of the Federal income tax with respect to a new vessel constructed, reconstructed, reconditioned, or acquired by the taxpayer, or with respect to which purchase-money indebtedness is liquidated as provided in section 511(g) of the Act, with funds deposited in the construction reserve fund, is reduced by the amount of the unrecognized gain represented in the funds allocated under the provisions of the regulations in this part to the cost of such vessel. (See § 2.1–18.)

§ 2.1–18 Allocation of gain for tax purposes.

(a) *General rules of allocation.* As provided in § 2.1–17, if amounts on deposit in a construction reserve fund are expended, obligated, or withdrawn for construction, reconstruction, reconditioning, or acquisition of new vessels, or for the liquidation of purchase-money indebtedness of such vessels, the portion thereof which represents gain shall be applied in reduction of the basis of such new vessels. The rules set forth below in this paragraph shall apply in allocating the unrecognized gain to the amounts so expended, obligated, or withdrawn:

(1) If the "net proceeds" of a sale or "net indemnity" in respect of a loss are deposited in more than one deposit, the portion thereof representing unrecognized gain shall be considered as having been deposited first.

(2) Amounts expended, obligated, or withdrawn from the construction reserve fund shall be applied against amounts deposited in the order of deposit.

(3) If any deposit consists in part of gain not recognized under section 511(c) of the Act, then any expenditure, obligation, or withdrawal applied against such deposit shall be considered to consist of gain in the same proportion that the part of the deposit which constitutes gain bears to the total amount of the deposit.

(b) *Date of obligation.* The date funds are obligated under a contract for the construction, reconstruction, reconditioning, or acquisition of new vessels, or for the liquidation of purchase-money indebtedness on such vessels, rather than the date of payment from the fund, will determine the order of application against the deposits in the fund. When a contract for the construction, reconstruction, reconditioning, or acquisition of new vessels, or for the liquidation of purchase-money indebtedness on such vessels is entered into, amounts on deposit in the construction reserve fund will be deemed to be obligated to the extent of the amount of the taxpayer's liability under the contract. Deposits will be deemed to be so obligated in the order of deposit, each new contract obligating the earliest deposit not previously expended, obligated, or withdrawn. If the liability under the contract exceeds the amount in the construction reserve fund, the contract will be deemed to obligate, to the extent of that part of such excess not otherwise satisfied, the earliest deposit or deposits thereafter made.

(c) *Illustration.* The foregoing rules are illustrated in the following example:

Example. (1) A taxpayer who makes his returns on the calendar year basis sells a vessel in 1963 for $1,000,000, realizing a gain of $400,000. Payment of $100,000 is received in March 1963 when the contract is signed, and the balance of $900,000 is received in June 1963 on delivery of the vessel. The $1,000,000 is deposited in a construction reserve fund in July 1963. In December 1963, the taxpayer also deposits $150,000, representing earnings of that year. In 1964, he sells another vessel for $1,000,000, realizing a gain of $250,000. The sale price of $1,000,000 is received on delivery of the vessel in February 1964, and deposited in the construction reserve fund in March 1964. In September 1964, the taxpayer purchases for cash out of the construction reserve fund a new vessel for $1,750,000. To the cost of this vessel must be allocated the 1963 deposits of $1,150,000 and $600,000 of the March 1964 deposit. This leaves in the fund $400,000 of the March 1964 deposit. The amount of the unrecognized gain to be applied against the basis of the new vessel is $550,000, computed as follows: Gain of $400,000 represented in the 1963 deposits, plus the same proportion of the $250,000 gain represented in the March 1964 deposit ($1,000,000) which the amount ($600,000) allocated to the vessel is of the amount of the deposit, i.e., $400,000 plus 600,000/1,000,000 of $250,000 or $150,000, a total of $550,000. This reduces the basis of the new vessel to $1,200,000 ($1,750,000 less $550,000).

(2) In 1965, the taxpayer sells a third vessel for $3,000,000, realizing a gain of $900,000. The $3,000,000 is received and deposited in the construction reserve fund in June 1965, making a total in the fund of $3,400,000. In December 1965, the taxpayer contracts for the construction of a second new vessel to cost a maximum of $3,200,000, thereby obligating that amount of the fund, and in June 1966, receives permission to withdraw the unobligated balance amounting to $200,000. To the cost of the second new vessel must be allocated the $400,000 balance of the March 1964 deposit and $2,800,000 of the June 1965 deposit. The unrecognized gain to be applied against the basis of such new vessel is that proportion of the gain represented in each deposit which the portion of the deposit allocated to the vessel bears to the amount of such deposit, i.e., 400,000/1,000,000 of $250,000, or $100,000 plus 2,800,000/3,000,000 of $900,000, or $840,000 making a total of $940,000. The $200,000 withdrawal is applied against the June 1965 deposit and the portion thereof which represents gain will be recognized as income for 1965, the year in which realized. The computation of the recognized gain is as follows: 200,000/3,000,000 of $900,000, or $60,000.

§ 2.1–19 Requirements as to new vessels.

(a) *Requirements.* For the purposes of section 511 of the Act and the regulations in this part, the new vessel must be—

(1) Documented under the laws of the United States when it is acquired by the taxpayer, or the taxpayer must agree that when acquired it will be documented under the laws of the United States;

(2) (i) Constructed in the United States after December 31, 1939, or (ii) its construction has been financed under Title V or Title VII of the Act, or (iii) its construction has been aided by a mortgage insured under Title XI of the Act; and

(3) Either (i) of such type, size, and speed as the Administration determines to be suitable for use on the high seas or Great Lakes in carrying out the purposes of the Act, but of not less than 2,000 gross tons or of less speed than 12 knots, except that a particular vessel may be of lesser tonnage or speed if the Administration determines and certifies that the particular vessel is desirable for use by the United States in case of war or national emergency, or (ii) constructed to replace a vessel or vessels requisitioned or purchased by the United States, in which event it must be of such type, size, and speed as to constitute a suitable replacement for the vessel requisitioned or purchased, but if a vessel already built is acquired to replace a vessel or vessels requisitioned or purchased by the United States, such vessel must meet the requirements set forth in subdivision (i) of this subparagraph. Ordinarily, under subdivision (i) of this subparagraph, a vessel constructed more than five years before the date on which deposits in a construction reserve fund are to be expended or obligated for acquisition of such vessel will not be considered suitable for use in carrying out the purpose of the Act, except that the five-year age limitation provided above in this sentence shall not apply to a vessel to be reconstructed before being placed in operation by the taxpayer.

(b) *Time of construction.* A vessel will be deemed to be constructed after December 31, 1939, only if construction was commenced after that date. Subject to the provisions of this section, a new vessel may be newly built for the taxpayer, or may be acquired after it is built.

(c) *Replacement of vessels.* It is not necessary that vessels shall be replaced vessels for vessel. The new vessels may

be more or less in number than the replaced vessels, provided the other requirements of this section are met.

§ 2.1–20 Obligation of deposits.

(a) *Time for obligation.* Within three years from the date of any deposit in a construction reserve fund, unless extension is granted as provided in § 2.1–22, such deposit must be obligated under a contract for the construction or acquisition of a new vessel or vessels (or in the discretion of the Administration for a share therein), with not less than 12½ percent of the construction or contract price of the entire vessel or vessels actually paid or irrevocably committed on account thereof or must be expended or obligated for the liquidation of existing or subsequently incurred purchase-money indebtedness to persons other than a parent company of, or a company affiliated or associated with, the mortgagor on a new vessel or vessels. Amounts on deposit in a construction reserve fund will be deemed to be obligated for expenditure when a binding contract of construction or acquisition has been entered into or when purchase-money indebtedness has been incurred and, if obligated under a contract of construction or acquisition, will be deemed to be irrevocably committed when due and payable in accordance with the terms of the contract of construction or acquisition.

(b) *Requirements for obligation.* Unless otherwise authorized by the Administration, contracts for the construction of new vessels must be for a fixed price, or provide for a base price that may be adjusted for changes in labor and material costs not exceeding 15 percent of the base price. The fixed or base price, as the case may be, shall be fair and reasonable as determined by the Maritime Administration. Any financial or other interests between the taxpayer and the contractor shall be disclosed to the Administration by the taxpayer. Plans and specifications for the new vessel or vessels must be approved by the Administration to the extent it deems necessary. A deposit in a construction reserve fund may be expended or obligated for expenditure for procurement under an acquisition or construction contract of a part interest in a new vessel or vessels only after obtaining the written consent of the Administration. The granting of such consent shall be entirely in the discretion of the Administration and it may impose such conditions with respect thereto as it may deem necessary or advisable for the purpose of carrying out the provisions of section 511 of the Act. Applications for such consent shall be executed in triplicate, and, together with eight conformed copies thereof, filed with the Administration.

§ 2.1–21 Period for construction of certain vessels.

A new vessel constructed otherwise than under the provisions of Title V of the Act, and not purchased from the Administration must, within six months from the date of the construction contract, or within the period of any extension, be completed to the extent of not less than 5 percent as estimated by the Administration and certified by it to the Secretary of the Treasury. In case of a contract covering more than one vessel it will be sufficient if one of the vessels is 5 percent completed within the six months' period from the date of the contract or within the period of any extension, and so certified. All construction must be completed with reasonable dispatch as determined by the Administration. If, for causes within the control of the taxpayer, the entire construction is not completed with reasonable dispatch, the Administration will so certify to the Secretary of the Treasury. For the effect of such certification, see § 2.1–23.

§ 2.1–22 Time extensions for expenditure or obligation.

(a) *Extensions.* The Administration, upon application and a showing of proper circumstances, (1) may allow an extension of time within which deposits shall be expended or obligated, not to exceed one year, and upon a second application received before the expiration of the first extension, may allow an additional extension not to exceed one year, and (2) may allow an extension or extensions of time within which five percent of the construction shall have been completed as provided in § 2.1–21 not to exceed one year in the aggregate, and (3) may allow any other extensions that may be provided by amendment to the Act.

(b) *Application required.* A taxpayer seeking an extension of time shall make application therefor, and transmit it with an appropriate statement of the circumstances, including the reasons justifying the requested extension or extensions, and appropriate documents in substantiation of the statement, to the Administration. The Administration will notify the Commissioner of Internal Revenue of any extension granted. In case an application for extension is denied, the taxpayer will be liable for delay as though no application had been made.

§ 2.1–23 Noncompliance with requirements.

(a) *Noncompliance.* The amount of the gain which is that portion of the construction reserve fund otherwise constituting taxable income under the law applicable to the taxable year in which such gain was realized shall be included in the taxpayer's gross income for such taxable year for income or excess-profits tax purposes, if—

(1) A portion of such fund is withdrawn for purposes other than—

(i) The construction, reconstruction, reconditioning, or acquisition of a new vessel; or

(ii) The liquidation of existing or subsequently incurred purchase-money indebtedness to persons other than a parent company of, or a company affiliated or associated with, the mortgagor on a new vessel or vessels; or

(2) The taxpayer fails to comply with the requirements of section 511 of the Act or the regulations in this part relating to the utilization of construction reserve funds in the construction, reconstruction, reconditioning, or acquisition of a new vessel, or the liquidation of purchase-money indebtedness on such a vessel.

If securities on deposit in a construction reserve fund are sold and the amount placed in the fund in lieu thereof is less than the value of the securities at the time of their deposit, the difference between such market value and the amount placed in the fund in lieu of the securities will be deemed to have been withdrawn. With respect to the substitution of new financing in the case of an irrevocable commitment, see paragraph (d) of § 2.1–13.

(b) *Amount recognized.* In the event of noncompliance with the prescribed conditions relative to any contract for construction, reconstruction, reconditioning, or acquisition of new vessels, or for the liquidation of purchase-money indebtedness on such vessels, recognition will extend to the entire amount of the gain represented in that portion of the construction reserve fund obligated under such contract. Thus, if the Administration determines and certifies to the Secretary of the Treasury that for causes within the control of the taxpayer construction under a contract is not completed with reasonable dispatch, the entire amount of the gain represented in the portion of the construction reserve fund obligated under the contract will be recognized even though all other conditions have been satisfied. In case of noncompliance with the requirements of section 511 of the Act or the regulations in this part, see the provisions of § 2.1–18 as to the allocation of gain.

(c) *Unreasonable accumulation.* Noncompliance with the provisions of section 511 of the Act or the regulations in this part relative to the utilization of the deposited amounts may also, inasmuch as the provision of section 511(f) of the Act is then inapplicable, warrant an examination to ascertain whether such amounts constitute an unreasonable accumulation of earnings and profits within the meaning of part I (section 531 and following), subchapter G, chapter 1 of the Internal Revenue Code of 1954, or corresponding provisions of prior law. If amounts are deposited and the fund maintained in good faith for the purpose of construction, reconstruction, reconditioning, and acquisition of new vessels, or for the liquidation of purchase-money indebtedness on such vessels, such amounts will be deemed to have been accumulated for the reasonable needs of the business.

§ 2.1–24 Extent of tax liability.

(a) *Declared value excess-profits tax.* Gain which is includible in gross income under § 2.1–23 shall be included in gross income for all income and excess-profits tax purposes, but not for the purposes of the declared value excess-profits tax and the capital stock tax as provided in section 511(i) of the Act. In lieu of any adjustment with respect to such declared value excess-profits tax, there is imposed for any taxable year ending on or before June 30, 1945, in which the gain is realized an additional tax of 1.1 percent of the amount of the gain. No additional capital stock tax liability is incurred.

(b) *Improper deposits.* In the case of deposits in the construction reserve fund of amounts derived from sources other than those specified in section 511 of the Act, or in the case of failure to deposit an amount equal to the "net proceeds" or "net indemnity" within the period prescribed in section 511(c) of the Act and § 2.1–15, the taxpayer obtains no suspension or postponement of any tax liability and the tax is collectible without regard to the provisions of section 511(c) of the Act.

(c) *Time for filing claim subsequent to election under section 511*(c)(2). If an election is made under section 511 (c)(2) of the Act, and paragraph (a)(2) of § 2.1–12, and if computation or recomputation in accordance therewith is otherwise allowable but is prevented, on the date of filing of notice of such election, or within six months thereafter, by any statute of limitation, such computation or recomputation nevertheless shall be made notwithstanding such statute if a claim therefor is filed within six months after the date of making such election. If as the result of such computation or recomputation an overpayment is disclosed, a claim for refund on Form 843 should also be filed within such six months' period.

§ 2.1–25 Assessment and collection of deficiencies.

Any additional tax, including the 1.1 percent amount imposed by section 511(l) of the Act, due on account of withdrawal from a construction reserve fund, or failure to comply with section 511 of the Act or the regulations in this part, is collectible as a deficiency. Interest upon such deficiency will run from the date the withdrawal or noncompliance occurs. The amount of any deficiency, including interest and additions to the tax, determined as a result of such withdrawal or noncompliance, may be assessed, or a proceeding in court for the collection thereof may be begun without assessment, at any time and without regard to any period of limitations or any other provisions of law or rule of law, including the doctrine of res judicata.

§ 2.1–26 Reports by taxpayers.

(a) *Information required.* With each income tax return filed for a taxable year during any part of which a construction reserve fund is in existence the taxpayer shall submit a statement setting forth a detailed analysis of such fund. The statement, which need not be on any prescribed form, shall include the following information with respect to the construction reserve fund:

(1) The actual balance in the fund at the beginning and end of the taxable year;

(2) The date, amount, and source of each deposit during the taxable year;

(3) If any deposit referred to in subparagraph (2) of this paragraph consists of proceeds from the sale, or indemnification of loss, of a vessel or share thereof, the amounts of the unrecognized gain;

(4) The date, amount, and purpose of each expenditure or withdrawal from the fund; and

(5) The date and amount of each contract, under which deposited funds are deemed to be obligated during the taxable year, for the construction, reconstruction, reconditioning, or acquisition of new vessels, or for the liquidation of purchase-money indebtedness on such vessels, and the identification of such vessels.

(b) *Records required.* Taxpayers shall keep such records and make such additional reports as the Commissioner of Internal Revenue or the Administration may require.

§ 2.1–27 Controlled corporation.

For the purpose of section 511 of the Act and the regulations in this part a new vessel is considered as constructed, reconstructed, reconditioned, or acquired by the taxpayer if constructed, reconstructed, reconditioned, or acquired by a corporation at a time when the taxpayer owns not less than 95 percent of the total number of shares of each class of stock of the corporation.

§ 2.1–28 Administrative jurisdiction.

Sections 2.1–3 to 2.1–11, inclusive, §§ 2.1–13 to 2.1–15, inclusive, and §§ 2.1–19 to 2.1–22, inclusive, deal primarily with matters under the jurisdiction of the Administration. Sections 2.1–12, 2.1–16 to 2.1–18, inclusive, and §§ 2.1–23 to 2.1–27, inclusive, deal primarily with matters under the jurisdiction of the Commissioner of Internal Revenue. Generally, matters relating to the establishment, maintenance, expenditure, and use of construction reserve funds and the construction, reconstruction, reconditioning, or acquisition of new vessels are under the jurisdiction of the Administration; and matters relating to the determination, assessment, and collection of taxes are under the jurisdiction of the Commissioner of Internal Revenue. Correspondence should be addressed to the particular authority having jurisdiction in the matter.

[F.R. Doc. 65-4496; Filed, Apr. 28, 1965; 8:48 a.m.]

Title 47—TELECOMMUNICATION

Chapter I—Federal Communications Commission

[FCC 65-335; Docket Nos. 14895, 15233]

PART 21—DOMESTIC PUBLIC RADIO SERVICES (OTHER THAN MARITIME MOBILE)

PART 91—INDUSTRIAL RADIO SERVICES

Miscellaneous Amendments

In the matter of amendment of Subpart L, Part 11,[1a] to adopt rules and regulations to govern the grant of authorizations in the Business Radio Service for microwave stations to relay television signals to community antenna systems, Docket No. 14895; amendment of Subpart I, Part 21, to adopt rules and regulations to govern the grant of authorizations in the Domestic Public Point-to-Point Microwave Radio Service for microwave stations used to relay television broadcast signals to community antenna television systems, Docket No. 15233.

First Report and Order. 1. These proceedings are directed to the policies we will follow in authorizing private and common carrier microwave stations for the purpose of relaying television signals to community antenna television (CATV) systems.[1b] The fundamental question we consider in these dockets is not whether to withhold such authorizations entirely, either generally or in specific situations. It is rather whether we should impose by rule certain conditions upon microwave grants designed to limit and regulate the manner in which CATV competes with the basic, off-the-air television broadcast service to which it is an adjunct.

2. The proceedings were instituted by a notice of proposed rule making in Docket No. 14895, issued on December 14, 1962, which proposed rules applicable to private CATV microwave stations in the Business Radio Service (27 F.R. 12586). In essence, we proposed to condition grants to CATV systems located within a specified coverage contour of any television broadcast station to require that, upon the station's request, the system must (1) carry the station's signal without material degradation and (2) avoid duplication of the station's programing either simultaneously or within a reasonable time period. After receiving comments and reply comments on this proposal, and following the Carter Mountain decision,[2] we issued (on Dec. 13, 1963) a further notice of proposed rule making in Docket No. 14895 and a notice of proposed rule making in Docket No. 15233 (28 F.R. 13789). The 1963 notices set forth more definitive proposals along the same lines and made them applicable also to grants in the Domestic Public Point-to-Point Microwave Radio Service for common carrier

[1a] Subsequent to the institution of these proceedings, Part 11 was redesignated as Part 91.

[1b] Generally speaking, a CATV system may be described as a facility which receives and amplifies the signals broadcast by one or more television stations and redistributes such signals by wire or cable to the homes or places of business of subscribing members of the public for a fee. The role of microwave facilities in the operation of such a system usually consists of the relay of television broadcast signals, normally picked up off-the-air at a point some distance from the transmitting broadcast antenna, through a series of one or more radio repeaters to a terminal point in or near the community served by the CATV, from which terminal point the signals are distributed by cable to the individual subscribers. In using microwave service, a CATV operator reaches out to obtain signals that cannot be received by means of an off-the-air antenna installation, or to obtain better reception of signals that can only be received marginally off-the-air.

[2] Carter Mountain Transmission Corp. v. Federal Communications Commission, 321 F. 2d 359 (C.A.D.C.), cert. den., 375 U.S. 951 (1963).

stations used to relay television signals to CATV systems.[3]

3. Our various notices have produced numerous and voluminous comments from interested persons, including extensive factual studies by the National Community Television Association (NCTA)—representing CATV interests—and by the National Association of Broadcasters (NAB)—representing broadcaster interests. During the proceedings, we have also conducted our own special study of issues related to CATV, utilizing the services of an economic consultant, Dr. Martin Seiden.[4] And we have engaged in a series of consultations with representatives of the NCTA, the NAB, and other affected interests, with reference to the form and nature of legislation which might be proposed to the Congress on the subject of CATV systems generally, including systems which use microwave relay service and those which rely exclusively upon off-the-air signals.

4. In the roughly 2-year period during which these proceedings have been pending, it has become apparent that the nationwide growth of CATV poses issues going beyond those with which we are concerned here—i.e., the carriage of local television signals and avoidance of program duplication by CATVs which rely upon microwave service. In response to these broader issues, we have today taken certain actions: (1) We have determined as an initial matter that the Communications Act vests in this agency appropriate rule making authority over all CATV systems, including those which do not use microwave relay service (the so-called "off-the-air" systems). We have issued a notice of proposed rule making calling for comments on the jurisdictional issue and proposing rules governing the carriage and nonduplication of local television signals by all such systems (FCC 65-334, Part I). (2) Recognizing the need for more definitive information on a wide range of issues which go beyond the carriage and nonduplication of local signals by CATV systems, we have also issued a notice of inquiry and proposed rule making looking toward the development of an appropriate record on these subjects (FCC 65-334, Part II). In taking these actions, we have stressed our awareness that legislative action by the Congress in this area is both possible and desirable. We have moved to deal with the overall problem of CATV in a manner which we think will allow us to be most helpful to the Congress and at the same time give us the maximum flexibility to act where action is needed.

5. Notwithstanding these changes in the situation, we believe that it is appropriate now to resolve, insofar as we can, the issues posed in these proceedings. The questions of carriage and nonduplication by CATVs that rely upon microwave service—while not the whole of the problem—are nonetheless important, if not central. We have considered these issues over a long period and have before us a substantial factual record pertaining to them. We have reached conclusions and it is appropriate to explain the reasons for those conclusions. In a period of explosive CATV growth, it is important to resolve, to the maximum extent feasible, uncertainties concerning our position. Moreover, establishment of general rules at the present time will have an additional benefit. During the pendency of these proceedings, as we have noted, we have granted microwave applications for facilities to serve CATV systems only on condition that the applicant would abide by the proposed rules. Since the procedure has been interim in nature, we have declined to consider requests for waiver of these conditions which are predicated on the assertion that the rules should not be applied in the particular circumstances of individual cases. (See our 1963 notice, par. 13, footnote 7.) With the adoption of rules establishing general guidelines, it will be appropriate and feasible for us to consider such requests for waiver.

6. We recognize, of course, that our exploration of broader issues—and particularly the application of carriage and nonduplication requirements to "off-the-air" CATV systems—may bring to light factors which would cause us to reconsider the conclusions we have reached. We must also take into consideration the fact that if Congress legislates in this field any rules we now adopt may have to be adjusted. Moreover, in applying any rules now adopted, we must consider the possible need for a transition period before requiring full compliance. For all of these reasons, we have decided upon the following course of action:

(1) We shall, as an initial step, adopt rules implementing our conclusions on the subject of the carriage and nonduplication of local television signals by CATV systems that rely upon microwave service.

(2) The great majority of microwave-served CATV systems receive service pursuant to authorizations in the Domestic Public Point-to-Point Microwave Radio Service which were issued prior to the institution of these proceedings, are not subject to their outcome, and do not expire until February 1, 1966. By that date, we expect to be in position to take action on the general question of the carriage and nonduplication of television broadcast signals by all CATV systems—microwave-served and "off-the-air"—either pursuant to the existing provisions of the Communications Act or pursuant to new legislation. In the interim, we propose to explore intensively the question of whether, and in what circumstances, it would be appropriate to allow a transition period before requiring full compliance with the new rules. In any event, we will apply the rules adopted today to the 1966 renewals only after we have had an opportunity to examine the overall subject of carriage and nonduplication in light of our further exploration and any Congressional action taken in the interim.

(3) Approximately 108 CATV systems are now authorized to receive microwave service under grants made in the Business Radio Service and the Domestic Public Point-to-Point Microwave Radio Service since the institution of these proceedings, subject to the interim procedures prescribed in our notices and subject to the ultimate outcome of the proceedings. In view of the possible desirability of allowing a transition period before requiring full compliance with the new rules, we think it appropriate to defer application of the rules to such systems until we have had an opportunity to explore this question fully. Pending our further order, the microwave permittees and licensees involved will continue to be subject to the interim procedures prescribed in our notices. Once again, we will apply the rules adopted today only after we have had an opportunity to examine the overall subject of carriage and nonduplication in light of our further exploration and any Congressional action taken in the interim.

(4) Applications are now pending for new or changed microwave facilities to serve approximately 180 CATV systems. There are also a relatively small number of renewal, transfer or assignment applications pending, which relate to facilities serving CATV systems. We will examine pending applications carefully to determine whether the new rules can be applied immediately or whether, in view of their effects in the individual case, it would be appropriate to defer their effectiveness until they are made applicable generally to all microwave-served CATV systems. In either event, we will afford the applicant an opportunity to make any showing it desires in this regard before taking action. Thereafter, assuming that a grant is otherwise appropriate, we will impose the new rules or grant on lesser conditions, such as those prescribed as interim procedures by our Notices in these proceedings. We cannot now predict the course we will take in each and every set of circumstances. However, in dealing with pending applications which have been designated for hearing, we think it appropriate normally to abide by the interim procedures already prescribed until we have had an opportunity to examine the overall subject of carriage and non-duplication in light of our further exploration and any Congressional action taken in the interim.

(5) We shall apply the new rules to all applications for new or changed microwave facilities to serve CATV systems, or for transfers or assignments of authorizations for facilities serving CATV systems, which are filed on or after the effective date of this order. Our records indicate that no relevant renewal applications in the Business Radio Service and few, if any, in the Domestic Public Point-to-Point Microwave Radio Service are due to be filed

---

[3] During the pendency of the proceedings, applications for microwave facilities to serve CATVs have not been granted unless the applicant expressly accepted the conditions proposed in the relevant rule making notice. In addition, of course, all such authorizations have been taken subject to the ultimate outcome of the proceedings.

[4] Dr. Seiden's report to us has been published by the Government Printing Office under the title, An Economic Analysis of Community Antenna Television Systems and the Television Broadcasting Industry (1965). (Cited hereafter as "Seiden Report".)

before those called for by the expiration of licenses in February 1966. The application of the new rules to any renewal applications filed in the interim will be considered on a case-by-case basis.

By this course of action, we will build up a body of experience with the practical operation of both new rules and the conditions prescribed as interim procedures by our notices in these proceedings, before considering the extension of the rules to the CATV industry as a whole. Accordingly, we will not terminate these proceedings by this First Report and Order. We will instead hold them open for final action in conjunction with our action upon the overall subject of carriage and non-duplication.

7. Our conclusions on the substantive issues of these proceedings must be considered in light of our basic determination as to the overall course of action we shall follow. It is to those substantive issues that we now turn. The questions presented may be divided into two broad categories: (1) Whether any rule making action on the subject of the carriage and non-duplication of local television signals by microwave-served CATV systems is necessary or desirable,[5] and (2) what the scope and nature of any such rule making action should be. In the first category, broadcaster interests urge that there is a need for action to prevent or ameliorate adverse impact of CATV competition upon the maintenance and healthy growth of television broadcast service. CATV interests generally urge that no showing has been made of any broad-scale adverse impact, and that the Commission is warranted in taking action to limit CATV competition with broadcasters only where, on a case-by-case basis, individual adjudicative records firmly establish an overriding need for such action. In the second category, broadcaster interests urge us to adopt and expand the limitations upon CATVs which we have proposed, while CATV interests argue that, if any action is deemed necessary, it should be restricted much more narrowly than the action we have proposed.

I. The Need for Rule-Making Action

A. Comments of the interested persons

1. *Broadcasters generally.* 8. The broadcasters and those supporting their position (some 34 comments) urge that CATV systems have a substantial adverse impact on local stations, particularly UHF stations and stations in small markets, through loss or division of audience and resulting reduction in revenues. They point out that the existence of a multi-channel CATV is not merely the equivalent of adding one additional signal in the community as would be the case with the establishment of another station, but involves adding whatever number of stations are presented by the CATV system.[6] Moreover, in addition to the CATV system located in the community of assignment of the local station, there may be CATV systems in most or all of the communities of any size within the station's service area. Taken together, these multiple systems may reach a sizeable percentage of the total TV homes served by the local station, and "skim off the cream" of the population most likely to contain local advertisers as well as that which nonlocal advertisers are most interested in reaching.

9. Generally, when a television set is connected with a CATV system, the antenna capable of receiving a local station is disconnected. Thus, if the local station is not carried on the CATV system, it cannot be received by subscribers unless the antenna is physically reconnected or a switching device is installed. It is asserted that the switching devices are frequently defective and that either means of receiving the local station is inconvenient for the subscriber. Moreover, when reception of the local station entails the purchase and maintenance of an outside or rooftop antenna, CATV subscribers usually will not go to this trouble and expense in order to obtain programming not available on the CATV cable. As a result, CATV subscribers are effectively lost to the local station unless its signal is put on the cable.

10. When the local station is presented on the cable, and apart from the audience division caused by the presence of additional program choices on CATV, the ability of the local station to attract or claim audience through the appeal of its programs is substantially diluted when the same programming is duplicated on the CATV by one or more distant signals. The audience appeal of network and other programs received by the local station on film by mail is further greatly lessened if the same programming has previously been shown on CATV through the signals of stations broadcasting it at network times, or otherwise at an earlier time. Even when the CATV carries the local station, it is asserted that the quality of the signal is degraded and in many cases is of lower quality than the distant signals brought in by the CATV, causing subscribers to view other channels. Often the local signal is carried on different channels at different times, preventing audience identification with the local station.[7]

11. The broadcasters assert that audience losses caused by CATV operations have a corresponding effect on station revenues particularly where the total audience is, in any event, relatively small. It is claimed that the willingness of advertisers and sponsors to buy time, and the rates paid, are based on the size of the audience the station can command, and are adversely affected by audience reductions. The presence of additional signals via CATV, especially CATV operations which do not carry the local station or duplicate its programming, cuts down the number of sets which the station can claim to deliver.

12. With respect to national advertisers, both spot and program, it is said that as these advertisers become increasingly aware that buying the larger metropolitan stations brought in by CATV includes substantial coverage of the community of the local station and other communities of any size within its service area, they will no longer see reason to buy the local small market station in addition. Moreover, even where advertisers continue to buy the local station, the rate may be reduced because of the decreased size of the audience. In addition, American Research Bureau (ARB) and Nielson ratings, upon which national advertisers rely in determining how best to reach the markets they are interested in covering, reflect audience losses through CATV impact. Also, these ratings purport to show total homes reached by a particular local station on a projection of a few surveyed and are distorted by homes subscribing to CATV. Thus, if a disproportionate number of CATV viewers who do not watch the local station is included in the sample, the projection may reflect a much larger number of persons not viewing the local station than is actually the fact.

13. It is further claimed that audience ratings are relied on not only by national advertisers, but also by regional and local advertisers. In rural, sparsely settled areas, advertising revenue comes largely from cooperative advertising, carried on behalf of all dealers in a particular area selling a particular product. This revenue is wholly dependent upon reaching

[5] Some of those commenting (notably, the National Association of Microwave Common Carriers, Inc. and Western Microwave) assert that the proposed rules, if applied to common carrier stations serving CATVs (Docket No. 15233), would exceed the Commission's statutory authority, require an unlawful discrimination between customers and abridge free speech in violation of the First Amendment to the Constitution and section 326 of the Communications Act. The arguments are substantially the same as those rejected in Carter Mountain Transmission Corp. v. Federal Communications Commission, 321 F. 2d 359 (C.A.D.C.), cert. den., 375 U.S. 951 (1963), supra, which we regard as dispositive. American Telephone and Telegraph Company urges that Carter Mountain does not control cases in which a common carrier serving the public generally with a wide variety of communications services also offers microwave service to a CATV system. However, in our view, application of the proposed rules to such a common carrier would be an appropriate extension of the Commission action approved in Carter Mountain. The essential point is that, in the cases with which we are concerned, microwave facilities subject to a license under the public interest standard of the Communications Act are being used to transmit television broadcast signals (video and aural) to a user who in turn distributes those signals to members of the public. In such a situation, we think the law not only permits but requires us to consider the effects of such transmission upon the goals established in the Communications Act for the development and distribution of television broadcast service. Cf., Federal Power Commission v. Transcontinental Gas Pipe Line Corp., 365 U.S. 1 (1961). This situation is, in our view, entirely different from one in which a common carrier merely provides a general kind of communication service to a user who happens, because of the nature of his business, to be in competition with one or more broadcasting stations.

[6] As a consequence, they argue, the Table of Television Assignments is distorted, and a small community often has more signals available than the larger cities whose station signals are distributed on CATV.

[7] This is claimed to be a particularly important factor when the CATV home is a participant in a rating sample and keeps a rating diary (see par. 12, below).

the maximum number of viewers in the trade area of the cooperative group. Audience splitting by CATV operations cuts down revenue obtained from cooperative regional advertising.

14. As for local advertising, it is asserted that audience splitting causes the local station to become a less attractive medium in comparison to other media (such as newspapers and radio stations) in the area. Stations in sparsely populated areas find it difficult to obtain national advertising, and so local advertising from all towns in the service area is particularly important. CATV systems are located in precisely the places where local advertisers are most apt to reside, and CATV homes include a disportionately large number of local businessmen. When they cannot receive the local station (or receive it with a poor signal, or see its programming duplicated on other channels), they assume that others in the community are also viewing distant station programming on CATV and that the local station's value as an advertising medium is small. Many local merchants allegedly ignore the fact that the local station serves a large but sparsely populated area outside the settled communities, which is not reached by CATV. Moreover, some CATV systems are beginning to originate local advertising and thus to compete directly for local advertising revenue.

15. The broadcasters claim that stations in smaller markets operate on a narrow profit margin or at a loss. Thus, it is stated, a reduction in revenues greatly inhibits the ability of the local station to meet its local programming responsibilities.

The studio facilities, equipment, personnel, etc., required for even a modest schedule of local programming entail great expense, and the revenue derived from such programming frequently does not cover the cost. Consequently, a curtailment of revenue is apt to result in curtailment of the more expensive and less remunerative local programming by those stations now attempting to meet their local responsibilities, and to prevent others from investing in facilities for local origination. It is further asserted by some of those commenting that reduction in revenues through CATV audience splitting will discourage licensees from expanding their service to underserved areas, or areas without adequate program choices, through satellites, semi-satellites and translators and will prevent such auxiliary facilities from developing into regular local outlets.

16. In addition, the broadcasters state that CATV is entering and preempting the very communities to which UHF looks for expansion as a result of the all-channel law (76 Stat. 150, 151 (1962)), i.e., communities with no local station or those with VHF stations and sufficient population to support additional UHF facilities. It is claimed that audience splintering through CATV is especially harmful to UHF stations, which for technical and set conversion reasons reach smaller audiences than VHF stations in any event. UHF reception is more dependent on outside antennas, which CATV subscribers may not bother to install or maintain, and may be more affected by leakage from the CATV cable or an improper reconnection of the outside antenna. Not only is UHF thus more adversely affected by not being carried on the cable, but it is also particularly vulnerable to audience fragmentation through duplication and the correlative effect on its ability to obtain advertising revenues. It is claimed that the presence and expansion of CATV operations in areas with potential for new UHF facilities will make many prospective UHF operators decide against undertaking the investment risk, especially where VHF competition is also present.

17. And, finally, it is urged (particularly by NAEB) that the survival and growth of local outlets and the development of UHF facilities is important to educational television (ETV). While CATV has provided ETV to areas where it might otherwise be unavailable, this should be as a complement to, not substitute for, ETV by local stations. Local educational stations are especially important to rural areas, providing services which cannot be supported by rural school systems and reaching many persons who cannot be reached by CATV. Where ETV is brought by CATV to a substantial number of homes and provided by cable to schools in the larger population centers, these communities are unlikely to provide financial support for local educational stations (which being noncommercial are dependent upon public contributions) in order to make possible ETV service to the surrounding rural area.

18. While supporting the Commission's proposal to take action with respect to those CATV systems using microwave, the broadcasters claim that similar action with respect to all CATV systems is essential to afford minimum protection to the public interest.

2. *Broadcasters' specific evidence of impact; the Fisher Report.* 19. The broadcasters support their assertions, in large part, by generalized statements referring to the obvious likelihood that the importation of competing signals via CATV, the duplication of local programming or the failure to carry a local signal will have some adverse effect upon the local telecaster's audience and revenues. Their comments are not devoid, however, of more specific evidence on the issue. For example, Frontier Broadcasting has submitted with its comments in response to our 1963 Notices an American Research Bureau survey indicating that Frontier's Station KSTF, Scottsbluff, Nebr., has a much higher audience for network and local programs in non-CATV homes than in CATV homes within its service area. And Frontier points out that the two communities served by CATV are the second and third largest communities within the KSTF Grade B coverage contour. Similarly, Springfield Television Broadcasting Corp. has submitted with its reply comments a comparison of the local revenues derived by its Station WRLP, Greenfield, Mass., from towns in its service area with CATVs that do not carry WRLP, towns with CATVs that carry WRLP but duplicate its network programming, and towns with no CATV. The comparison indicates that communities without CATVs returned substantially more local revenues than communities of comparable size with CATVs. And Channel Seven, Inc., submitted evidence, in its comments in response to our 1963 Notices, tending to show that the CBS Television Network's 1956 decision to cut sharply the network rate of Channel Seven's Station KLTV, Tyler, Tex., was in part motivated by an on-site engineering survey indicating substantial penetration of the Tyler market and duplication of KLTV's network service by the signals of Dallas stations carried on the Tyler CATV system.

20. By far the most ambitious effort to demonstrate the effect of CATV competition upon the audience and revenues of television broadcasters, however, is contained in the Fisher Report, appended to the NAB's reply comments. This report describes statistical studies conducted by Dr. Franklin M. Fisher, Associate Professor of Economics at Massachusetts Institute of Technology, to provide actual measurements of the average impact of CATVs on television broadcast stations. Studies were made of 487 television stations and nearly 1,000 CATV systems, with intensive analysis of more than 800 CATV systems and their impact on 136 television stations in one and two station markets. These studies entailed thousands of hours of data collection, compilation, tabulation, computation and analysis. The studies used 1963 station revenue data furnished by the Commission on coded computer cards (Report, p. 23–24) and ARB audience estimates, both "able to receive" (ATR) and "net weekly circulation" (NWC). (Report, pp. 46–54.) The intensive 136 station study is based on three and a half prime time hours of each day during the ARB March 1964 Survey week (Report, p. 45).

21. The bulk of the Fisher Report (pp. 5–96) is devoted to a detailed explanation of the statistical procedures followed in the analyses, the factors or variables considered, the manner in which they were treated and why, the quantitative results obtained and the basis for each subsidiary conclusion drawn. Only the ultimate conclusions are indicated below.

22. The Report concluded that there is a direct correlation between increases in audience size and station revenues. It was found that an increase in a station's average hourly prime time audience of one TV home will, on the average, increase its annual revenue approximately $27.00 (Report, pp. 28, 30). This finding was based on a survey of the 487 television stations for whom 1963 revenue data and 1964 ARB audience estimates were available (Report, pp. 23–29). A like survey conducted for 172 stations in one and two station markets reached substantially the same result ($29.00). (Report, p. 30.)

23. The Fisher Report further concluded (pp. 31–37) that small stations, which are on the average less profitable than large stations, have operating expenses which are more sensitive to changes in revenue than those of large

market stations and that when a small market station's revenue falls, it can be expected to cut expenditures relatively more than will a large market station. The entire group of 487 stations was divided into quartiles based on size of audience and analyzed on the basis of cost data furnished by the Commission (in the form of coded computer cards). It was found that for the 121 smallest audience stations, a change of $1 in revenue will lead to a reduction in gross costs on the average of about 72 cents, whereas in the largest station quartile, the effect of a change in revenue is only about 52 cents (Report, p. 35).[8] The Report concludes (p. 37) that a loss of audience to a small market station magnifies the impact on programing and other expenditures.

24. With respect to CATV impact on stations in one and two station markets (analyzed in pp. 38–110), the Fisher Report summarized its conclusions as follows (Report, pp. 1–2):

> Through the use of standard statistical techniques we have measured the impact on station revenues of being duplicated and of not being carried by CATV systems with which they compete. The impact is substantial.
>
> While masses of data were gathered for nearly every commercial television station in the United States, our study focuses on the 136 one- and two-station market stations for which full current financial, broadcast competition, and CATV competition data are available. Of these 136 stations, 9 stations known to have nonduplication agreements were isolated out for special analysis. The following conclusions, therefore, represent the average effects of CATV competition on the remaining 127 stations:
>
> 1. For every additional 1000 TV homes, formerly able to view only the local station, which subscribe to a CATV not carrying the local station, that station's annual revenue is reduced on the average by a minimum of $14,000. This is equal to more than 50 percent of the average net profits of all stations in the lower half of our study group ranked by size of audience, i.e., the smaller stations. 1000 TV homes is equal to about 2 percent of the average net weekly circulation for these smaller stations.
>
> 2. For every additional 1,000 TV homes, formerly able to view both the local station and another, which subscribes to a CATV not carrying the local station, the local station's annual revenue is reduced on the average by a minimum of almost $8,000 or about one-third of average net profits for the smaller stations.
>
> 3. For every additional 1,000 TV homes, formerly able to view only the local station, which subscribe to a CATV carrying the local station with average duplication, that station's annual revenue is reduced on the average by a minimum of $9,400 or slightly less than two-fifths of average net profits for the small stations.
>
> 4. For every additional 1,000 TV homes, formerly able to view both the local station and another, which subscribes to a CATV carrying the local station with average duplication, the local station's annual revenue is reduced by a minimum of $2,900 or some more than 10 percent of average net profits for the smaller stations.
>
> 5. One additional half hour of prime time duplication per week above present average levels reduces average local station annual revenue by $380 for every 1000 CATV subscribers.

25. The report concludes by considering these findings in the context of the average gross and net profits of the stations studied.[9] Using a variety of measures, Dr. Fisher shows that if his basic projections are correct, the impact of CATV noncarriage, duplication or simple fractionalization of station audience through additional program choices upon the profits of a large number of stations can be serious and, in the case of stations already marginal, disastrous.[10]

3. *The CATV interests.* 26. The principal contention of the CATV interests, most fully stated by NCTA, is that the broadcasters have furnished no proof that CATV has had, or is likely to have, a substantial adverse impact on local television stations, and that this would be an unwarranted assumption on the part of the Commission. NCTA asserts that the Commission should not act on the basis of assumptions unsupported by demonstrated facts and that facts of this nature can only be established by evidentiary hearing as to the circumstances in individual situations (NCTA Further Comments, pp. 14, 19–23, 27–28, 137–138).[11]

27. According to NCTA, information as to adverse economic effect upon a television station "is more peculiarly within the knowledge of broadcasters" and "within the grasp of the Commission which receives annual financial data from these broadcasters" (NCTA Further Comments (FC), p. 8). Although not in a position to examine the financial returns of local television stations in order to disprove the existence of a substantial, adverse economic impact from CATV, NCTA has conducted extensive research to obtain what facts are available (NCTA Further Comments, pp. 8, 16). On the basis of this research NCTA points to several circumstances which, it states, affirmatively demonstrate that CATV has had little or no part in the demise of stations leaving the air and little, if any, adverse effect on existing stations.[12]

28. NCTA asserts that out of 129 stations (107 UHF and 22 VHF) leaving the air in the past twelve years, only three (ceasing operation in 1959) have cited CATV as one of the factors in their demise and only five have claimed that CATV had any impact at all on their operations (NCTA Further Comments, pp. 10–11), and that two of these stations have since resumed operation (NCTA, FC, p. 10). NCTA further states (FC, p. 12) that no station which has failed within the past five years has claimed CATV as a factor. It asserts that even in those three instances where the demise was partly attributed to CATV, the presence of other adverse factors, such as off-the-air VHF competition or an exceptionally small market, was primarily responsible for the demise (NCTA, FC, p. 11).

29. Moreover, NCTA has made studies of the 19 stations which claimed a serious impact from CATV in 1959, both before the Commission in Docket No. 12443 and also before the Senate Interstate Commerce Committee.[13] It states that 18 of these stations are still on-the-air and only one has failed (NCTA, p. 13). NCTA also asserts that several of these stations have not protested the advent of translators within their Grade A and B contours, even though they rebroadcast the programs of other competing stations and the Commission has no proposed or applicable nonduplication rules for translator operations (FC, p. 13). NCTA further claims that of the 12 stations in the 1959 "impact group" for whom statistics were available, nine have increased their network base hourly rate or their highest local hourly rate in the years between 1959 and 1963 (with increases ranging from 11⅑ percent to 66⅔ percent), and for three there has been no change (NCTA, FC, pp. 16–18).

30. NCTA further asserts (FC, pp. 35–36, Reply C., p. 34) that its studies show that CATV has not hindered the development of UHF. It states that of the 92

---

[8] Using net cost data, the average effect of a $1 change in revenue remained the same (52 cents) for large market stations, but dropped from 72 cents to 62 cents for small market stations (Report, p. 36). This was attributed to the practice of small stations (not generally followed by large stations) of taking out some profits as salaries, including them in gross but not net costs (ibid.). It was also noted that in the case of smaller stations depreciation may depend more on the financial history of the station than on its current operations (Report, p. 34, fn. 31). While net and gross costs results may in fact be consistent when these factors are considered, the Report concludes that even leaving them aside "the strong indication remains that when a small station's revenue falls it can be expected to cut expenditures relatively more than will a large station market" (Report, p. 37).

[9] As used by Dr. Fisher, the term "net profit" is the same as that reported by television stations on FCC Form 324, Schedule 3, line 3. "Gross profit" includes, in addition, depreciation and proprietary payments. (Report, p. 97, fn. 82.)

[10] E.g., "Thus, for example, an increase above the average of five half hours of duplication to the 5,500 CATV subscribers presently receiving the local station in an average third and fourth quartile audience area would reduce net profits a minimum of 45 percent, or from $23,500 to $10,500, assuming no corresponding cut in expenditures." (Report, p. 104.) Despite the general sensitivity of the expenditures of smaller stations to a drop in revenues, Dr. Fisher's data suggests that the very smallest ("fourth quartile") stations "may presently be at the expenditure margin (as well as the profit margin) with little leeway remaining for cost reduction." (Report, p. 99, and compare p. 36 fn. 33.)

[11] By way of example, NCTA states that it would appear logical to assume that when an AM station receives competition from a second AM station it will incur a loss of advertising, whereas the Commission found that both develop their own advertising and, generally, a new broadcast station generates some new business (NCTA Further Comments, pp. 19–20).

[12] NCTA asserts that most of the allegations of adverse impact come from a small group of stations and not from the broadcast industry at large (Further Comments, pp. 87–88).

[13] See Report and Order in Docket No. 12443, Inquiry into the Impact of Community Antenna Systems, TV Translators, TV "Satellite" Stations, and TV Repeaters" on the Orderly Development of Television Broadcasting, 26 F.C.C. 400; Hearings before the Communications Subcommittee of the Senate Committee on Interstate and Foreign Commerce, 86 Cong., 1st sess.

UHF stations now on-the-air, 22 have CATV systems in the community of assignment and 14 of these began operation after the CATV system was in existence (ibid.). NCTA also claims that CATV systems affirmatively aid UHF stations by carrying their signals and providing a ready-built audience without need of UHF convertors or all-channel sets (NCTA, FC, pp. 2–3, 35). It is likewise asserted that CATV provides affirmative assistance to ETV by distributing the signals of ETV stations to schools which either cannot receive an ETV station off-the-air or cannot receive a good signal (NCTA, FC, Exh. 1 and 2). NCTA states that CATV gives schools access to high quality educational material far beyond local means and enables those school systems which may lack the technical knowledge or financial resources to establish a local ETV station, to obtain ETV at a price they can afford to pay (ibid.).

31. In addition, NCTA claims that CATV assists many local stations by extending their service areas (FC, p. 35), and that most CATV systems situated in the community of assignment of the local station have already put the station on the cable. According to NCTA (FC, pp. 42–43), there are 96 cities with both local stations and CATVs: 122 stations (100 VHF and 22 UHF) and 105 CATV systems. Of these 105 CATV systems, 85 carry the local station, 15 do not carry the local station, 2 carry one of two local stations, and 3 CATV systems in one city carry 7 of 9 stations (FC, p. 43, Exh. 12 and 13).

32. With respect to all the foregoing, NCTA states that it has not distinguished between CATV systems which use microwave and those which do not. However, apart from the matters relied on as showing that CATV in general has no adverse impact on local stations, NCTA points out that only a relatively small number of CATV systems receive microwave service—250 out of 1300 CATV systems (NCTA, FC, p. 9).[14] Of these 250, 79 are located outside the contour of any station, 71 are in the Grade B contour only, 28 are in the Grade A, 26 are in the city grade contour, and 46 are in the city to which the local station is assigned (ibid.). Only 20 of the systems within the Grade A contour of a local station do not carry the station on the cable. (FC, p. 45).[15] Thus, it is urged, Commission action in the microwave field would affect only a small number of CATV systems and would not fulfill the Commission's purpose even if, contrary to NCTA's belief, CATV systems in toto do have some adverse effect.

4. *The CATV interests: Response to the Fisher Report.* 33. After expiration of the time for filing reply comments, NCTA tendered additional reply comments directed toward the Fisher Report. Those comments will be accepted and considered.[16]

34. In order to evaluate the Fisher Report, NCTA retained Dr. Herbert Arkin, professor and head of the business statistics division of the Baruch School of Business of the City College of New York. Dr. Arkin has provided an analysis of the Fisher Report, which is appended to NCTA's additional reply comments (NCTA, ARC, exhibit B). In Dr. Arkin's opinion, "the conclusions in the report, about the effect of CATV subscriptions on the financial position of local television stations, are at best of dubious validity and at worst a possible complete misstatement" (NCTA, ARC, exhibit B, p. 15). He bases this opinion on a set of criticisms of the report's logic, its statistical techniques and the data which it utilizes.

35. Dr. Arkin argues that it cannot be assumed that all viewers who watch competing nonlocal signals on a CATV, rather than those of a local station, would watch the local station in the absence of a CATV system. Similarly, he urges, it cannot be assumed that all viewers of nonlocal programs on a CATV that does not carry the local station would watch the local station in the absence of CATV. In both cases, some people might not have used television at all in the absence of CATV.[17] Put more generally, the advent of CATV may stimulate viewing, resulting in more television homes and more hours of viewing. As a result, audience "lost" to the local station through noncarriage or competition and duplication may (1) be composed in part of audience which the station would never have had in the absence of CATV and (2) be compensated by new audience for the local station resulting from CATV's stimulating effect upon viewing generally.

36. Dr. Arkin also criticizes the Fisher Report for its asserted failure to "disclose in detail the actual data used in the analysis" (NCTA, ARC, exhibit B, pp. 6–8), and for various asserted faults in its statistical techniques. Particularly emphasized are (1) the "built in" correlation between actual and potential station audience in Dr. Fisher's fundamental formula, which in Dr. Arkin's view vitiates any conclusions drawn from that formula as to the relationship between other variables (relating to CATV) and actual station audience, and (2) the assertion that Dr. Fisher's group of study stations is not a probability sample or a representative cross section of stations, from which projections can be made as to all stations, but rather a conglomerate group of stations as to which various kinds of data were available (NCTA, ARC, exhibit B, pp. 8–15).

37. Apart from Dr. Arkin's analysis, NCTA makes a number of other critical comments on the Fisher Report. Most heavily emphasized is the claim that, using its own study group of 723 CATV systems and Dr. Fisher's 127 study stations, NCTA has been unable to find any actual situations in which Dr. Fisher's first two conclusions (as to the impact upon station revenues of 1,000 subscriptions to a CATV not carrying the station) are applicable—much less borne out—in practice (ARC, pp. 6–14). While making a number of other critical comments, NCTA states that it cannot respond to the remaining three basic Fisher conclusions, because it does not have available the data (particularly as to "average duplication") on which those conclusions were based or the time necessary to examine the data, were they available, and to prepare a response (ARC, pp. 6–7).

38. Arguing that Dr. Arkin's analysis and its own comments demonstrate that the Fisher Report is entirely lacking in weight or meaning, NCTA petitions us to disregard that report totally as a basis for decision in these proceedings (ARC, p. 24). In the event we do propose to rely upon the report, NCTA requests an additional 134 days to "provide statistical evidence of the impact of the defects in the 'Fisher Report' and to insure that the basic technique was not faulty," as well as a Commission order that the basic data underlying the report be made available to NCTA (ARC, pp. 25–27).[18]

B. EVALUATION

39. The comments of the parties center upon the effect which CATV competition has, or may be expected to have,

[14] The NCTA included a statistical compilation concerning each of the 250 CATV systems employing microwave facilities to relay one or more of the signals carried by the system. The data included: The location of the system; the stations received by the system; whether or not microwave facilities were used to receive the station; whether or not the system is located within the A, B or City Grade contour of a station, and whether that station is carried on the system; the power and antenna height for each station; the time zone; the 1960 population, population rank and net weekly circulation, and market rank for the city of assignment of each station; the network affiliations of each station, and translators, if any assigned to the city where the system is located. (NCTA FC, p. 9, 137, Exh. 32.) NCTA has also furnished a series of maps of the United States showing three things: (1) The location of each city where a CATV system operates, employing microwave facilities; (2) the calculated Grade A contours of each TV station where the contour includes one or more cities having such a CATV system; (3) the location of each city where a TV station is operating or authorized. (NCTA, Appendix to Reply Comments, Exh. 3.)

[15] NCTA states that 13 of these 20 stations are duplicated at the system's location off-the-air because of contour overlap with another station affiliated with the same network or by translator operations (FC, p. 46). It also states that 60 of the 250 CATV systems are located in areas where there is off-the-air duplication by two or more stations or translators (FC, p. 45).

[16] Dr. Fisher has submitted a supplemental statement date with respect to the reliability of his conclusions. This statement also will be accepted.

[17] Dr. Arkin also criticizes the Fisher Report's assumption that subscribers to a CATV which does not carry the local station must necessarily be a total loss to the station. In some cases, he points out, the subscriber to such a system is equipped with a switch enabling him to choose—at any point in time—between cable and off-the-air reception.

[18] We note here that the basic data underlying the Fisher Report were in fact submitted by NAB for inclusion in the record of these proceedings by letters of October 26 and November 9, 1964. They have been associated with that record, and have been available to all parties since a time shortly after those dates. NCTA's assumption, in additional reply comments tendered on December 14, 1964, that this information was not available to it, is evidently based upon a misunderstanding.

upon television broadcast service. We must evaluate this effect, however, in light of our statutory responsibilities. We also must take into account the basic conditions under which CATV systems and television broadcasting stations compete as alternative means for the distribution of television programs. We discuss these matters before taking up the question of CATV impact upon broadcasting service.

1. *Statutory responsibilities of the Commission.* 40. The fundamental statutory responsibilities of the Commission are clear. The Commission is charged with the duty of executing the policy of the Communications Act to "make available, so far as possible, to all people of the United States, a rapid, efficient, nationwide and worldwide wire and radio communication service" (47 U.S.C. 151) and "generally to encourage the larger and more effective use of radio in the public interest" (47 U.S.C. 303(g)). The Commission is also required to "make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same" (47 U.S.C. 307(b)).

41. In the television field the Commission has sought to fulfill these responsibilities on a nationwide basis through the table of assignments contained in § 73.603 of the rules. When the basic assignment plan was promulgated in 1952, the Commission expected that the overall assignments would substantially achieve the statutory objectives.[19] As was stated in the Sixth Report and Order (par. 67), by intermixing VHF and UHF assignments:

> • • • the Commission was able to formulate an assignment plan that has the potentiality of fulfilling the objective of section 1 of the Communications Act. If all the VHF and UHF channels are utilized, there should be few, if any, people of the United States residing beyond the areas of television service. (See priorities 1 and 3.) Moreover, the table has gone far in fulfilling the need of individual communities to obtain local television outlets. It has provided at least one assignment to over 1,250 communities (see priority 2). And it has attempted where possible to provide each community with at least two assignments.

42. While many areas now have local outlets and/or multiple reception services, the full potential of the assignment plan has not been realized in the intervening years. Three major factors have contributed to this. First, UHF assignments in areas with sufficient population to support additional stations have not been utilized because of the difficulties of competing with VHF stations on an intermixed basis and because television sets capable of receiving UHF signals are not yet generally prevalent. Second, in some sparsely settled areas of the country where unused VHF as well as UHF assignments are available (notably in the Mountain and Western States), there has not been sufficient population to provide economic support for local outlets or multiple services. And, third, some persons residing within the computed service areas of existing stations have not in fact received their broadcast signals because of adverse terrain or other conditions.

43. The public demand for television service in areas too small in population to support a local station or too remote in distance or isolated by terrain to receive regular or good off-the-air reception has led to the development of CATV systems, "satellite" stations, translators and VHF repeaters or "boosters."[20] This development has not been limited to areas which, absent auxiliary means of distributing television programs, would have been totally devoid of service. It has proceeded in areas with one and two off-the-air signals of good technical quality, and—insofar as CATV is concerned—is proposed for communities with three full network services. The public in all areas has made clear its demand for good reception of multiple program choices. This desire and need must be recognized and fulfilled, to the extent practicable. It is one of the principle components of the public interest standard of the Communications Act. Indeed, it may be said that the development of CATV and other auxiliary means for distributing the signals of assigned stations to the public (something not envisioned at the time of the Sixth Report and Order) now makes possible the realization of some of the most important goals which have governed our allocations planning. The provision of at least four commercial program choices and an educational service to most parts of the United States, using auxiliary means where necessary, may now be a feasible goal.[21]

44. However, while CATV systems are capable of making a valuable contribution toward the achievement of expanded television reception service, it is of the utmost importance to the overall public interest that extensions of the table of assignments by auxiliary distribution means are accomplished on a fair and orderly basis, and that CATV systems and television broadcast facilities have complementary rather than conflicting roles. The distribution of multiple reception services through CATV cannot be permitted to curtail the viability of existing local service or to inhibit the growth of potential service by new broadcast facilities. Because of the prohibitive cost of extending the cables beyond heavily built-up areas, CATV systems cannot serve many persons reached by television broadcast signals. Persons unable to obtain CATV service, and those who cannot afford it or who are unwilling to pay, are entirely dependent upon local or nearby stations for their television service. The Commission's statutory obligation is to make television service available, so far as possible, to all people of the United States on a fair, efficient, and equitable basis (secs. 1 and 307(b) of the Communications Act). This obligation is not met by primary reliance on a service which, technically, cannot be made available to many people and which, practically, will not be available to many others. Nor would it be compatible with our responsibilities to permit persons willing and able to pay for additional service to obtain it at the expense of those dependent on the growth of television broadcast facilities for an adequate choice of services.

45. Moreover, local stations afford a means for community self-expression. They provide programming designed to meet the particular tastes and needs of the public in their service areas, such as local news and public affairs, and are accountable to the Commission for operations in the public interest. Very few CATV systems originate local programming. Even if they were to do so generally, and were to comply with the safeguards contained in sections 315 and 317 of the Communications Act and other aspects of the public interest standard for broadcast operation, CATV-originated local programming would not be available to persons residing in rural areas and other nonsubscribers.

46. In addition, the table of assignments is predicated upon the social desirability of having a large number of local outlets with diversity of control over disseminating sources rather than a few stations serving vast areas and populations.[22] In the Sixth Report and Order the Commission rejected the "Dumont" allocation plan and its premise that channel assignments should be clustered in major cities with sufficient population to support extensive television facilities, while smaller communities within an appropriate range should obtain reception service from the major

---

[19] It was recognized, of course, that the allocation priorities could not be rigidly or mechanically applied in view of the limited number of available frequencies and varying geographic, economic, and population conditions from area to area (Sixth Report and Order, pars. 63, 65).

[20] See the report and order in Docket No. 12443, CATV and Repeater Services, 26 F.C.C. 403, for a description of the nature and development of CATV systems, satellites, translators and boosters. See also, report and order in Docket No. 14184, Television Broadcast Translator Stations, FCC 62-710, 23 Pike & Fischer, R.R. 1565.

[21] We note that the University of Utah has extended the educational service of Station KUED in Salt Lake City to communities throughout the State by means of translators, and the Department of Health, Education, and Welfare will grant matching funds for the construction of educational translator stations.

[22] See Associated Press v. United States, 326 U.S. 1, 20 (1945); The Goodwill Stations, Inc. v. Federal Communications Commission, 325 F. 2d 637, 640, n. 5 (C.A.D.C.); United States v. Storer Broadcasting Co., 351 U.S. 192. As the court noted in the Goodwill case (325 F. 2d at 640, and n. 5), the Commission concluded in the clear channel proceeding that it was technically feasible for class IA standard broadcast stations to expand their skywave services by high power but was concerned as to whether the social and economic objections to high power had been sufficiently met; i.e., "whether (1) authorizing a few 'superpower' radio stations to serve a vast area and population would be compatible with the principle that the widest possible dissemination of information from diverse and antagonistic sources of local origin is in the public interest; (2) whether it is in the public interest to allow a few stations to achieve the competitive preeminence that would come with their use of higher power."

cities rather than attempt to support stations with their own less substantial economic resources. The Commission stated (Sixth Report and Order, par. 70):

> The Commission, on the other hand, believes that on the basis of the Communications Act it must recognize the importance of making it possible with any table of assignments for a large number of communities to obtain television assignments of their own. In the Commission's view as many communities as possible should have the opportunity of enjoying the advantages that derive from having local outlets that will be responsive to local needs.

47. Thus, our commercial television system is based upon the distribution of programs to the public through a multiplicity of local station outlets. In seeking to lift restrictions upon the growth of multiple services imposed by the UHF–VHF problem, we have not turned to an alternative system of signal and program distribution, based upon a handful of "super stations" and a nationwide network of wires, microwave relays and translators. Our fundamental program in this area stems from the all-channel receiver legislation, enacted in 1962 (76 Stat. 150, 151). And that legislation, recognizing the importance of local outlets and local service, seeks an expansion of the present system through the creation of new station outlets in the UHF bands. As the House Report states (H. Rept. No. 1559, 87th Cong., 2d sess., p. 3):

> The goal is thus a commercial television system which will (1) be truly competitive on a national scale by making provision for at least four commercial stations in all large centers of population; (2) provide at least three competitive facilities in all medium-sized communities; and (3) permit all communities of appreciable size to have at least one television station as an outlet for local self-expression.

48. These considerations, all expressed or inherent in our Carter Mountain decision, lead to certain broad conclusions:

(1) If there is a significant risk that CATV competition will destroy or seriously degrade the service offered by a television broadcaster, our statutory duties require us to seek means to prevent this result. The competition involved is not between basically similar entities, which offer similar benefits to the public. On the contrary, if CATV operations should drive out television broadcasting service, the public as a whole would lose far more—in free service, in service to outlying areas, and in local service with local control and selection of programs—than it would gain.

(2) It is therefore inappropriate to equate competition between broadcasting stations with competition between broadcasting and CATV. In dealing with competition between broadcasters, the courts have said: "Of course the public is not concerned with whether it gets service from A or from B or from both combined. The public interest is not disturbed if A is destroyed by B, so long as B renders the required service." Carroll Broadcasting Co. v. Federal Communications Commission, 258 F. 2d 440 (C.A.D.C.). But if CATV competition should destroy a broadcasting operation, the CATV would not thereafter "render the required service."[32]

(3) We cannot properly ignore this problem until and unless it is raised in the context of individual adjudicative cases. As the Supreme Court long ago pointed out, "The Communications Act is not designed primarily as a new code for the adjustment of conflicting private rights through adjudication. Rather it expresses a desire on the part of Congress to maintain, through appropriate administrative control, a grip on the dynamic aspects of radio transmission." Federal Communications Commission v. Pottsville Broadcasting Co., 309 U.S. 134, 138 (1940). Our responsibilities are not discharged, therefore, by withholding action until indisputable proof of irreparable damage to the public interest in television broadcasting has been compiled—i.e., by waiting "until the bodies pile up" before conceding that a problem exists. Our duty is "to encourage the larger and more effective use of radio in the public interest"—to ensure that all the people of the United States have the maximum feasible opportunity to enjoy the benefits of broadcasting service. To accomplish this goal, we must plan in advance of foreseeable events, instead of waiting to react to them.

(4) This is not in any way to ignore or to denigrate the very real contribution which CATV service makes to the public interest. Our conclusion is rather that community antenna television serves the public interest when it acts as a supplement rather than a substitute for off-the-air television service. The question at the heart of these proceedings is whether and to what extent rule making action is necessary or appropriate to integrate CATV service into our existing television system—to insure that CATV performs its valuable supplementary role without unduly damaging or impeding the growth of television broadcast service.

2. *Basic conditions under which competition occurs.* 49. It is often asserted that CATV systems do not, in fact, compete with broadcasting stations, since they do not compete for the advertising dollar on which commercial broadcasting lives. While superficially appealing, we cannot accept this view. There are CATV systems, existing and proposed, which operate in areas of poor television reception and provide only the signals of local stations, which are prevented from reaching these reception "pockets" by special terrain or other factors. Such a system provides, in effect, a pure "reception" service to its subscribers. It "competes" with broadcasting service only in the sense that the reception difficulties it is designed to overcome might in some situations be resolved by a change in station facilities (antenna height or location, effective power, etc.) or by the erection of one or more translators rebroadcasting the signals of local stations. Much the same might be said of CATV systems which extend broadcast signals into areas that are simply beyond the range of any off-the-air broadcast signal.

50. In large part, however, the CATV industry brings to areas already served by one or more stations the signals of other stations which are well beyond the normal range of reception. Moreover, in providing additional television signals, it does more than supply subscribers with signals of their own choosing. As we have held on several occasions, the CATV operator—not the individual subscriber—determines which stations (and sometimes which programs) will be available on the system.[34] Systems that reach out for the signals of specific stations through the use of microwave relay service are obvious, but not the only, examples of this kind of operation. When a cable system brings to a station's market additional signals which would not be readily available in the system's absence, it introduces competition for audience attention—and audience attention is the basic commodity that a station sells to advertisers.

51. The competition between CATV systems and stations may be marked by at least two features which are not present in the ordinary competition between broadcasting stations. First, the system—while carrying the signals of distant stations—may not carry the signals of a local station which the subscriber is otherwise able to receive. Upon installation of the cable, the CATV operator may not provide the subscriber with a switch enabling him to choose between off-the-air and cable reception. Outdoor antennas necessary for off-the-air reception may be dismantled at the time of cable installation, or may not thereafter be maintained.[35] True, switching devices are sometimes installed (although the comments indicate considerable dispute as to the technical efficacy of such devices). But in any event the end result will often be a total loss of potential audience for the local station. For the sheer inconvenience of switching is an obvious deterrent to its use by the subscriber.[36] In effect, the CATV oper-

---

[32] For this reason, while we are aware that off-the-air competition from another broadcaster can—in some situations—be more damaging to an individual station than competition via CATV (cf., Seiden Report, pp. 72–73), and while we do consider carefully any harm to the public interest which might result from this cause, in accordance with the doctrine of the Carroll Broadcasting decision, we do not normally regard this kind of competition as ground for the kind of concern with which we must view the potential effects of CATV competition upon broadcasting.

[34] See, e.g., Frontier Broadcasting Co. v. Collier, 16 Pike & Fischer, R.R. 1005 (1958); CATV and TV Repeater Services, 26 F.C.C. 403, 427–8 (1959). Were the facts otherwise, a serious question would arise whether CATV systems are subject to regulation under Title II of the Communications Act as interstate communications common carriers.

[35] One of the standard selling points of CATV service is the subscriber's ability to dispense with expensive or unsightly outdoor antennas.

[36] This is apparent if we consider the situation in terms of network programming (and the appropriateness of focusing upon the network situation is pointed up by (i) the fact that the principal basis for CATV growth thus far has been the provision of network

ator who does not carry local stations offers potential subscribers a choice between available off-the-air service and the entire bundle of services from distant stations which his system provides. A gain of a subscriber to the system will in most cases mean the effective loss of a potential viewer for the local station. This kind of barrier to competitive access is not created in the course of competition between television broadcasting stations.

52. Second, in subjecting the local station to competition from additional program services, the cable system does not enter the market for programming, as would a competing broadcaster. Television stations obtain their programs, for the most part, from various program suppliers. The most important of these, for most stations, are the national television networks. However, stations deal in addition with the distributors of feature film, cartoon, syndicated and sports programming.[27] The station obtains the right to exhibit network programs by offering to the network attractive audience circulation, etc., and by giving up to the network a major portion of the compensation which the sponsor or participating advertiser pays for the use of the station's facilities in connection with that program. The station normally obtains the right to exhibit non-network programs by outright payments to non-network program suppliers.

53. In dealing with program suppliers, stations usually obtain the exclusive right to exhibit programs within a particular geographical area and for a particular length of time. This exclusivity reflects, among other things, the judgment that duplication of the program within the station's market—either simultaneously or within some period of time—reduces the audience and the value of the program to the station. The amount and kind of exclusivity that can be created is restricted by our rules (in the case of network programs) and, more generally, by the antitrust laws.[28] However, our rules and the antitrust laws permit the creation of substantial exclusivity as a normal incident of the program distribution process.[29] And this exclusivity is maintained, in large part, through the operation of section 325 of the Communications Act which forbids the rebroadcasting of any station's signal without the consent of the originating station. For network affiliation agreements and most station contracts with other program suppliers either explicitly or implicitly forbid the station to grant rebroadcasting consent for the programs involved without the approval of the supplier.[30]

54. The CATV system that provides its subscribers with the signals of distant stations presently stands outside of the program distribution process we have described. It has not been found subject to the requirements of section 325.[31] It does not compete for network affiliation, nor for access to syndicated programs, feature films or sports events. It is not concerned with bidding against competing broadcasters for the right to exhibit these programs nor with bargaining with program suppliers for time and territorial exclusivity. Moreover, because the distant station whose signal is carried has no control over the CATV's use of its signal, the question of whether a program should be exhibited through CATV facilities in any particular market cannot be the subject of bargaining or agreement between the distant station and the program supplier—although the question of whether the same program should be rebroadcast in that market by a television station or a translator can be, and often is, the subject of such bargaining and agreement.

55. This is not the usual competitive situation. The CATV system and the local broadcaster provide the public with access to the same basic product—the programs created or sold for distribution through broadcasting stations. The broadcaster, however, must himself obtain access to the product in the program distribution market, with its various restrictions and conditions. The CATV operator need not enter this market at all.[32]

56. The resulting situation is in many ways an anomalous one. From the point of view of an existing station, the CATV may—in providing its subscribers with the signals of distant stations—duplicate programs for which the station has bid and obtained exclusive exhibition rights. No other station in the same market could normally obtain access to those programs without effectively outbidding the local station in the program market. Nor could a translator carry them without the express or implied approval of the program supplier. The CATV, however, carries them without paying anyone or engaging in any bidding process. From the point of view of an entrepreneur considering the establishment of another station in the same market, the situation is even more anomalous. Over and above his inability to obtain program exclusivity as against the CATV system, the very programs which he cannot obtain from program suppliers (because the existing station has been given exclusive exhibition rights in those programs) are made available in the market by the CATV without any payment or bidding process.

---

service to areas where the programs of all three networks are not readily available, and (ii) the well-known importance of network programming to the financial support of local television service. If, for example, there is a local CBS affiliate competing for audience with a CATV which brings in a distant big-city CBS affiliate, there is no reason to believe that the subscriber will go to the trouble of using the switching device on the back of his set in order to get the CBS programs locally rather than from the big-city channel on the CATV. Commonsense indicates that the subscriber will in most instances take the easiest, most convenient route and simply watch CBS programs on the CATV channel (thus avoiding the necessity of using the switch several times a night as he goes back and forth from CBS to those programs of other networks which are available only on the CATV channels).

[27] The relatively few independent stations now on the air must, of course, rely primarily upon non-network sources of supply.

[28] Section 73.685(b) of our rules prohibits arrangements between a network and its affiliate which prevent or hinder another station in the same community from broadcasting programs of the network not carried by the affiliate, or prevent a station in a different community from broadcasting any program of the network. The rules permit arrangements granting the affiliate a right of "first call" or "first refusal" in its community. The antitrust laws forbid exclusive "clearances" for the "runs" of a feature film in any area which (a) apply against a theatre not in "substantial competition" with the exhibitor to whom clearance is granted, or (b) are longer in time or wider in area than is reasonably necessary to protect the value of the license in the run granted. They permit reasonable clearances, creating reasonable exclusivity within these limits. United States v. Paramount Pictures, 334 U.S. 131 (1948); ABC-Paramount Merger Case, 8 Pike & Fischer, R.R. 541, 561–71, 621–2 (1953). Similar restrictions would appear to apply to the distribution of television programs. Cf., United States v. Loew's, Inc., 371 U.S. 40 (1962).

[29] See note 28 above. We note that our rules restrict the kinds of exclusivity that can be created by agreement between a network and its affiliate. They do not presently control the kinds of exclusivity which the network can create as a matter of its own practice and for its own reasons. Networks do, in fact, have substantial incentives to avoid program duplication in selecting their affiliates and in deciding whether to make their program available to stations not affiliated with them. (The most important of these is probably the advertiser view that duplication is a waste for which no payment is warranted.) As a result, most network affiliates enjoy substantially exclusive access to the programs of their network in an area going well beyond their own communities and, in many cases, well beyond their Grade A reception contours. Similarly, although the network is free to offer its programs to another station when its affiliate refuses to clear time except on a delayed basis, it rarely does so. As a result, the affiliate's network programs are almost never duplicated in advance of its own presentation and rarely thereafter, until the program leaves the network and enters the so-called syndication market. For a description of network practices in these respects, see Network Broadcasting, reprinted as H. Rept. No. 1297, 85th Cong., 2d sess., pp. 208–47, 263–73 (1958).

[30] We have examined, of course, the network affiliation agreements in our files and have obtained sample contracts for the sale of right to exhibit syndicated, feature film and sports programming from stations and program suppliers. In addition, our general experience supports the statement made above. For an example of the way in which one network has exercised control over the distribution of its programs through the operation of section 325, see National Broadcasting Co., 20 Pike & Fischer, R.R. 1013 (1960).

[31] See CATV Systems and TV Repeater Services, 26 F.C.C. 403, 429–30 (1959).

[32] We are aware, of course, of the pending copyright litigation in which program suppliers are seeking to establish their right to control the use by CATV systems of signals carrying their programs. See United Artists Associated, Inc. v. N.W.L. Corp., Civil Action No. 60–2583, U.S. District Court for the Southern District of New York, filed 1960; Columbia Broadcasting System, Inc. et al. v. Teleprompter et al., Civil Action No. 64–3814, U.S. District Court for the Southern District of New York, filed 1964. We neither intimate nor express any view as to the merit of these suits, which fall beyond our jurisdiction. We cannot close our eyes, however, to the significance which the present inability of program suppliers to control the availability of their programs via CATV has for competition between CATV and broadcasting stations.

57. These considerations as to carriage of the local station's signal and duplication of its programing—like those stemming from our statutory responsibilities—lead to certain broad conclusions:

(i) As a competitive practice, the failure or refusal by a CATV system to carry the signal of a local station is plainly inconsistent with our belief that CATV service should supplement, but not replace, off-the-air television service. The cable system that follows such a practice offers the subscriber the benefits of additional television service at the price of blocking or impeding his access to available off-the-air signals. Moreover, it gives the service of distant stations, offered to the subscriber as a group, an artificial advantage over the service of local stations in competing for the subscriber's attention. If the distant stations themselves were to establish a system carrying their signals, the anticompetitive character of their failure or refusal to carry the signals of local stations would be obvious. We think it no less obvious where the CATV system is independently owned.

(ii) Because it is inconsistent with the concept of CATV as a supplementary service, because we consider it an unreasonable restriction upon the local station's ability to compete, and because it is patently destructive of the goals we seek in allocating television channels to different areas and communities, we believe that a CATV system's failure to carry the signal of a local station is inherently contrary to the public interest.[33] Only if we were persuaded that the overall impact of CATV competition upon broadcasting would be entirely negligible could we consider countenancing such a practice.[34]

(iii) In light of the unequal footing on which broadcasters and CATV systems now stand with respect to the market for program product, we cannot regard a CATV system's duplication of local programming via the signals of distant stations as a fair method of competition. We do not regard the patterns of exclusivity created in the existing system for the distribution of television programs as sacrosanct. We think it apparent, however, that the creation of a reasonable measure of exclusivity is an entirely appropriate and proper way for program suppliers to protect the value of their product and for stations to protect their investment in programs.[35] We think the basic Congressional judgment underlying section 325's limitation on rebroadcasting is the same.

(iv) Nor do we consider the duplication of existing off-the-air service to be consistent with CATV's appropriate role as a supplementary service. Whatever the ultimate impact of CATV competition upon the revenues and operation of competing stations, duplication is highly likely to affect the audience for the specific programs involved.[36] And it does so without generally offering the public a substantially different service. We believe that a service such as CATV, which lives on the product of the existing television system and finds its justification as a supplementary service, should at a minimum give some measure of recognition to the fundamental distribution practices that have developed in the parent industry's competitive program market—to exhibition rights for which others must bargain and pay but which it has thus far been able to use without any bargaining by itself or by the stations whose signals it carries.[37] Once again, unless we were convinced that the impact of CATV competition upon broadcasting service would be negligible, we would favor some restrictions upon the ability of CATV systems to duplicate the programs of local broadcasting systems, as a partial equalization of the conditions under which CATV and broadcasting service compete.

3. *Impact of CATV competition on the Development of Television Broadcasting Service.* 58. In light of what we have said about the basic conditions under which competition between CATV systems and broadcasting stations occurs, it is plain that these proceedings do not turn upon a showing that CATV competition is demonstrably certain to cause widespread and serious damage to the public interest in television broadcasting. We think the basic fact that CATV service, while entirely dependent upon television broadcasting, also offers substantial competition to television station outlets is enough to justify regulatory action designed to ensure that the competition involved is conducted under fair and reasonable conditions. But in any event, in light of our statutory responsibilities, we cannot view the issue before us as one which depends upon a showing that CATV competition is highly likely to cause the wholesale demise of television stations across the country in the immediate future.

59. There is another reason for taking this position. When we last considered the overall questions raised by the development of CATV, our approach to the "economic impact" issue was focused largely upon the question of whether the adverse impact of CATV competition on broadcasters "would justify us in taking action, or seeking authority under which we could act, to bar CATVs from coming into or continuing to operate in a particular market." CATV and TV Repeater Services, 26 F.C.C. 403, 424 (1959).[38] As we stressed at the beginning of this report and order, however, the issue in these proceedings is not whether to bar CATV entry into any particular market or markets. It is rather whether to permit the use of microwave facilities to serve CATVs, while imposing some restrictions upon the manner in which the relevant cable systems compete with local television stations. And, as our 1959 Report points out, "The amount and certainty of the impact which we would have to find in order to justify a particular course of restrictive action naturally varies with the character of the particular action to be considered." (26 F.C.C. at 424.)

60. With these considerations in mind, we turn to an evaluation of the facts on the question of impact. We shall discuss this question first in terms of impact on existing operations and second in terms of the indications for new stations that may come on the air in the immedi-

[33] We note that in 1959 we expressed our willingness to recommend legislation requiring that all CATV systems carry the signals of local stations. CATV Systems and TV Repeater Services, 26 F.C.C. 403, 439 (1959). The major factors which prevented the imposition of such a consideration upon licenses for microwave relays serving CATVs in the common carrier and business radio services were (1) our determination—since reconsidered and reversed in the Carter Mountain decision—that it would be legally improper to consider the economic impact of a common carrier's provision of service to a CATV upon competing broadcasters in deciding whether to issue a common carrier authorization, and (2) the fact that at the time we had not yet opened microwave frequencies for the use of private business entities on a regular basis. See Frequency Allocations Above 890 Mc/s, 18 Pike & Fischer, R.R. 1767 (1959); 20 Pike & Fischer, R.R. 1602 (1960).

[34] In the above discussion we have focused upon commercial television broadcasting. We point out that any substantial roadblock to the reception of local noncommercial educational signals by CATV subscribers would also be contrary to established national policy, which seeks to promote the widest reception of educational television service. See Public Law 87-477, 87th Cong., 2d sess; S. Rept. No. 1526, 87th Cong., 2d sess., p. 3; H. Rept. No. 1559, 87th Cong., 2d sess., pp. 3-4.

[35] We note that our network study staff rejected the idea that the right of "first call" for network programs should be abolished, on the ground that this right is essential to the working of the network system. See Network Broadcasting, supra, pp. 274-275 (1958).

[36] This probability is clearest with regard to simultaneous duplication, where—a prior—it is reasonable to expect that the station's audience among subscribers might be reduced by as much as one-half, since there is no real basis for preference as between watching the same program on the local channel or that of the distant station. But a similar effect on audience is often likely in the case of duplication within a short time of presentation by the local station.

[37] In 1959, while we rejected proposals that nonduplication requirements be imposed on CATV systems, we concluded that the restrictions on rebroadcasting embodied in sec. 325 of the Communications Act should be extended to the distribution of broadcast signals by CATVs, both in order to "clarify the situation with respect to property rights (* * * we believe Congress intended to recognize and protect the property rights in programs)" and in order to "place the CATV under the same conditions as the broadcaster with respect to access to programs originated by other stations." CATV Systems and TV Repeater Services, 26 F.C.C. 403, 438-440 (1959). The Congress, however, has not seen fit to adopt this recommendation. Various parties to these proceedings now urge us to construe the microwave carriage and distribution of television signals by or for the benefit of CATVs as a single transaction which, in effect, constitutes "rebroadcasting" under the existing provisions of sec. 325. We think the proposed construction is a strained one, which we are not at liberty to adopt. However, we believe that reasonable nonduplication requirements will serve, in part, to achieve the equalization of competitive conditions at which the rebroadcasting consent" proposal is, in large part, aimed.

[38] See also 26 F.C.C. at 425 (par. 54) and 436-8.

ate future. In both instances, we stress, the question is not only whether CATV competition may destroy or prevent the establishment of stations (and thus frustrate achievement of the "fair, efficient and equitable" distribution of both local and nonlocal television service contemplated by section 307(b) of the Communications Act), but also whether it may seriously impair the ability of stations fully to serve the needs and interests of their communities (cf. Program Policy Statement, 20 Pike & Fischer, R.R. 1901 (1960)).

61. When we last reviewed the overall effect of CATV competition upon television stations, we concluded that "there is an impact upon television stations, regular and satellite, from the operation of auxiliary services of substantial size which bring competing signals into the stations' home communities (and perhaps, to a lesser extent, into other communities within their coverage areas)." We were unable to determine, however, "at what point, in terms of size of the market or auxiliary, the number of signals brought in, etc., this impact becomes serious enough to threaten the station's continued existence or serious degradation of the extent and quality of its service." CATV Systems and TV Repeater Services, 26 F.C.C. 403, 421–2 (1959). We reviewed three cases in which stations had gone off the air claiming that CATV competition was the cause of their demise (26 F.C.C. at 415–18) and concluded that it was impossible to isolate the effect of CATV competition from other factors which might—absent CATV—have presented successful operation (26 F.C.C. at 422–3). We also considered evidence of less extreme situations in which broadcasters had claimed that they had been forced to curtail their service to the public because of CATV competition (26 F.C.C. at 418–20, 423), but concluded that "the circumstances are essentially as unpredictable as the occurrences of the more drastic situations." (26 F.C.C. at 423)

62. As of the date of our 1959 Report, a number of other stations which were subject to some degree of CATV competition had gone off the air without citing CATV as a substantial factor in their situations. And, as NCTA notes, since 1959 yet other stations subject to some CATV competition have gone off the air, but none has publicly cited CATV as an important factor in their financial difficulties. Moreover, a number of the stations which in 1959 were complaining that CATV competition was placing them in a precarious condition having subsequently enjoyed sufficient financial health to increase the rates at which their facilities are sold to network and nonnetwork advertisers.

63. We cannot regard these facts, however, as dispositive of the question of impact upon existing stations. Quite aside from the inherent weakness of an approach which makes conclusions turn upon whether or not a station owner or manager has publicly cited CATV as a causal factor in financial difficulties, the situation with which we are faced is not static but dynamic. Concentration upon the immediate results at a particular point in time in a few particular situations—without probing underlying factors and the longer range trends affecting them—can produce highly erratic conclusions.[39]

64. Looking, then, to the underlying factors, we note that in 1959 we concluded that "The amount of impact * * * depends not only on the number of people served by the auxiliary service and that number's relation to the size of the market, but also on the number and character of the signals brought in." (26 F.C.C. at 420). The record of the landmark Carter Mountain case illustrates the operation of these factors. It shows that the amount of local revenue received by Station KWRB–TV, Riverton, Wyo., from each of the major towns in its market area was inversely proportional to the ratio of CATV subscribers to total TV homes in each town. As shown in the table below, the towns with the lower proportion of CATV homes produced disproportionately greater revenue to the station than communities of comparable size but with substantial ratios of CATV penetration:

Town	Population	Revenues	*CATV* subscribers	*Non-CATV* TV homes
Lander	5,806	$14,191	50	850
Worland	4,182	2,485	1,000	500
Riverton	6,845	17,429	350	1,150
Thermopolis	3,955	6,457	400	500

On the basis of these and other facts as to KWRB–TV's condition as a small market station, we found that the unconditional grant of an application for microwave service—which would result in substantially improved reception of distant signals—would probably also result in the station's demise. Upon review, the Court of Appeals held that the record "amply" supported our conclusion (Carter Mountain Transmission Corp., 32 F.C.C. 459, affirmed, Carter Mountain Transmission Corp. v. FCC, 321 F. 2d 359 (C.A.D.C.), cert. den., 375 U.S. 951 (1963)).

65. In seeking to determine whether it is probable that many other stations will be faced with circumstances like those of the Carter Mountain case, we must take account of nationwide trends affecting the nature of CATV service offerings, the character of the markets entered and the degree of penetration achieved. In this respect, we think, there is ground for real concern. In 1959, there were approximately 550 identified CATV systems, serving an estimated 1,500,000 persons (26 F.C.C. at 408). Now approximately 1,300 CATV systems serve 4 million or more viewers (NCTA, FC p. 8). In the late 1950's and early 1960's, franchises for cable systems were granted at an average rate of 50 a year. Between October 1963 and July 1964, the number of franchises granted was 158 (Seiden Report, p. 49). The average CATV system provided three signals to its subscribers in 1959 (26 F.C.C. at 407); now, the majority provides five or more signals (Seiden Report, pp. 53–54). It is not uncommon for a system to offer as many as 12 channels, and plans have been announced for the construction of 20-channel systems. In 1959 only 50 CATV systems made use of microwave facilities, and the maximum distance from which signals were brought in was some 300 miles (26 F.C.C. at 409). Since then, the number of systems using microwave has increased more than five-fold to 250 in 1964 (NCTA, FC, p. 9) and many more today. Microwave applications pending before us involve distances of 665 miles or more. And while the CATV industry originated in sparsely settled areas and areas of adverse terrain, with little or no off-the-air television service, it is now spreading to metropolitan centers with as many as two local stations and is proposed for three-station cities such as Cleveland, Philadelphia, Pittsburgh, and Baltimore.[40]

66. CATV has already achieved significant penetration of the service areas of many stations, particularly small market stations, and the trend toward increasing penetration is apparent. In 1959, very few stations reported a heavy penetration of their overall service areas by CATVs. (See 26 F.C.C. at 447–452.) Our current study, however, showed 32 stations whose Grade A contours contained CATV subscribers aggregating 10 percent or more of the station's net weekly circulation (as measured by the American Research Bureau surveys in standard use by stations and advertisers). Some 25 stations showed a similar penetration of their Grade B contours. Over 45 percent of the stations in one- and two-station markets had some CATV penetration of their contours. Over 50 percent of the stations in markets ranking below 151 in size had some CATV penetration of their Grade A contours, and as to nearly 20 percent of these stations, CATV subscribers in the Grade A contour equaled over 11 percent of their net weekly circulation (Seiden Report, pp. 75–80).

67. Particularly noteworthy is the experience of the seven stations with CATV subscribers exceeding 25 percent of their net weekly circulation within their Grade A contours. (The individual station penetration ratios were as follows: 27 percent, 29 percent, 34 percent, 46 percent and 55 percent.) All seven of these stations are effectively in one-or-two-station markets. Six are in markets ranking in size below 199. None of the stations reported gross revenues of more than $224,000 in 1963, and five of the seven operated at a loss (Seiden Report, pp. 767).

[39] For example, the station in Kalispell, Mont., which had been off the air, had returned to the air at the time of our 1959 Report, and we relied heavily on this fact (26 F.C.C. at 416 and 422). Shortly thereafter, the station once again ceased operation—this time permanently. Also see generally the discussion in the Fisher Report on pp. 7–10.

[40] We note that, for the most part, the move into three-station markets remains in the proposal stage. The heart of CATV development is still in areas which lack good reception of three full network services. (See Seiden Report, pp. 83–84.)

68. These figures do not, of course, establish that substantial CATV penetration always or even usually causes stations which might otherwise operate profitably to operate at a loss.[41] Now, as in 1959, we think it impossible, with the data at hand, to isolate reliably the effects of CATV competition from all of the other factors which operate to produce particular financial results in differing settings. The Fisher Report, in our view, marks a substantial advance toward the goal of isolating and predicting the effects of CATV competition, and we think many of the criticisms leveled at that report by other parties are misplaced.[42] But there remain a number of questions. The Fisher Report assumes that a small decline in reported station circulation is followed by an equivalent decline in the prices advertisers are willing to pay. The Report furnishes no specific evidence of this fact, and our experience is that—particularly where national advertisers deal with smaller markets—there is much less tendency to react to small changes in station audience.[43] There is also a question concerning the extent to which the various conditions described in Dr. Fisher's conclusions (as to noncarriage and duplication where the subscriber was previously able to receive one or more stations) are present in practice.[44] Without further exploration of these and other questions,[45] we would not and do not rely upon Dr. Fisher's conclusions as to the dollar effects of CATV competition and their significance in different settings.

69. To suggest that the likelihood of serious impact can therefore be dismissed, however, is to misconceive entirely the terms on which the problem comes to us. Now, as in 1959, it is plain that CATV competition can have a substantial negative effect upon station audience and revenues, although we lack the tools with which to measure precisely the degree of such impact. Now, as was not the case in 1959, the CATV industry is in a very rapidly expanding stage of its career. The long range trends are in the direction of deeper CATV penetration and greater impact. Countervailing factors may, in a number of cases, offset or mask these effects. If present trends should continue, however, there is good reason to believe that the negative effects will become dominant in more and more situations. Moreover, aside from these factors, there is an additional reason to believe that competitive impact will be more serious in the future than it has been in the past. As we have noted, and as NCTA itself has pointed out, the typical national advertiser (network or non-network) is barely aware of the effect of CATV upon station audience or its role in making the programs broadcast in one market available in others. It is highly probable that national advertisers will in the future take much greater account of CATV operations, and that estimates of adverse impact upon stations will become increasingly real. Rating services are beginning to supply the relevant information and the data compiled in these proceedings will undoubtedly direct advertiser attention to the significance of CATV. Advertisers normally view duplication as a waste for which they will not pay, and network affiliations and rates are based on the amount of unduplicated coverage a station can provide.[46] As advertisers become aware that the purchase of big city stations may include coverage of secondary markets, it is likely that they will react."[47]

70. Prediction of particular results in particular cases must, of course, remain hazardous. We think it clear, however, that the most serious effects will be felt by (1) stations in smaller one and two-station markets, where the public does not receive the full services of all three national networks off-the-air, (2) by marginal stations in larger markets, and (3) by new stations coming on the air. The latter point is particularly significant. In 1959, we said (26 F.C.C. at 425): "In the area of impact on the development of new stations * * * we can only conclude that there is probably an impact in some situations, so that in these situations a regular station will not be built with the auxiliary service in existence, whereas absent the auxiliary service it would be. But there is no way to define these situations, or tell when they exist or do not exist." As a general matter, it remains true that there is no way to predict with reliability the results of individual cases. In light of the explosive growth of CATV, however, there is one overriding fact which we must take into consideration.

71. The remaining idle VHF channel assignments fall largely in sparsely settled regions west of the Mississippi River. Other potential new television stations must operate in the UHF frequency bands. The all-channel receiver legislation enacted in 1962 provides a basis for successful UHF operation in many areas which has hitherto been lacking. But the all-channel legislation, while a necessary first step toward more extensive use of UHF frequencies, affords no automatic guarantee of successful UHF operations—particularly where they are conducted in competition with established VHF stations. The full effects of the legislation will not be felt for several years. Moreover, the earlier history of UHF failures prior to the legislation,[48] and residual "psychological" prejudices against UHF are interim factors to be overcome. Acceptance of UHF is also dependent upon technological advances in UHF receiving and transmitting equipment, which, in turn, are most likely to be stimulated by the advent of new UHF stations.

72. In short, we are in a critical period with respect to UHF development. Most of the new UHF stations will face considerable financial obstacles. Many will be deprived of access to network affiliation. Many, in addition will lack access to popular syndicated and feature film or sports programs, which are under long-term contract to existing stations.

73. NCTA asserts that fears for the impact of CATV competition upon potential UHF stations are groundless. It points out that in the absence of all-channel or other UHF-equipped receivers a CATV may extend the circulation of a UHF station by carrying it to subscriber homes with VHF-only receivers. Its figures show that in 14 of the 22 cases where UHF stations are now subject to CATV competition in their home community, the station went on the air after the CATV system or systems were already in operation. Its figures also show that CATV competition was present in 10 out of 107 cases in which UHF stations have left the air. NCTA cites letters from 2 out of the 10 relevant UHF broadcasters complimenting their CATV competitors on the assistance received through CATV carriage of UHF signals. It argues further that the factors which caused the demise of 97 UHF stations without CATV competition must have been the primary cause of UHF failure in the 10 instances where CATV competition was present. In sum, it urges that UHF stations do go on the air in the presence of CATV and that few UHF stations with CATV in their home community go off the air.

74. We think this showing wholly inadequate to support the proposition which NCTA advances. With no specification of the degree to which any of the stations involved were subjected to CATV competition, or to which they

---

[41] See Seiden Report, pp. 73–75, 80.

[42] For a discussion of one of the major criticisms made by Dr. Arkin, see Seiden Report, pp. 67–69.

[43] Cf., Seiden Report, pp. 64–66, 71–72; NCTA, ARC, p. 25.

[44] See par. 37, p. 17, above. Although the comments do not make the point explicit, it is apparent that NCTA has used predicted coverage contours to determine whether CATV subscribers would otherwise be able to receive a station off-the-air. (ARC, pp. 9, 10, 14) Dr. Fisher, on the other hand, has utilized primarily American Research Bureau survey data (Fisher Report, pp. 17–20). Notwithstanding this fact—which may account in large part for any differences in their results—we think the NCTA comments point up an area which requires exploration in depth before serious reliance is placed upon Dr. Fisher's specific conclusions.

[45] In particular, we are concerned with the degree to which the cost data used to establish the net and gross profits of different stations (cf. fn. 9, p. 13, above) and the audience data supplied by rating services, which in some cases may have unduly magnified the effects of CATV competition on station audience because of inadequate sampling techniques (cf. par. 12, p. 8, above), can be used to establish relatively precise dollar figures for the effects of CATV competition and its relation to station profitability.

[46] See Network Broadcasting, supra, pp. 209–12, 216–20, 226–9, 233–6, 263–74 (1958).

[47] "Should the marketplace become aware of these data the economic results could be disastrous for small market stations. The networks would cut back the station's hourly rate, and the spot market or the rating agencies would adjust the audience rating to effect a higher CPM," Seiden Report, p. 77; see also id. at pp. 72 and 75.

[48] See, e.g., Second Report on Deintermixture (1956), 21 F.R. 4958, 13 Pike & Fischer, R.R. 1571; Greylock Broadcasting Co. v. United States, 231 F. 2d 748 (C.A.D.C.); Fort Harrison Telecasting Corp. v. Federal Communications Commission, 324 F. 2d 379 (C.A.D.C.); Triangle Publications, Inc. v. Federal Communications Commission, 291 F. 2d 342 (C.A.D.C.).

benefited from CATV extension of their coverage, it is impossible to derive from this data any inference as to the effects of CATV on UHF development.

75. On the other hand, there is one general factor giving cause for serious concern. As NCTA points out, a CATV sells to the public what a broadcasting station provides free of charge. (FC, pp. 120–1). Inevitably, the primary attraction offered the public by the CATV operator must be service which is not available off-the-air. In some cases, this may take the form of a better picture than is receivable through normal means. In many cases, however, the primary economic justification for CATV entry into an area must be its ability to provide programming of distant stations which is not already available off-the-air from existing local stations. The ability to provide programming not available from existing stations, however, must also be the basic reason for the development of any new local station or stations. The competition between the two must necessarily be sharp and direct, and the likely impact correspondingly severe. We have noted the claim that CATV systems aid in the development of UHF stations by giving them a "built-in" potential audience on the VHF sets in the homes of subscribers. To the extent this is so, it seems to us an additional reason to require carriage of a local station's signal by the CATV. In any event, the beneficial effect of such carriage is counterbalanced by the additional fractionalization of audience and duplication of programs to which CATV operation may subject a struggling new station.

C. CONCLUSION AS TO THE NEED FOR RULE MAKING ACTION

76. We conclude that rule making action is amply justified. First, we believe that requirements of carriage and reasonable nonduplication are appropriate as means designed to create reasonably fair and open conditions for competition between CATV and broadcasting stations as alternative ways of making television programs available to the public. These requirements stem also from our belief that, on the whole, the appropriate role for CATV systems is to make available television service which is not available off-the-air, rather than to duplicate or prevent reception of local signals. So long as CATV is not an insignificant factor in the competitive conditions facing the television broadcasting industry, we think every station affected is entitled to appropriate carriage and nonduplication benefits—irrespective of the specific damage which any individual CATV system may do to the financial health of the individual station. Commission action to achieve an accommodation of this nature between the two services is appropriate and in the public interest.

77. Secondly, we believe that the imposition of minimum carriage and nonduplication requirements by rule is required in order to ameliorate the adverse impact of CATV competition upon local stations, existing and potential. NCTA's argument that CATV has not yet caused any widespread demise of existing stations misses the point. As we have pointed out above it would be clearly contrary to the public interest to defer action until a serious loss of existing and potential service had already occurred, or until existing service had been significantly impaired. Corrective action after the damage has already been done, if not too late, is certainly much more difficult. Further, it is difficult, if not impossible, to attempt to delineate with any precision a factor such as discouragement of entry of potential broadcasters because of CATV competition. In short, we must plan now for the healthy coexistence of CATV and local stations and safeguard the public from future injury. Circumstances have changed since our 1959 report and order, and the likelihood or probability of adverse impact upon potential and existing service has become too substantial to be dismissed. If studies are in conflict and present a close question as to the precise extent of the impact, it is not close as to how this uncertainty should be resolved. This is one of those situations in which the public interest requires that conditions conducive to the sound future of television "be assured rather than left uncertain." United States v. Detroit Navigation Co., 326 U.S. 236, 241. This is particularly so, where we have two modes of service, one of which is almost completely dependent on the other for its product. In such circumstances, uncertainties should be resolved in favor of ensuring the healthy growth and maintenance of the basic service.

78. Thirdly, we believe that rule-making action is best designed to meet the procedural problems inherent in the subject matter with which we are dealing. Although this proceeding involves only those CATV systems which make use of microwave relays, a fairly large number of stations are affected, and the volume of microwave applications continues to increase. An adjudication as to the effect of any particular microwave grant is not only cumbersome and time-consuming but will often lose its validity as new CATV facilities are subsequently added. Individual adjudicatory proceedings do not afford a satisfactory means for determining the cumulative effect of a number of grants, each perhaps having relatively small impact. Moreover, those stations operating marginally and most apt to be severely affected by CATV operations are the ones least in position to undergo the expense of evidentiary hearings, or repeated hearings to avoid "chipping," even assuming that interim action of some kind were to be taken during the hearings. Also, there would be little, if any, opportunity to consider on a case-by-case basis the effect of microwave grants upon the decisions of potential applicants or existing licensees whether to inaugurate or improve service. And rule making is the most appropriate method to accomplish an orderly extension of service by means of CATV. The establishment of minimum across-the-board requirements lets all parties—CATV operators, broadcasters, program suppliers and advertisers—know in advance what the basic operational conditions will be. All parties are thus given a reasonable chance to plan their activities with the foreknowledge of the basic requirements we will impose. We regard the introduction of as much stability as possible into the planning perspectives of those affected by our regulation as a highly desirable objective.

79. Finally, we note that reasonable carriage and non-duplication requirements need impose no substantial burden on the ordinary CATV operator or his subscribers. Most CATV operators already recognize the unfairness implicit in a refusal to carry the signal of a local station. Indeed, NCTA argues that a requirement of carriage is unnecessary, since in most instances cable systems carry local stations voluntarily. If this is true, however, there can be no objection to a rule recognizing the actual practices of CATV operators as desirable. Moreover, our investigation has disclosed a significant number of CATV systems that do not carry a station or stations that serve their communities off-the-air. Some 80 stations were found to have 151 CATV systems in their Grade A contours which do not carry their signals to approximately 220,000 subscribers. Some 123 stations have 261 CATV systems in their Grade B contours which do not carry their signals to about 324,000 subscribers (Seiden Report, p. 54). It is apparent that there is a need for regulation to delineate the situations in which the principle of carriage is applicable. The form and scope of that regulation is a matter we discuss hereafter.

80. The situation as to nonduplication is not greatly different. Our aim in this regard is not to take any programs away from any CATV subscriber, but to preserve to local stations the credit to which they are entitled—in the eyes of advertisers and the public—for presenting programs for which they had bargained and paid in the competitive program market. NCTA itself concedes that a requirement of simultaneous nonduplication would injure very few CATV systems (NCTA, FC, p. 121), but argues vigorously against any requirement that nonsimultaneous duplication be avoided. This is a matter which, again, goes to the form of the specific rules adopted, and which we discuss hereafter.

81. Generally, we believe that our purposes in these proceedings can be accomplished without unduly burdening or obstructing the operations of CATV systems.[49] Our aim in adopting rules as to carriage an nonduplication is, we repeat, not to block or thwart but to seek an accommodation.

"We foresee regulations which will require us to adopt certain conditions of operation that will foster the development of local stations. As for example:

"(a) We may be required to carry the local television station (or stations) on our cables and not degrade their picture quality.

"(b) We may be required to prevent the duplication of the local station's pro-

[49] A spokesman for the largest CATV operator in the country (operating 29 systems in 12 states and 44 communities, with over 85,000 subscribers) has said, in a recent statement to the stockholders of that company:

grams by a distant station carried on our cables. This can be accomplished by appropriate switching operations.

* * * * *

"All of the foregoing conditions would be acceptable to your company and, in fact we have on occasions entered into such agreements on a voluntary basis with area stations * * *"

82. We realize that the rules we adopt will not solve all problems.[80] But this fact does not argue against their adoption. We act now where we can and as we can, to accomplish what we can. We hope that these rules, ensuring many stations' ability to maintain themselves as their areas' outlets for highly popular network and other programs, will permit more expeditious processing of applications for the use of microwave facilities to serve CATV systems. Should they be inadequate or unduly burdensome in individual cases, special action or waiver can be obtained upon an appropriate showing. *United States* v. *Storer Broadcasting Co.*, 351 U.S. 192 (1956).[81] If the rules should ultimately prove unnecessary or need modification in light of the passage of time, Congressional action or other factors, they can be modified or rescinded. Our best present judgment is that the public interest requires their adoption.

II. Specific Provisions of the Rules

83. We turn now to the specific substantive provisions of the proposed rules. After careful consideration of all the comments and for the reasons previously set forth, we have decided that the public interest would be served by adopting the rules substantially as proposed, but with some significant modifications. The substance of these comments and the resulting modifications in the rules are set forth below.

84. We shall discuss first the basic questions of (a) what stations are entitled to the benefit of required carriage, (b) what stations are entitled to the benefit of nonduplication and as against which signals, and (c) what the time period for nonduplication should be. Thereafter, we shall discuss various miscellaneous issues relating to the three primary aspects of the rules and to the question of the kind of transitional period that should be allowed before requiring full compliance with the rules.

A. Stations entitled to be carried

85. The rules proposed would require carriage of a station's signals by any CATV system receiving microwave service and located within its predicted Grade A contour. The comments of CATV interests generally indicate a preference that carriage requirements be limited to systems located in the station's city of assignment. Broadcaster interests, on the other hand, urge that limiting the carriage requirement to the Grade A contour is inappropriate, because many stations rely on an effective market area, extending to their Grade B contours and beyond. Small stations, operating in sparsely settled areas, are put forward as prime examples, since they must depend upon wide-area service to attain minimum financial success. In addition, it is pointed out that such stations are least able to afford the expense of case-by-case procedures to obtain Grade B carriage.

86. A related issue is the question of whether a CATV should be required to carry more than two local stations. NCTA urges that such a requirement would be burdensome, if not disastrous, for systems which have very limited channel capacity. The broadcasters argue, on the other hand, that the carriage requirement is appropriate for any and all stations which meet an across-the-board definition of "local station" and that discrimination between local signals should not be allowed.

87. In the view we take of both matters, carriage of a station's signal is desirable wherever the signals brought in by a CATV system compete effectively for the audience upon which the station relies. For, as we have already concluded, failure to carry the station's signal in such circumstances puts an unreasonable restriction upon the station's ability to compete. From the point of view of national advertisers and program suppliers, it makes little difference where a home in the station's normal audience is located. Signal contours, in this context, are merely useful rules of thumb for determining where a station's basic market area lies. Within that area, the station's right to be carried should not depend upon a showing of specific need in each instance.

88. On the other hand, we must consider the problems raised by the presently limited channel capacity of many CATV systems. The findings of our special study indicate that some 34 percent of all systems provide less than five channels and an additional 37 percent provide only five channels (Seiden Report, p. 52).[82] Extension of the carriage requirement to the maximum limits conceivable could in some instances outrun the capacity of these systems (i.e., in cases where a system located between several markets is overlapped by six or more Grade B or better signals). Even in lesser situations, a blanket requirement that all Grade B or better signals be carried could easily result in the carriage of several substantially duplicating signals from network-affiliated stations in nearby markets and the consequent exclusion of signals from more distant independent and educational stations.[83] Indeed, informal investigation has revealed some instances in which primary affiliates of the same network place overlapping Grade A or better signals in the same area, although there are very few such cases in which the area now contains a CATV system.

89. Given these conflicting considerations, we think that a compromise approach is in order. Such a compromise has, in fact, been suggested in connection with the legislative discussions to which we referred at the beginning of this report. In essence, its concept is as follows: A CATV system owes its primary duty to the stations that are closest and place the best signal over its community. It should, therefore, within the limits of its channel capacity, carry first all stations that place a signal of the highest intensity and technical quality over its community. Thereafter, it should carry the stations that place successively lower grades of signal over its community, with the lower limit being a Grade B contour. At any stage, the system need not carry a signal if (1) it substantially duplicates the network programming of a signal of a higher grade, and (2) carrying it would—because of limited channel capacity—prevent the system from carrying a non-network signal, which would contribute to the diversity of its service.

90. We shall adopt this concept. The modified rules will provide that, within the limits of its channel capacity, a CATV system using microwave service shall carry first the stations that place a "principal community" contour over it, second the stations that place a Grade A contour over it, and third those that place a Grade B contour over it. However, the system need not carry any station if its network programming is substantially duplicated by one or more stations of higher priority, and (b) carrying it would, because of limited channel capacity, prevent the system from carrying the signal of an independent, nonaffiliated commercial station or the signal of a noncommercial, educational station. Thus, a Grade A signal that is substantially duplicated by one or more "principal community" signals need not be carried if, because of limited channel capacity, its carriage would prevent the carriage of an independent or an educational station. Similarly, a Grade B signal that is substantially duplicated by one or more Grade A or better signals need not be carried if, because of limited channel capacity, its carriage would prevent the carriage of an independent or an educational station.

91. We note the following subsidiary points in connection with this requirement:

(a) For purposes of this rule, we define a "substantially duplicated" signal to be one which regularly duplicated the network programming of one or more other stations, in a normal week during the hours of 6 to 11 p.m., local time, for a total of 14 or more hours. We concentrate upon the evening hours be-

[80] We refer here to the problems we are considering in the related notice of proposed rule making and notice of inquiry issued this day (FCC 65-). We note particularly that, although we will include noncommercial, educational stations in our requirements as to the carriage of local television signals by microwave-served CATV systems, we have taken no further action with regard to the issues raised by educational broadcasters. (See par. 17, above.) We have instead reserved consideration of those issues for the broader proceeding instituted today.

[81] As required by the Act (e.g., section 309), we will examine any question raised in connection with individual microwave applications which bears on the public interest in the particular applications involved.

[82] For microwave-served systems, the comparable figures are 33 percent and 36 percent. Ibid.

[83] See generally, NCTA, FC, Ex. No. 14.

cause, from the public's viewpoint, this is the period of maximum viewing and, from the station's viewpoint, this is the period of maximum revenue. With the three commercial networks offering evening schedules approximating 28 hours per week, we have chosen 14 hours as a rough midpoint defining "substantial duplication".

(b) In cases where there are substantially duplicating signals of equal grade over the CATV community, and carriage of both would prevent the cable system from carrying the signal of an independent or an educational station, the system may in its discretion select one of the duplicating signals for carriage. We realize that this makes possible "discrimination" between local signals in some cases. Upon complaint, we would examine closely any charge of abuse, particularly where the CATV operator has an ownership or other interest in one of the two duplicating stations.

(c) Moreover, we note another qualification. We have used the concepts of "principal community", "Grade A" and "Grade B" contours, already embodied in our rules," as if they described uniform and sharply distinguishable grades of signal intensity. Actually, of course, signal intensity declines, not in sharp stages, but gradually as distance from a transmitter increases. It can be affected, also, by a number of factors such as terrain, directional antennae, etc. Once again, we stress that we are using signal contours as useful rules of thumb. If a station is able to show, for example, that its signal over a CATV community lying just beyond its Grade A contour is materially better than another, "substantially duplicating" Grade B signal, the CATV system will be obliged to select that signal in carrying out the responsibilities imposed under the rules. If a system is able to show that, notwithstanding an apparent difference in signal contours, the signals of two substantially duplicating stations are of equal grade, we will allow appropriate relief.

(d) In cases where, because of limited channel capacity, a system is not carrying the signals of all stations that place a Grade B or better contour over its community, we think it retains an obligation to disturb the off-the-air competitive relationships of the relevant stations as little as possible. Accordingly, we shall require such a system to offer and maintain, for each subscriber, a switch allowing the subscriber to choose at any time between cable and off-the-air reception, unless the subscriber affimatively indicates in writing that he does not desire this service.

92. By these means, we hope to reconcile the objective of establishing broad, uniform requirements that each station be carried within its basic market area with the limitations imposed by the channel capacity of many CATV systems. We have noted a strong trend in the CATV industry toward the introduction of systems with wide channel capacity. Over a period of time, therefore, the problem of limited capacity should tend to disappear. As noted, we can and will re-evaluate our requirements in light of future experience.

[14] See §§ 73.683–73.686 of our rules, 47 CFR 73.683–73.686.

B. STATIONS ENTITLED TO THE BENEFIT OF NONDUPLICATION AND AS AGAINST WHICH STATIONS

93. The proposed rule would entitle any station placing a Grade A or better contour over a CATV community to the benefit of nonduplication protection against any other signals carried by the system, except a signal which is itself required to be carried under the rule (i.e., a Grade A signal) or pursuant to an agreement "reached by the parties in lieu of the requirements of this section". See proposed §§ 11.556(a)(4) and 21.710(a)(4). Once again, CATV interests urge restriction of this provision to systems in a station's city of assignment; once again, broadcaster interests urge its extension to systems within a station's Grade B contour.

94. We take the same basic view of the nonduplication benefit that we do of the carriage requirement, i.e., that it is something to which a station is entitled, without a showing of special need, within its basic market area. However, we face here analogous problems of defining a station's basic market, of recognizing the limited channel capacity of many CATV systems, and of ensuring that our requirements do not work an undue disruption in CATV service.

95. In large part, CATV objections to any wide definition of the stations to be protected relate to the impact of protection of two or more stations against anything more than simultaneous duplication upon certain systems, viz, those with limited channel capacity that are located so far away from any independent, non-network station as to make access to the signals of such a station prohibitively expensive. The fear is that, in these circumstances, two stations could preempt for themselves most or all of the most popular network programs, sharply reducing if not destroying the usefulness and attractiveness of the service brought in on other channels by the cable system. Because of its limited capacity, and its practical inability to obtain the signals of independent, non-network stations, the system would then lose a large part of its economic reason for being (cf., NCTA, FC, p. 123).

96. But CATV objections also stem from the fact that there is, in a number of instances, duplication of programming as a result of the overlap of off-the-air signals from stations located in different markets. (See, e.g., NCTA, FC, pp. 45–6, 134–5, Ex. No. 14.) A certain amount of such duplication results from the overlap of the Grade A or better contours of two primary affiliates of the same network. A much greater amount results from the overlap of Grade B or better contours of two affiliates of the same network. (See NCTA, Reply Comments, Appendix, Ex. 2.) If duplication exists off-the-air, argues NCTA, the Commission should not seek to prevent it via CATV.

97. The question of the time period for which duplication protection should be afforded we discuss below. It has a bearing on the issue of what stations are entitled to protection, and we shall take both matters into consideration in our subsequent discussion. Here, we address our attention to the more general question of the area within which a station is entitled to exclusivity—whatever its scope in time. On this issue, we think that NCTA's basic point is a good one. As noted, our proposed rule would have exempted from the nonduplication requirement any overlapping Grade A signal required to be carried under the rule or a private agreement. Our purpose was and is to preserve the existing off-the-air situation, insofar as exclusivity is concerned, and not to give stations any greater exclusivity vis-a-vis CATV systems than they now enjoy as against each other. Stated otherwise, in the absence of a market in which the question of competitive access to programing by stations and CATVs can be resolved, our aim is to preserve for stations the competitive exclusivity they have been able to obtain as against other stations, but nothing more.

98. Taking these factors into consideration, we shall modify our proposed rules to provide the nonduplication benefit for all stations (1) within whose Grade B or better contour a microwave-served CATV system operates, and (2) which are carried on the system: *Provided*, That (a) as to network programing, the system will not be required to protect a station's exclusivity if one or more stations which substantially duplicate its network programing off-the-air place an equal or higher grade signal over the system; and (b) as to non-network programing, the system will not be required to protect a station's exclusivity if any stations operating in what is normally and usually considered another market for purposes of program distribution place an equal or higher grade signal over the system. In these situations, the CATV operator will be free to carry duplicating signals of other stations, wherever they may be located. Thus, a station that places only a Grade B contour over the CATV system would not be entitled to nonduplication of network programing if one or more affiliates of the same network (or networks) place a Grade B or better contour over the same system. The station would not be entitled to nonduplication of non-network programing if any station located in what is normally and usually considered another market places a Grade B or better contour over the CATV system. Similar qualifications will apply to stations placing Grade A and principal city contours over the CATV system. We note, in this connection, the following subsidiary points:

(i) We define a "substantially duplicated" signal here as we have above—i.e., as one which is regularly duplicated by the network programing of one or more other stations in a normal week during the hours of 6 to 11 p.m., local time, for a total of 14 or more hours.

(ii) A network's willingness to allow off-the-air duplication of its programs by two stations is rough index of its willingness to treat the stations as if they were located in essentially separate markets. No similar index is easily available with regard to non-network programing.

However, the concept of a station's "market" is one much used in the television industry. Only in a few instances is there likely to be much dispute concerning the application of the concept. In those instances, the practices of stations and program suppliers can be investigated, to determine whether the CATV community fails in an area in which the station normally obtains exclusivity as against other stations.

99. On the other hand, the rules will provide for nonduplication, even though a station's signal contour over the CATV system is overlapped by a lower priority signal contour from another station in a different market. (A station with a "principal community" contour will be protected even though overlapped by Grade A's, and a Grade A will be protected even though overlapped by Grade B's.) In such situations, the CATV system, which can effectively render the signals of all stations carried equal in technical quality, is in fact altering the existing off-the-air situation as to exclusivity.[50]

100. By these means, we hope to leave the cable system that operates "between" adjacent television markets relatively unaffected by the nonduplication requirements. At the same time, a station which—despite the overlap of lower-grade signals from an adjacent market—has been able to maintain itself as the exclusive outlet for network and other programing in its immediate area, will not find its position upset by the growth of CATV systems in its area of primary signal strength. And stations in sparsely populated areas, which rely upon wide-area coverage, will be able to maintain, within their Grade B contours, their fundamental position as against distant, large-market stations.

C. THE TIME PERIOD WITHIN WHICH NONDUPLICATION IS REQUIRED

101. Perhaps the most seriously contested issue in this proceeding—apart from the basic question of whether rule making action is warranted—is whether restrictions on duplication of the programing of local stations should extend beyond simultaneous duplication. As we have noted, NCTA is willing to concede that avoidance of simultaneous duplication would not injure many existing CATV systems. The reason for this is plain. With the exception of factors such as color transmissions, which we discuss later, prevention of simultaneous duplication takes nothing of any real significance away from the CATV system or its subscribers. All that is at stake is the availability of the same program on two different channels of the subscriber's set at the same time. However, controversy is sharp with reference to our proposal that duplication be avoided for a period of 15 days before and after local broadcast by a station.

102. NCTA's comments most fully present the CATV position. It urges that nonsimultaneous duplication benefits the subscriber by making the same program available to him at different times, that the amount of nonsimultaneous duplication varies drastically from case to case and station to station, with no perceptible general pattern, that no need for an across-the-board restriction of nonsimultaneous duplication has been shown, and that the few broadcasters who have agreements with cable systems which limit nonsimultaneous duplication have chosen not to exercise their full rights under such agreements. It argues further, as we have already noted, that nonsimultaneous duplication protection—if afforded to two or more stations—can destroy systems which have limited channel capacity and are unable to obtain access to the signals of independent stations. Even where protection is afforded to only one station, NCTA claims, the "15-day before-and-after" period would permit an unscrupulous broadcaster—by arranging his schedule to "program against" the CATV—to maximize the hours of programing the system is prohibited from carrying, disrupting if not destroying the attractiveness of the CATV service and forcing the subscriber to wait until each protected program appears on the local station, often at an inconveniently early or late hour of the evening (NCTA, FC, pp. 51–109, 118–24).

103. Most of the broadcasters, on the other hand, urge that the full period of 15 days before and after the local station presents a program is necessary (1) to allow stations with multiple network affiliations to maintain their exclusive right to present—often on a delayed basis—programs of more than one network, and (2) to maintain minimum exclusivity with regard to non-network syndicated and feature film programing, which is not ordinarily presented simultaneously—or even nearly so—nationwide.

104. Our consideration of this issue must start with the facts of broadcaster practice in the scheduling of various programs. Most network programs are presented simultaneously throughout the eastern and central time zones, with a direct "feed" of the programs to different stations through common carrier facilities, station-owned microwave relays or off-the-air pickup of one affiliate's signal by another affiliate. In the Pacific time zone, network programs are normally delayed for the 3-hour period which covers the difference between that area and the eastern time zone, but are presented simultaneously throughout the Pacific time zone itself. In the mountain time zone, there are various practices. Some stations carry network programs simultaneously with their broadcast in the eastern and central zones (carrying a program which originated at 8 p.m. in New York at 6 p.m. mountain time). Many others, however, delay their network schedules for varying periods, to meet the convenience of their viewers.

105. It is at once apparent that a CATV could—by bringing programs across either border of the mountain time zone—duplicate a local station's network programs an hour or two before or after they are presented locally. Comments filed in a related proceeding by the operator of a CATV system in Yuma, Ariz., reveal that his system follows just such a practice.

106. The information at our disposal, however, does not indicate that this practice is at all widespread. Opportunities for nonsimultaneous duplication of a local station's network programing by a CATV which carries the signals of a distant affiliate of the same network appear to arise primarily out of another set of circumstances.

107. When a network offers its affiliate a program, the affiliate may not wish to clear time for the program on a "live" basis, i.e., at the time when most of the stations in its time zone are carrying the program, using the common carrier or other facilities through which it is fed. The network typically then offers the program to the affiliate for broadcasting on a delayed basis, providing that the time slot provided is acceptable to the program sponsors or participating advertisers and to the network itself.[51] The affiliate's reluctance to clear time on a "live" basis stems from its desire to present either the program of another network or non-network program in the time period involved. Since the affiliate's independence vis-a-vis its own network and its opportunity to obtain the programs of other networks depends largely upon the relative number of station facilities in its market (i.e., whether there are fewer or more station outlets than national networks), one would expect, a priori, that the practice of carrying network programs on a delayed basis would appear primarily in one- and two-station markets, but relatively less in the larger three-station markets.[52]

---

[50] We note here another qualification akin to one we have applied in relation to the requirement of carriage. If a station is able to show that its signal over the CATV system is materially better than another signal of "equal priority" or that, for whatever reason, it is in fact the dominant outlet in the CATV community for the network or non-network programing it carries—notwithstanding the presence of duplicating signals of "equal priority"—we would require the CATV system to afford it nonduplication protection. For instance, if a CATV system is just outside the Grade A contour of one station and barely within the Grade B contour of another, the system might well—on a proper showing—be required to protect the first. We would give similar treatment to a showing by a CATV operator that—notwithstanding an apparent difference in signal contours—two stations in fact put substantially "equal" signals over the CATV system.

[51] In such instances, the network usually mails a film copy of the program to affiliate.

[52] There is another reason to expect more delayed broadcasts in smaller one- and two-station markets. Some smaller stations are forced to obtain all of their programs by mail because the business they generate does not, in the network's view, justify the expense of ordering common carrier facilities and the station cannot afford its own microwave relay or arrange for an off-the-air pick-up of another affiliate's signal. In situations of this kind, the station's entire network schedule may be run on a delayed basis. This accounts, we think, for many of the cases discussed in the NCTA comments (FC pp. 69, 65–6) in which a CATV carrying the signals of a large market station did not duplicate any programs of the local station simultaneously but duplicated a large number nonsimultaneously.

108. We have requested and obtained from the three national networks information concerning delayed broadcasts by their affiliates during a recent week. Analysis of this information for stations in the continental United States reveals the following: Twelve (12) markets with four or more stations reported some delayed broadcasts; the number of hours of programing delayed in the median market, during the sample week, was two; the range was from 1 hour to 20 hours. Sixty-four (64) markets with three stations reported some delayed broadcasts; in the median market, all stations delayed a total of 2½ hours; the range was from ½ hour to 23½ hours. Fifty-seven (57) markets with two stations reported delayed broadcasts; the median was 11 hours and the range was from 1 to 42½. And with 84 one-station markets reporting some delayed broadcasts, the median fell between 5 and 5½ hours, with the range from ½ hour to 23½ hours.[59]

109. This information confirms generally our expectations. Stations in the one and two-station markets, where CATV systems have most often appeared, are likely to engage much more heavily in delayed broadcasting of network programs than their counterparts in the larger three and four-or-more-station markets, which typically appear in the role of the distant station carried on a CATV system. As a result, there is a substantial opportunity for CATV systems to duplicate the network programs of a local station in advance, since it carries the programs "live" from the large-market station, while the local station will often carry them on a delayed basis. Chances for duplication of a local station's network programs after the station has presented them are much less; for they depend upon the large-market station's delaying of a broadcast which the local station presents "live". The figures on advance and delayed duplication by existing CATV systems, supplied in this proceeding by NCTA, likewise confirm these statements (See NCTA, FC, pp. 68–84).

110. Non-network syndicated and feature film programing offers even more opportunities for nonsimultaneous duplication. As the broadcasters point out, such programs—particularly feature films—are scheduled individually in each market, with relatively little nationwide pattern and no tendency for scheduling to be simultaneous within a region or time zone. Our own research indicates that stations typically bargain for and obtain exclusive exhibition rights to these programs for substantial periods of time, with the median for syndicated series falling somewhere around 2 to 3 years and the median for feature films approximating 5 years. Within these periods, the scheduling of the episodes of a syndicated series may be affected by the need to "bicycle" film copies from one market to another. There does not appear, however, to be any particular nationwide pattern in either the syndicated or the feature film area. As a result, syndicated or feature film programs may be scheduled on large market stations at widely varying times, both before and after the same programs appear on smaller market stations.

111. Assessing the contentions of the parties against the background of these facts, we think reasonable restriction of nonsimultaneous duplication is warranted. We have found that restrictions upon CATV duplication generally are appropriate both to create fair conditions of competition and to safeguard against the potential impact of such duplication upon the ability of broadcasting stations to serve the public goals for which they have been licensed. If the amount of nonsimultaneous duplication is large—as it may well be for many stations in one- and two-station markets subject to CATV competition—our requirement must recognize this fact if it is to be effective. If, on the other hand, the amount of nonsimultaneous duplication is small, its prevention will have correspondingly little effect on CATV operation. In neither case do we think that a station should be put to the test of establishing an overwhelming need for reasonable exclusivity within its basic market area.

112. This action does not take from the CATV system any program which is now available to it. No broadcast will be deleted from any channel on a system unless it is scheduled for earlier or later presentation on the channel of a local station. Nor is any significant "waiting" forced upon the subscriber because he cannot view a program before it is presented by his local station. Our 1963 notice states that we would not regard the 15-day nonduplication requirement as applicable to programs of national importance, such as Presidential addresses or missile shots, which depend for their significance upon their timeliness. We made no proposal in this regard, as the notice also states, because it was our understanding that such programs are not presented on a delayed basis by any station except in extraordinary circumstances. However, to make our intention absolutely clear, we have incorporated a provision in the rules exempting programs as to which timeliness of presentation is essential from the nonsimultaneous duplication requirement.

113. Thus, our requirement of exclusivity for delayed broadcasts will apply only to the great mass of standard network and other programs, which are produced long in advance of their exhibition and are almost entirely independent of highly timely references.[60] It can hardly make much difference to the CATV subscriber whether viewers in another community are able to see a particular feature film or a particular episode of a network or syndicated program series a week or two before or after he is able to see it. The situation today, absent CATV, is that syndicated series and feature films are scheduled on widely varying dates in different communities, without noticeable discomfort on the part of the audience.

114. NCTA urges that the local broadcaster may present a program (which was scheduled "live" in prime evening time by a network) on a delayed basis at highly inconvenient viewing times, such as after midnight or in midafternoon. No showing has been made that as a general practice networks or sponsors would permit prime time programs to be shifted to less desirable periods, that non-network advertisers would be very interested in purchasing announcements adjacent to such programs, or that broadcasters have engaged, or are likely to engage, in such a practice. Once again, however, in order to make our intentions clear, we have incorporated a provision in the rules that programs which are scheduled by a network between 6 and 11 p.m., eastern time, but broadcast by a local station, in whole or in part, outside of what would normally be considered prime time for network programs in the time zone involved, are exempt from the nonduplication requirement.[61]

115. The one thing our action does withdraw from the CATV subscriber is the opportunity to view the same program twice (or, in some cases, three or more times)—once on the local station's channel and once or more times, at a different hour or date, on the channels of incoming distant stations. Repeat presentations of this kind can undoubtedly be a service to the subscriber, giving him more than one chance to view a program he desires and perhaps avoiding the conflict between two attractive programs normally scheduled at the same time. Once again, however, we note that if the amount of nonsimultaneous duplication is small, our requirement withdraws very little from the subscriber. If the amount of nonsimultaneous duplication is large, we think the desirability of preventing it must normally outweigh its benefit to the subscriber. There are, in this connection, two important additional considerations: (1) In the larger communities served by the distant stations whose

[59] Several comments on this analysis are appropriate: (1) Some 217 out of approximately 260 television markets reported some delayed broadcasts; if the markets with no delayed broadcasts are taken into consideration, the median figures are reduced as follows: four-or-more station markets—1¼ hours, three-station markets—2 hours, two-station markets—10½ hours, and one-station markets—4.5 hours. We do not regard these differences as significant. (2) The upper end of the range for four- and three-station markets may appear to be high. However, the average number of hours per station is much lower. Moreover, the total number of hours per market falls off sharply from the peak. For example, only 7.8 percent of the reporting three-station markets showed 10 or more hours during the sample week. Only 20.3 percent reported 5 or more hours. And in each case a number of markets reported no delayed broadcasts. (3) While the median for one-station markets was less than for two-station markets, the average number of hours per station in the median market was approximately the same (5½ hours) in both. Moreover, there was a considerable tendency for one-station markets to cluster near the upper end of the range.

[60] On the basis of these considerations, our network study staff came to the conclusion that "the fact that a network program may be carried on a delayed rather than a live basis is not per se contrary to the public interest" Network Broadcasting, supra, p. 276 (1958).

[61] We point out that nothing said above is intended to suggest that the nonduplication requirement will be inapplicable where a station has shifted a program normally scheduled at one hour during the daytime to another daytime hour.

signals are imported by the cable system, the competitive program market does operate as between stations. As a result, this service—the presentation of the same program within a 2-week period on different channels—is normally unavailable to the residents of those larger communities. Our requirement does not discriminate against the residents of the smaller communities typically served by CATV systems. It withdraws from them a service not available to anyone else at present. We cannot regard this as an undue hardship. (2) When a local station delays the broadcast of a program from one network, in order to present the program of another network scheduled in the same time period, it provides for all its audience—both CATV subscribers and off-the-air viewers—the chance to avoid a conflict between two attractive programs normally scheduled at the same time. If duplication via CATV should cause a network or sponsor to object to such scheduling, or if it should so reduce the station's incentive that it avoids such scheduling, the entire audience—CATV and off-the-air—would lose this opportunity.

116. On the whole, we are convinced that our action, properly understood, will cause very little inconvenience for the CATV subscriber. Nor are we persuaded that it will have any undue impact upon the financial health of CATV systems. At the outset, we note NCTA's showing that in a few instances where broadcasters have had the right to demand protection against non-simultaneous duplication under private agreements with CATV systems, they have chosen not to request all, or even the major portion, of the relief to which they were legally entitled. Without going into the underlying details, whatever this showing suggests as to those broadcasters' varying judgments of their needs for exclusivity in differing circumstances, it hardly squares with NCTA's claim that broadcasters will use the non-simultaneous duplication provisions of our rules to cause maximum damage to competing cable systems.

117. In this respect, we do not regard the station practice of presenting network programs on a delayed basis, in order to present highly popular programs of another network, as inherently contrary to the public interest. For the reasons described previously, this practice—referred to as "cherry-picking" in various comments—is characteristic only of stations in one- and two-station markets. Given the availability of more network schedules than station outlets, the station wishes to bring its viewers what it judges to be the most entertaining or most attractive programs of two or more networks; by doing so, it makes those programs available to those who are not on the cable in the community, or who live beyond the physical or economic reach of the cable in the area around the community. Absent a showing that the programs are being presented at inconvenient viewing hours, or that the practice is being deliberately used in an attempt to undermine a CATV operation—both of which matters we would consider seriously upon complaint—we can give no weight to the claim that this practice contravenes the public interest.[61]

118. Generally, we point out, it is the growth of CATV on a "simultaneous nonduplication only" basis which could change the scheduling of network programs. Our action, which tends to maintain the existing situation in relation to program exclusivity, leaves stations to make their choices on the basis of program availability and their judgment as to how best to serve their communities. Only if delaying a network broadcast would incur the penalty of duplication would there be an incentive to change. By and large, the question thus comes down to the effect of present scheduling practices upon the viability of competing CATV systems, assuming some restriction on nonsimultaneous duplication.

119. We consider this question, first, as it relates to situations in which a CATV system is obliged to protect only one station. NCTA has provided figures which suggest—but do not prove—that in a few instances where a broadcaster has successfully obtained protection against nonsimultaneous duplication the effect has been to slow—but by no means halt—the expansion of the CATV's subscriber list. In one of the three instances supplied, involving a cable system in Hattiesburg, Miss., "cable company officials do not attribute the losses to any significant degree to dissatisfaction with nonduplication" and NCTA itself concedes that "the dissatisfaction isn't strong enough to have harmed the Company's business." (NCTA, FC, p. 109.) We cannot regard this as evidence of undue disruption.

120. More generally, there are stringent limitations upon a single station's ability to carry network programming on a delayed basis—thus creating the possibility of substantial nonsimultaneous duplication. The amount of prime time available to the station per week is limited, and so is the station's ability to persuade networks to make additional programs available. NCTA has submitted a study of the damage which a broadcaster might do to a competing three-channel CATV system, given 15-day nonduplication protection. The study was conducted by "the former general manager of a network television station with a net weekly ARB circulation in excess of 500,000 TV homes." It suggests that the station could raise the hours between 6 and 11 p.m. during which it is duplicated on one or both of the competing channels of the system from 4½ in a week to 13. The total "blackout" during the week would be 1 hour on one competing channel and 13 hours on the other, out of a total of 35 hours of programming presented on each channel between 6 and 11 p.m. during the week (NCTA, FC, pp. 51–6, Ex. 15). The system would still offer 34 hours of nonduplicating programing on one competing channel and 22 hours on the other, between the hours of 6 and 11 p.m. Without further information, these figures do not suggest a ruinous impact, even on an extraordinarily limited system.[62]

121. There are, of course, the situations we have noted in which a station in a small market is carrying its entire network schedule on a delayed basis, because a "live" pickup is not available to it. There are also the situations in which, due to time zone differences, the CATV system is duplicating the entire network line-up of a single station an hour or two before or after. However, the stations involved—which fall largely in the sparsely settled regions of the Mountain and Pacific Time Zones—are the ones most likely to need the protection which a "simultaneous only" rule would take from them. And the total amount of programming effectively "preempted" by one station is no greater in these situations than it is in others.

122. Turning to the effects of our action in situations where more than one station is protected, we must distinguish between two different cases. The first is where a cable system is located effectively within a market served by two or more stations. The second is where the system falls "between" markets. In the first situation, problem areas are largely confined to two-station markets. CATV has not yet made a substantial entry into markets containing three or more stations.[63] The stations in such markets do not engage in a large amount of delayed network broadcasting and the CATV systems proposed rely almost exclusively upon improving the reception of local stations or importing independent, nonnetwork signals.

123. Concentrating upon the two-station market situation, it is possible that prevention of non-simultaneous duplication could have a serious effect upon a CATV system which offers the public nothing over and above the available off-the-air service except the signals of network affiliated stations. For two stations can, in fact, preempt a significant proportion of the most popular programs of the three networks. We note, however, the following considerations: (1) What is involved is a claim by a supplementary service that it cannot survive in competition with off-the-air broadcast service unless it is allowed to duplicate some of the product of its competitors,

[61] It has been suggested that the practice results in an expansion in the amount of network programming carried by the station in prime time, to the exclusion of non-network and particularly local programming. Along these lines, it is argued that we should restrict duplication protection to simultaneous duplication, so as to give the station an incentive to carry local programming—which could not by its nature be duplicated. Without going into the question of whether such action would be appropriate or effective, we think it sufficient to note that the same action would also penalize the broadcaster who delays a network program in order to present a non-network, local program.

[62] Further, we note that the proposed rules afford protection against undue effects arising out of the prevention of nonsimultaneous duplication, by providing that in single-station situations duplication need not be prevented if it results in reducing the CATV system, at any particular time, to presenting the program of only one network.

[63] There is a question of whether CATV can ever become a significant factor in such markets. See, e.g., Seiden Report, pp. 82–6.

rather than provide new product. (2) Over and above duplicating programming, the CATV operator retains his ability to provide a number of services to his subscribers. Our investigation of network programming available to UHF stations seeking to enter two-station markets indicates that a significant number of popular programs are not being presented by the existing stations in such markets.[44] The 15-day rule, which is truly minimal in relation to the extended periods for which stations now receive the exclusive right to present syndicated and feature film programming, will allow the CATV to present the great bulk of the non-network programming broadcast by distant affiliates. Moreover, the system may be able to offer better reception of local signals. (3) Our provision allowing duplication where necessary to allow a CATV system to present—at any particular time—the programs of two networks was originally limited to situations in which the system is "affording protection to a single television broadcast station." See proposed §§ 11.556(a)(3) and 21.719(a)(3). We have decided to extend that provision to all situations. Thus, the situations in which delayed network broadcasting by one or both local stations in a two-station market would leave the competing cable system with only one or no network programs will be avoided.[45] (4) Most CATV operators who enter the heart of a two-station market must be expected to equip themselves with the capacity to offer the public the signals of non-network stations, if at all possible. Only two cases (Rapid City, S. Dak., and Great Falls, Mont.) are put forward in NCTA's comments as instances in which this is asserted to be impossible, because of limited channel capacity, distance from independent stations or both. (NCTA, FC, pp. 121–3.) Without specifying further, NCTA claims that there are numbers of others in similar situations. On the present record, however, we believe that the problem is sufficiently confined that it can be given appropriate treatment upon application for waiver of the rules. Moreover, the overall course of action we have adopted will give us an opportunity to examine a number of situations in which a CATV system is required to afford 15-day nonduplication protection to two or more stations before deciding whether to extend this requirement to the great majority of microwave-served systems.

124. Finally, considering the case of a system which falls effectively "between" television markets, our conclusions are similar. We have relieved such systems of the nonduplication requirement in many instances. Thus, a system operating within the overlapping Grade B contours of a multiplicity of stations from different markets could often carry all such stations without affording them program exclusivity against each other or against more distant stations. There will be some instances in which a "between market" CATV system will be required to afford nonduplication protection to more than one station. In many such situations, however, the stations protected will be located in markets containing three or more stations—thus reducing the incidence of any nonsimultaneous duplication. In most such situations, the CATV system will have a highly significant function to perform in improving the reception of the available off-the-air signals, which would be unaffected by any nonduplication requirement. On the whole, we are convinced that our restriction of nonsimultaneous duplication would create no insuperable problems for such systems. Once again, however, the overall course of action we have adopted will give us an opportunity to examine these situations again, before extending the rules to the great majority of systems.

125. There remains the question of the precise extent of the restrictions to be imposed upon nonsimultaneous duplication. After examining this question carefully, we believe that the 15-day before and after period proposed in our last Notice should be adopted. In dealing with network programs, our sample week study shows that, of all the hours of delayed network broadcasts, 10.2 percent were delayed less than 1 day, 48.9 percent were delayed from 1–7 days, 30.2 percent were delayed 8–15 days, and 10.7 percent were delayed over 15 days. A more detailed distribution shows that the number of hours of delayed network broadcasts fell off sharply at the end of a 7-day period of delay and once again at the end of a 15-day period.

126. These figures reflect the practices of stations of which only a miniscule proportion are now in position to "program against" a CATV in an effort to cause a "blackout" of programs on competing channels. They fully justify the advance period of 15-days specified in our rule-making proposal, without even taking into consideration any requirement for the prevention of duplication of nonnetwork programs in advance of their presentation by local stations.

127. With respect to the "after" nonduplication period, we think that a similar 15-day period is called for. Our judgment in this respect is not based on the situation with regard to network programs, since—as we have pointed out—the likelihood of duplication after a local station has presented a network program is relatively small. But a 15-day "after" period is clearly a minimal measure of protection against the duplication of syndicated or feature film programs, considering the extended periods—up to and exceeding 5 years—for which stations now bargain and obtain exclusivity in relation to such programs.

D. MISCELLANEOUS MATTERS: THE QUESTION OF A TRANSITION PERIOD

There are a number of subsidiary issues relating to the basic requirements of the rules which we have not treated thus far. Without attempting to summarize them in advance, we discuss them here.

128. *Use of predicted contours.* In dealing with both the carriage and the nonduplication requirements, we have made liberal use of the signal contour concepts embodied in our rules. As proposed in our notices, these references were entirely to predicted contours. As we have stated several times, however, signal contours are, in the present context, useful rules of thumb. And, as we have repeatedly recognized, the methods of prediction specified in our rules are based on various assumptions as to terrain and other factors, which may not necessarily hold true in an individual instance. In the absence of other information, predictions based on our rules will be regarded as creating a prima facie presumption as to the location of signal contours. With one exception to be noted later, however, any party, however, will be free to make a showing that, because of terrain or other factors, the contours lie elsewhere. If the parties are unable to agree, the matter may be brought to us for resolution.

129. *Material degradation.* One of the matters covered by the proposed rules on which dispute has long been endemic is the requirement that CATV systems carry the signals of local stations "without material degradation."[46] Broadcaster interests—fearing intentional degradation of their signals by CATVs—seek a more specific definition of "material degradation in quality" and ask that some criteria be set forth. It is suggested that the CATV system should use a good quality antenna at an optimum site chosen after consultation with the station's engineer and with his approval. CATV interests point out that many problems in the reception of a station's signal may stem from deficiencies that may occur anywhere in a transmission path that can extend—in the case of network programs—from network studios in New York across the country, through a station transmitter and thence to the point of pickup by the cable system.

---

[44] Cf., FCC, Public Notice, Mimeo. No. 3627, Report No. 4664, Issued May 31, 1963.

[45] Under the provision originally proposed—now applicable to systems served via microwave grants made under the interim procedures—the system is free to select which of two network programs (both of which are scheduled for delayed broadcast by the local station) it will duplicate. In extending this provision to cases in which protection is afforded to two or more stations, we recognize that we create the possibility of "discrimination"—i.e., that a system could theoretically decide always to duplicate the programs of one station, instead of basing its judgment upon the needs of its subscribers. Upon complaint, we would consider carefully any charge of abuse, particularly where the cable system has an ownership or other interest in one of the two stations concerned.

[46] We take this opportunity to comment on the argument of TAME, an association representing manufacturers of receiving antenna equipment, that CATV systems should be required to ensure that television sets of subscribers are capable of receiving local signals off-the-air, instead of requiring that the system receive and carry the signals of local stations. For the reasons we have given, and because the installation and maintenance of roof-top antennas may entail substantial expense for the subscriber—or may not otherwise accord with the subscriber's desires, we think it preferable to require that CATV systems carry the signals of local stations. As noted above, however, in those cases where the system does not carry all Grade B or better signals, we have required the system to provide and maintain a switch enabling the subscriber to receive off-the-air service, if he should desire this service.

They deny that any instances of deliberate degradation have occurred, and urge us to leave such matters to the parties to work out, resolving disputes on a case-by-case basis.

130. We will not attempt to prescribe specific quality standards for the reception and carriage of television signals by CATV systems in this proceeding. Such action may be desirable.[47] However, with the large number of variables involved, it would take some time to develop appropriate technical criteria. Moreover, any prescribed minimum standard would fall short of what can be achieved by cooperative, good faith efforts on the part of CATV operators and broadcast licensees. With the adoption of general carriage and nonduplication requirements, it will be in the best interest of both parties to provide a good signal on the cable in order to retain the good will of the subscribing public.

131. We shall, however, retain a general requirement that local signals be carried "without material degradation." We stress that this requirement imposes a duty to do more than avoid deliberate damage to reception of the station's signal. CATV systems have demonstrated an ability to provide a good signal, received off-the-air, beyond the Grade B contours of stations they have themselves desired to carry. Our carriage requirement, on the other hand, applies only where at least a Grade B contour is in fact placed over the CATV community. And the system's obligation to the local signal is at least as great as its obligation to the signals of more distant stations. Accordingly, the requirement of "no material degradation" implies an obligation, on the part of the CATV operator, to provide appropriate means for the best reception of the local station's signal that is reasonably possible. In this regard, he should consult with the station's engineer as to the optimum site and manner in which to receive the station.

132. On the other hand, the cable system's obligation is not unlimited. The station has an obligation to provide a transmission that meets the technical standards laid down in our rules. It cannot expect a cable system to make good deficiencies in its signal that result from its failure to meet these minimum requirements. Nor can it demand more than a reasonable effort on the part of the CATV operator to provide the best reception of its signal possible in all the circumstances. If both parties operate in good faith, we believe that most problems can be resolved. Any disputes may be brought to us for ruling on a case-by-case basis.

133. *Selection of a channel for carriage purposes.* Closely related to the question of "material degradation" is the issue of the channel on which the local station is carried. NCTA has submitted a showing indicating that carriage of signals on a cable system on the same channel as that on which they are transmitted can cause degradation due to interference from (1) the off-the-air signal (picked up by the subscriber's set "from the receiver chassis, from power lines, or from other sources") where that signal is strong or (2) radiation from the cable (even within the limits permitted by § 15.161 of our rules) where the CATV is attempting to receive a weak off-the-air signal. (See NCTA, Appendix to Reply Comments, Ex. 4.) On the other hand, broadcasters prefer to be carried on their own channel, if this is possible without material degradation. Moreover, they contend that the only way for a station to build and maintain program identification with the CATV audience is for their signal to be received on the cable always on the same channel.[48] And there are some who assert that a local station can be carried "on-channel" without degradation (e.g., through various means of amplifying that signal)—particularly where the off-the-air signal is of less than principal city grade.

134. There is no way to prescribe a specific rule covering all of the various situations possible. Where practicable without material degradation, however, we will require that the local station be carried on its own channel. Moreover, once a channel position on the cable is selected, we do not believe it should ordinarily be changed without the station's consent, except to accommodate the signal of a station having higher claims, because it places a higher grade signal over the CATV community. Without incorporating an express provision in the rules, we would examine any charges of abuse upon complaint.

135. We note one additional matter in this connection. There may be situations in which the presence of a strong off-the-air signal or other factors render one or more channel positions on the cable inferior to others—no matter what signal is placed in those positions. In such situations, the cable system may have a choice between placing a local signal (i.e., one required to be carried) or a nonlocal signal (i.e., one not required to be carried) in the inferior position. We expect the local station to be given preference in such choices, and construe the requirement of carriage without material degradation to impose this obligation.

136. *Duplication; the means of prevention.* There are basically three ways in which duplication—simultaneous or nonsimultaneous—can be avoided. (a) The duplicating signal may be "blacked out" and a slide substituted, informing the subscriber of the channel on which and time at which he may view the deleted program. (b) The signal of the protected station may be switched so that it appears—during the "blacked out" period—on both its own channel and on the channel of the duplicating station. (c) The "blacked out" period may be filled with the signal of some other, nonduplicating station carried on the system (which would then appear simultaneously both on its own channel and on the duplicating channel) or by other material of the cable operator's choosing. In any of these cases, the switching required may be performed manually or by means of various automatic devices.[49]

137. Some broadcasters urge that the use of a slide is the only effective way to establish, in the eyes of the subscribing public and the advertiser, the exclusivity that the rule is designed to protect. Other broadcasters, while not insisting upon the use of a slide, contend that carriage of their signal on more than one channel tends to destroy their program identification in the eyes of the audience and the advertiser. CATV interests, on the other hand, generally prefer to retain the ability to fill a "blacked out" period with program material, either from another broadcast signal or of their own choosing, so as to avoid subscriber dissatisfaction.

138. We will not require the use of a slide. While it may be of some benefit to the broadcaster—particularly in dealing with local advertisers—the benefit is a marginal one compared with the major benefit of nonduplication. The interests of the CATV system outweigh, we think, this consideration. We will, however, require that, upon the station's request, the cable system refrain from carrying its signal on more than one channel.[50] The CATV operator has no stake in whether a "black out" period is filled by the protected station's signal or the signal of another station. Neither has the subscriber. Moreover, by filling "blacked out" periods with material other than the signal of the protected station, the parties would largely avoid another problem discussed in the comments—the "clipping" or other disruption that may occur when switching is not properly coordinated with the local station's programming.[51] Whether the fault in such situations lies with the broadcaster (in failing to keep to standard time schedules) or with the CATV (in failing to perform switching operations or set time clocks accurately), the problem can be alleviated by the use of a slide or a signal other than that of the protected station. The local programs and advertisements will then be received in their entirety on the channel of the local station and the CATV operator will retain full control over the switching that occurs on the duplicating channel.

139. *Duplication; nature and timing of notice from local station.* The rule

[47] We note the pendency of a petition for rule making to prescribe technical standards for the reception and carriage of television signals by all CATV systems, filed on July 28, 1964, by Springfield Television Broadcasting Corp. (RM-636). We will consider that petition in the general proceeding concerning CATV regulation instituted today (FCC 65- , Part II).

[48] The importance of this matter in situations where the CATV viewer is a participant in a rating sample is particularly stressed.

[49] The mechanisms now in use for this purpose depend upon a preset time clock.

[50] We know of no reason why CATV operators should want to carry the signal of a local station on more than one channel, except to accomplish nonduplication. The loss of program identification for the local station would be the same whenever such duplicate carriage occurred. Accordingly, we have made this requirement apply generally.

[51] By "clipping" the parties are referring to situations in which CATV subscribers miss the beginning or last few minutes of a program, including local advertisements, because of a failure of coordination between switching operations and the protected station's programming.

originally proposed in Docket No. 14895 would have required a station entitled to nonduplication protection to give the competing CATV system at least 30 days advance notice of the date on which the protected broadcast would occur. In our 1963 notice, we modified this requirement to provide for "notification as soon as possible and in any event, at least seven days in advance of the date of the program's scheduled presentation over the CATV system." See proposed rules 11.556(a)(1) and 21.710(a)(1).

140. CATV interests make various objections to this provision, and we have in any event reconsidered the entire matter. Given a requirement for 15-day nonduplication, the searching out of duplicating programs in the schedules of competing stations can impose some burden on the CATV operator—especially with regard to syndicated and feature film programs, which may be scheduled in different markets on widely varying dates with little regular pattern, and particularly where he is required to protect more than one station. We think this task should properly be undertaken by the broadcaster requesting protection, i.e., that he should specify both the program to be protected and the program against which he desires protection. For the most part, this burden will be minimal—particularly in relation to regularly scheduled network programs. Where it is more than minimal, we think the broadcaster should bear it unless the CATV operator would prefer to do so himself. The proposed rules will be modified accordingly.

141. On the other hand, with the broadcaster notifying the system of the programs as to which he desires protection, the remaining reasons for specifying a period for advance notification are (1) to give the cable operator an opportunity to arrange for the appropriate switching operations, and (2) to give him an opportunity to keep subscribers informed of the differences between the program schedules for the duplicating distant stations which are printed in area newspapers or other publications and their schedules as they will appear on the cable system. Any broadcaster desiring to retain the good will of subscribers will naturally seek to provide the required information to the cable system as early as possible. Last minute changes in the scheduling of both network and non-network programs do occur, however. Considering all factors, we have decided to require notification as soon as possible and, in any event, no later than 48 hours preceding the broadcast of the program to be deleted. However, we also expect the CATV system to afford reasonable cooperation in case of shorter notice.

142. *Duplication; color transmission.* CATV interests urge vigorously that they should not be required to delete reception of programs transmitted in color in order to avoid duplication of the same programs in black and white. They urge that a significant number of subscribers possess color receivers and that a significant number of local stations carrying network broadcasts available in black and white or color do not themselves possess color transmission equipment. Nonduplication of these stations, they contend, can destroy the usefulness of the subscriber's color receiver.

143. We are not convinced that the problem is as wide-spread as NCTA claims it to be.[72] However, we also would not wish to withdraw from a significant proportion of subscribers the opportunity to view programs in color unless there are weighty considerations justifying such action. With the market for color receivers showing substantial expansion, and with all networks commencing a significant amount of color transmission, we believe that almost all stations will have equipped themselves for color transmission in the relatively near future. In the interim, we believe that some relief from nonduplication requirements may be warranted. However, present levels of color receiver saturation are relatively low. We are not now in position to specify any particular level of color set saturation among a system's subscribers which would always justify removal of the nonduplication requirements. We are therefore adopting rules without a specific provision on this subject, but are calling for comments on it in the related notice of proposed rule making issued today (FCC 65-334, Part I). Before imposing nonduplication requirements on the bulk of microwave-served CATV systems or the industry at large, we will address ourselves to this subject again. In the interim, we will consider individual cases on application for waiver of the rules.

144. *Stations entitled to carriage and nonduplication: satellites and translators.* As proposed, the rules would not require cable systems to carry or nonduplicate boosters, repeaters, translator television stations or satellites (which do not originate at least seven hours per week of local programming) unless such facilities present the programming of a station which is otherwise entitled to carriage and/or nonduplication. Both CATV and broadcaster interests have expressed dissatisfaction with this provision. The CATVs urge that a satellite originating only seven hours per week is still primarily a repeater facility, which does not stand on the same footing as a local station. Beyond this, they contend that our failure to impose restrictions upon the duplication of local station programming by translators is discriminatory. The broadcasters—with the support of various independent translator groups—urge that satellites and translators should have the same carriage and nonduplication benefits as regular local stations, with no prerequisite for a minimum amount of local program origination. Pointing out that such auxiliary facilities are normally located in underserved areas with a corresponding need for free reception service, the broadcasters claim that a lack of relief from CATV competition will discourage licensees from continuing, or undertaking new, translator or satellite ventures to meet that need. Further, they point out that unless a satellite obtains protection akin to that afforded a full-fledged local station, it may never have the opportunity to develop into such a full-fledged station.

145. We think the broadcasters' basic point with regard to satellite stations is sound. Both as means for extending off-the-air service and as potential local stations, we think satellites are entitled to the basic benefits of the rules. However, a satellite cannot be treated precisely as we would treat any other television station. A satellite's coverage contours may overlap the "equal priority" contours of the parent station, thus creating off-the-air duplication of programming. But this has nothing to do with the geographical scope of the market in which satellite and parent operate as a unit, and should not result in a loss of nonduplication protection for both. On the other hand, if the CATV system involved has wide channel capacity, treatment of a satellite as a full-fledged station might in some instances require the system to carry both satellite and parent, with only a very marginal amount of nonduplicating programming added for the benefit of subscribers. We believe that a satellite and its parent should generally be treated as a unit. Carriage of one will relieve a CATV system of any obligation to carry the other. Affording nonduplication protection to one will relieve the system of any obligation to afford protection to the other. However, off-the-air duplication of a satellite's programming by a parent station, or vice versa, will not result in a loss of exclusivity for both.

146. The question as to translators, whether station-owned or independently owned, is a more difficult one. For it involves broad issues as to the appropriate role of these auxiliary broadcast facilities. We are urged by Dr. Seiden to consider a wide expansion in their use, to extend the service areas of small market stations and bring three full network services to the entire country off-the-air.[73] And we are considering an expanded use of translators in certain limited circumstances.[74] The issues raised, however, are entirely too broad for resolution here. For the present, we have decided to treat translators and other repeaters in the manner proposed in our notices in these proceedings. Where they operate within the Grade B or better contour of the station whose programming they rebroadcast, they will be treated as extensions of that station's facilities, adding to its rights under the rules only to the extent they bring its service to an area which would otherwise not have it because of terrain or other factors. Nor will any off-the-air dupli-

[72] NCTA shows that one out of every four stations whose signals were carried by microwave-served cable systems as of the date of its comments was not equipped for color transmission. Casual inspection of the list of 72 stations it submits, however, reveals that a large number are nonnetwork, independent stations or affiliates of networks that have not, until recently, engaged in a significant amount of color transmission. At least one of the stations is a noncommercial, educational station. (See NCTA, FC, Ex. No. 31.)

[73] See Seiden Report, pp. 7, 22, 89–90.

[74] See notice of proposed rule making in Docket No. 15858, issued February 19, 1965.

cation due to translators and other repeaters be regarded as ground for withholding nonduplication protection from the originating station. However, in the related notice of proposed rule making issued today (FCC 65-334), we have called for comments on the appropriate role of translators and the manner in which they should be treated for purposes of carriage and nonduplication by CATV systems. We will therefore have an opportunity for further consideration of this subject in the relatively near future.

147. Finally, we point out that translators and satellites—unlike CATV systems—operate under the provisions of section 325 of the Act and that our rules now impose restrictions on the use of station-owned VHF translators to invade the service areas of other stations whose programs would be duplicated. (See § 74.732(3) of the rules.) The question of whether further restrictions should be imposed on duplication of the programming of local stations by translators repeating the signals of distant stations is also too broad for resolution here. We will evaluate it in light of further experience or, where raised, in the context of individual grants.[75]

148. *Agreements between broadcasters and CATV systems as to carriage and nonduplication.* We have emphasized throughout these proceedings that any rules adopted are not intended to preclude parties from arriving at agreements tailored to the specific circumstances in which they find themselves. The carriage and nonduplication requirements operate only at the request of the station, and the nonduplication requirement specifically depends upon notification by the station. The rules establish the minimum to which the station is entitled—not the minimum it must demand. Similarly, they establish the maximum we will require of the cable system as a normal matter, not the maximum to which it may agree in particular circumstances.

149. NCTA points to language in our 1963 notice indicating that it is not our intention to upset or replace existing agreements between broadcasters and CATV systems "which both parties still believe suited to their particular situation." This language, it claims, "literally invites the broadcaster to repudiate existing agreements." Some of these agreements, it notes, have been written for definite periods of time; all of them were entered into after our Carter Mountain decision gave notice that we were prepared to impose some carriage and nonduplication requirements in connection with the licensing of common carrier microwave facilities. In NCTA's view, these agreements were forced upon cable operators by our action and—where narrower than the rules adopted—should not now be repudiated. (NCTA, FC, pp. 112–13.)

150. The question of whether a broadcaster or a CATV operator should be bound by an agreement entered into on the basis of varying calculations as to our probable action is not one we can resolve by rule. Insofar as it may turn on considerations of "good faith and fair dealing" by our licensees,[76] the facts of each case must be controlling. We will therefore consider it on a case-by-case basis, where raised, taking into account the equities of the parties in the specific circumstances involved and the other pertinent public interest considerations.

151. *Procedural matters; notification by applicant.* The proposed rules would impose upon the applicant for microwave facilities in either the common carrier or private business radio service the duty of notifying any television stations within whose predicted Grade A or Grade B contours the CATV systems it seeks to serve may fall. (See proposed §§ 11.556(b) and 21.710(b).) NCTA objects generally, arguing that stations normally retain attorneys to keep them advised of the filing of applications that may affect their interests. American Telephone & Telegraph Co. and others argue that burdens of this nature should not be imposed upon the carrier bringing video service to CATV systems.

152. The purpose of the proposed provision is to ensure that actual notice of the filing and basic content of applications reaches those most concerned—in this instance, affected broadcasters. As we have recognized throughout, there may well be cases in which one or more parties wish to seek more or less than the rules provide. The Congress has required that broadcasters give public notice of the filing of their applications "in the principal area which is served or is to be served by the station." Communications Act, section 311(a), 47 U.S.C. section 311(a). We think an analogous requirement is appropriate here.

153. On the other hand, we agree that a common carrier providing video service to CATV systems should not itself be required to carry out the notification involved. However, the obligation is one which the carrier can easily impose upon the customer ordering service. Accordingly, we have modified proposed § 21.710 (b) to provide that the carrier's application shall contain a statement that the appropriate television stations have been notified by the CATV systems involved.

154. Finally, in this one instance, we think it appropriate to require all parties to use predicted contours based on the computations prescribed in our rules. (See § 73.684 of the rules.) The "notice" stage of an application is not one at which it is appropriate to consider disputes between parties as to the location of coverage contours. Moreover, it is reasonable to require notice somewhat broader in its scope than the action which may, in some instances, be taken ultimately.

155. *Procedural matters; special procedures and interim relief.* The proposed rules set out the specific procedures to be followed in the event that a party believes that one or more provisions should not apply in the particular circumstances of its case. (See proposed §§ 11.557 and 21.711.) On further consideration, we have deleted these provisions. The Communications Act and our normal rules prescribe the procedures to be followed in considering applications for permits, licenses and other authorizations.[77] Further, we have provided generally for the consideration of requests for waiver of any rule. (See § 1.3 of the rules.) And our concern with special procedures stemmed largely from our initial decision to restrict the carriage and nonduplication requirements to the Grade A contour, notwithstanding the strong indication that many stations would request protection out to their Grade B contours. (See pars. 5–7, 10–12 of our 1963 notice in these proceedings.) As we have now extended the geographical scope of the carriage and nonduplication requirements, while providing for relief from their impact in cases where there is "off-the-air" duplication, the need for special procedures is substantially lessened. On the whole, we are not now persuaded that special procedures will be necessary. We will evaluate this question, however, in light of further experience and particularly in light of the general proceeding on CATV matters instituted today.

156. *Procedural matters; enforcement and sanctions.* The proposed rules are designed to operate as conditions upon the access of CATV systems to microwave authorizations and service. A system that accepts a license in the Business Radio Service but refuses to abide by the rules is subject to a cease and desist order or to revocation of license, pursuant to section 312 of the Communications Act. A broadcaster who abuses the benefits granted him under the rules subjects himself both to a loss of those benefits through a waiver of the rules, and, in sufficiently serious cases, to action against his broadcast authorization. In the Domestic Public Point-to-Point Microwave Radio Service, the proposed rule would require the relevant carrier to include the appropriate requirements in its tariffs or in any contracts for service to any CATV system. If a system receiving service under these provisions refuses to abide by them, it is subject to withdrawal of service by the carrier. If the carrier does not carry out its obligation, it is subject to a cease and desist order or revocation of license. If a broadcaster abuses his position, he is once again subject to a loss of benefits under the rules or to action against his broadcast authorization.

157. There are two major questions raised by this procedural scheme. The American Telephone & Telegraph Co. argues that a common carrier should not be required to undertake the interpretation, application and enforcement of rules which may be subject to considerable dispute between its CATV customers and affected broadcasters. We think there is merit in this argument. Accordingly, we have modified proposed § 21.711 to provide that where there is a dispute between a broadcaster and a CATV customer on the question of whether the customer is complying with

[75] We consider this subject explicitly in the related notice of proposed rule making and notice of inquiry issued today (FCC 65-334).

[76] Cf., Granik v. Federal Communications Commission, 234 F. 2d 682 (C.A.D.C.).

[77] See, e.g., Communications Act, sections 308, 309, 310(b), 319, 47 U.S.C. section 308, 309, 310(b), 319.

the applicable tariff or contract conditions, the carrier may refer the matter to us for a ruling. However, we will require the carrier to obtain from any customer a statement of willingness to comply with the applicable conditions prior to providing the relevant service.

158. NCTA argues that we should impose severe sanctions on any broadcaster who, after giving notice of his intention to carry a program and requiring a cable system to delete a duplicating presentation of the same program, thereafter fails to broadcast the program at all. We have made it clear that we will examine charges of abuse. We take this opportunity, however, to stress one general proposition that we consider of overriding importance: The proposed rules will not work at all without a reasonable amount of good faith cooperation between the affected parties. Particularly in the early stages of their operation, we expect a certain number of errors to be made—a certain number of programs to be duplicated through inadvertence on the part of the cable operator or to be needlessly "blacked out" through an error by the broadcaster in transmitting scheduling information—even with the utmost good faith on all sides. An occasional such error may occur even after the parties have worked out the practical operating details and have become accustomed to operation under the rules. We would not regard errors of this kind as an abuse of our rules. Parties must make a showing that substantial efforts have been made to resolve outstanding problems before requesting action on our part.

159. *Copyright matters.* A number of participants in these proceedings urge us to incorporate in our rules an express declaration that nothing in them is intended to affect in any way the copyright or other rights that broadcasters or others may have in television program material. We think incorporation of such a declaration in the rules is unnecessary. We have noted (par. 55, fn. 32, above) the pendency of suits in which programs suppliers are seeking to establish their rights to control the use by CATV systems of signals carrying their programs. We have also noted that such suits fall entirely beyond our jurisdiction. Our decision to require nonduplication takes account—as it must—of the existing practices of CATV system operators and the present inability of program suppliers to control the availability of their programs via CATV. For these facts are central in any evaluation of the nature and effects of competition between CATV and television broadcasting. Our determination does not rest, however, on any theory concerning the requirements of copyright or any federal or state law other than the provisions of the Communications Act we have discussed.[78] Nor is anything we have said or done intended to affect the determinations of other federal or state tribunals as to matters within their jurisdiction.

160. *Possible creation of a new microwave service for CATV systems.* In Docket No. 15586 (notice of proposed rule making issued August 3, 1964) we are considering a number of matters with relation to the appropriate frequency allocations for microwave facilities serving CATV systems. One of the proposals under consideration is the creation of a new service for all noncommon carrier Community Antenna Relay Stations (CARS Service), in which the licensing of stations would be administered by the Commission's Broadcast Bureau. If such a proposal is adopted, we will apply the rules here adopted to the new CARS Service without further rule making proceedings.

161. *The question of a transition period.* We have tailored our requirements, both as to carriage and nonduplication, to the channel capacity of individual CATV systems. Notwithstanding this, however, the rules may well operate in some instances to require CATV operators to choose between substituting a local for a more distant signal on their systems and expanding their systems' channel capacity. For this and other reasons, as we have stressed in paragraph 6, above, it may well be desirable to allow a transition period for some systems before requiring full compliance with the rules. The overall course of action we have adopted will allow us to examine this question thoroughly before applying the rules we adopt to the great majority of CATV systems. The rules will therefore be made effective in the manner we have described.

CONCLUSION

162. Authority for the rules adopted herein is contained in sections 4(i), 303, 307(b), 308, 309, 310, and 319 of the Communications Act of 1934, as amended.

Accordingly, it is ordered, This 22d day of April 1965, that the rules set forth below are adopted, effective June 1, 1965, as to applications for new or changed microwave facilities, assignments of license or transfers of control filed on or after June 1, 1965; and

It is further ordered, That the rules shall be made effective as to other applications, permits or licenses by further order of the Commission.

(Secs. 4, 303, 307, 308, 309, 310, 319, 48 Stat. 1066, 1082, 1083, 1084, 1085, 1086, 1089, as amended; 47 U.S.C. 154, 303, 307, 308, 309, 310, 319)

Released: April 23, 1965.

FEDERAL COMMUNICATIONS COMMISSION,[79]

[SEAL] BEN F. WAPLE, *Secretary.*

I. Part 21 is amended by adding new §§ 21.710, 21.712, 21.714, 21.716 to read as follows:

§ 21.710 Definitions.

As used in §§ 21.712, 21.714, and 21.716,

(a) *Community antenna television system.* The term "community antenna television system" ("CATV system") means any facility which receives and amplifies the signals transmitting programs broadcast by 1 or more television stations and redistributes such signals by wire or cable to subscribing members of the public, but such terms shall not include (1) any such facility which serves fewer than 50 subscribers, or (2) any such facility which serves only the residents of 1 or more apartment dwellings under common ownership, control, or management, and commercial establishments located on the premises of such an apartment house.

(b) *Television station; television broadcast station.* The terms "television station" and "television broadcast station" mean any television broadcasting station operating on a channel regularly assigned to its community by § 73.606 of this chapter, but shall not include boosters, repeaters or translator television stations, unless such facilities carry the programming of a station within whose Grade B contour a relevant CATV system operates or proposes to operate, in whole or in part, in which event such facilities shall be deemed extensions of the originating station.

(c) *Principal community contour.* The term "principal community contour" means the signal contour which a television station is required to place over its entire principal community by § 73.683 (a) of this chapter.

(d) *Grade A and Grade B contours.* The terms "Grade A contour" and "Grade B contour" mean the field intensity contours defined in § 73.683(a) of this chapter.

(e) *Network programming.* The term "network programming" means the programming supplied by a national television network organization.

(f) *Substantially duplicated.* The term "substantially duplicated" means regularly duplicated by the network programming of one or more other stations, singly or collectively, in a normal week during the hours of 6 to 11 p.m., local time, for a total of 14 or more hours.

(g) *Priority.* The term "priority" means the priority among stations established in § 21.712(a).

(h) *Independent station.* The term "independent station" means a television station which is not affiliated with any national television network organization.

§ 21.712 Authorizations for fixed stations to relay television signals to CATV systems.

Authorizations (including initial grants, modifications, assignments or transfers of control, and renewals) in this service to establish or operate fixed stations used to relay television signals to community antenna television systems (CATV systems) will contain the condition that the licensee carrier shall include the following requirements in its tariffs or in any contracts for service to any CATV system:

(a) *Stations required to be carried.* Within the limits of its channel capacity, any such CATV system shall carry the signals of operating or subsequently authorized and operating television broadcast stations in the following order of

[78] See Communications Act, sections 1, 303, 307, 308, 309, 310, and 319; 47 U.S.C. sections 151, 303, 307, 308, 309, 310, and 319.

[79] Dissenting statement of Commissioner Bartley and partly dissenting and partly concurring statement of Commissioner Loevinger filed as part of original document.

priority, upon the request of the licensee or permittee of the relevant station:

(1) First, all commercial and noncommercial, educational stations within whose principal community contours the system operates, in whole or in part;

(2) Second, all commercial and noncommercial, educational stations within whose Grade A contours the system operates, in whole or in part; and

(3) Third, all commercial and noncommercial, educational stations within whose Grade B contour the system operates, in whole or in part.

(b) *Exceptions.* Notwithstanding the requirements of paragraph (a) of this section,

(1) The system need not carry the signal of any station, if (i) that station's network programming is substantially duplicated by one or more stations of higher priority and (ii) carrying it would, because of limited channel capacity, prevent the system from carrying the signal of an independent commercial station or a noncommercial, educational station.

(2) In cases where (i) there are two or more signals of equal priority which substantially duplicate each other, and (ii) carrying all such signals would, because of limited channel capacity, prevent the system from carrying the signal of an independent commercial station or a noncommercial, educational station, the system need not carry all such substantially duplicating signals, but may select among them to the extent necessary to preserve its ability to carry the signals of independent commercial or noncommercial, educational stations.

(3) In cases where the system operates within the Grade B or higher priority contour of both a satellite station and its parent station, carriage of the signal of one of these stations will relieve the system of any obligation to carry the signal of the other.

(c) *Special requirements in the event of noncarriage.* Where the system does not carry the signals of one or more stations within whose Grade B or higher priority contour it operates, the system shall offer and maintain, for each subscriber, an adequate switching device to allow the subscriber to choose between cable and noncable reception, unless the subscriber affirmatively indicates in writing that he does not desire this device.

(d) *Manner of carriage.* Where the signal of any station is required to be carried under this section,

(1) The signal shall be carried without material degradation in quality (within the limitations imposed by the technical state of the art);

(2) The signal shall, upon request of the station licensee or permittee, be carried on the system on the channel on which the station is transmitting (where practicable without material degradation); and

(3) The signal shall, upon the request of the station licensee or permittee, be carried on the system on no more than one channel.

(e) *Stations entitled to program exclusivity.* Any such CATV system which operates, in whole or in part, within the Grade B or higher priority contour of any commercial television broadcast station and which carries the signal of such station shall, upon request of the station licensee or permittee, maintain the station's exclusivity as a program outlet in the manner and to the extent specified in paragraph (f) of this section: *Provided,* That:

(1) The system is not required to maintain the exclusivity of the network programming of any such station if the system carries the signal(s) of one or more equal or higher priority stations (other than a satellite or parent of the station requesting exclusivity) which substantially duplicate the network programming of the station requesting exclusivity; and

(2) The system is not required to maintain the exclusivity of the non-network programming of any such station if the system carries the signal(s) of one or more equal or higher priority stations (other than a satellite or parent of the station requesting exclusivity) which operate in what are normally and usually considered other markets for purposes of television program distribution.

(3) In cases where the system operates within the Grade B or higher priority contour of both a satellite station and its parent station, protection of the program exclusivity of one of these stations will relieve the system of any obligation to protect the program exclusivity of the other.

(f) *Program exclusivity; extent of protection.* Where a station is entitled to program exclusivity, the CATV system shall, upon the request of the station licensee or permittee, refrain from duplicating any program broadcast by such station, simultaneously or within a period commencing 15 days prior to its broadcast by the station and ending 15 days after such broadcast, if the CATV operator has received notification from the requesting station of the date and time of its broadcast of the program and the date and time of any broadcast to be deleted, as soon as possible and in any event no later than 48 hours prior to the broadcast to be deleted.

(g) *Exceptions.* Notwithstanding the requirements of paragraph (f) of this section,

(1) The CATV system need not delete reception of a network program if, in so doing, it would leave available for reception by subscribers, at any time, less than two network programs (including those broadcast by any stations whose signals are being carried and whose program exclusivity is being protected pursuant to the requirements of this section);

(2) The system need not delete reception of a network program which is scheduled by the network between the hours of 6 and 11 p.m., e.t., but is broadcast by the station requesting deletion, in whole or in part, outside of the period which would normally be considered prime time for network programming in the time zone involved; and

(3) The system need not delete reception of any program consisting of the broadcast coverage of a speech or other event as to which the time of presentation is of special significance, except where the program is being simultaneously broadcast by a station entitled to program exclusivity.

NOTE: Whether or not a particular station which does not present a significant amount of locally originated programming is a "satellite", as that term is used in § 21.712, will be determined on the facts of the particular case.

§ 21.714 Notification of the filing of the application.

An application for any authorization subject to § 21.712 shall contain a statement that (a) each CATV system served or to be served has notified the licensee or permittee of any television broadcast station, within whose predicted Grade B contour the CATV system operates or will operate, of the filing of the application and (b) the CATV system has indicated willingness to comply with the provisions of § 21.712. Such statement shall be supported by copies of the letters of notification directed to such television broadcast licensees or permittees and by a statement of such CATV system(s) indicating willingness to comply with § 21.712. The notice shall include the fact of intended filing by the applicant, identification of each CATV system served or to be served under the authorization sought, identification of the community served or to be served by each such CATV system, and the television station(s) whose programs will be distributed by each such CATV system.

NOTE: As used in § 21.714, the term "predicted Grade B contour" means the field intensity contour defined in § 73.683(a) of this chapter, the location of which is determined exclusively by means of the calculations prescribed in § 73.684 of this chapter.

§ 21.716 Disputes between television broadcast stations and CATV systems as to requirements under § 21.712.

In the event that a dispute should arise, at any time, between a television broadcast station and a CATV system served under an authorization subject to § 21.712, on the question of whether the CATV system is complying with the applicable tariff or contract requirements, the licensee carrier may refer the matter to the Commission for a ruling.

II. Part 91 is amended by adding new §§ 91.557, 91.559, and 91.561 to read as follows:

§ 91.557 Definitions.

As used in §§ 91.559 and 91.561,

(a) *Community antenna television system.* The term "community antenna television system" ("CATV system") means any facility which receives and amplifies the signals transmitting programs broadcast by one or more television stations and redistributes such signals by wire or cable to subscribing members of the public, but such terms shall not include (1) any such facility which serves fewer than 50 subscribers, or (2) any such facility which serves only the residents of one or more apartment dwellings under common ownership, control, or management, and commercial establishments located on the premises of such an apartment house.

(b) *Television station; television broadcast station.* The terms "television

station" and "television broadcast station" mean any television broadcasting station operating on a channel regularly assigned to its community by § 73.606 of this chapter, but shall not include boosters, repeaters or translator television stations, unless such facilities carry the programing of a station within whose Grade B contour a relevant CATV system operates or proposes to operate, in whole or in part, in which event such facilities shall be deemed extensions of the originating station.

(c) *Principal community contour.* The term "principal community contour" means the signal contour which a television station is required to place over its entire principal community by § 73.683(a) of this chapter.

(d) *Grade A and Grade B contours.* The terms "Grade A contour" and "Grade B contour" mean the field intensity contours defined in § 73.683(a) of this chapter.

(e) *Network programing.* The term "network programing" means the programing supplied by a national television network organization.

(f) *Substantially duplicated.* The term "substantially duplicated" means regularly duplicated by the network programing of one or more other stations, singly or collectively, in a normal week during the hours of 6 to 11 p.m., local time, for a total of 14 or more hours.

(g) *Priority.* The term "priority" means the priority among stations established in § 91.559(a).

(h) *Independent station.* The term "independent station" means a television station which is not affiliated with any national television network organization.

§ 91.559 Authorizations for operational fixed stations to relay television signals to CATV systems.

Authorizations (including initial grants, modifications, assignments or transfers of control, and renewals) in the Business Radio Service to construct or operate point-to-point operational fixed stations to relay television signals to community antenna television systems (CATV systems) will contain the following conditions:

(a) *Stations required to be carried.* Within the limits of its channel capacity, any such CATV system shall carry the signals of operating or subsequently authorized and operating television broadcast stations in the following order of priority, upon the request of the licensee or permittee of the relevant station:

(1) First, all commercial and noncommercial, educational stations within whose principal community contours the system operates, in whole or in part;

(2) Second, all commercial and noncommercial, educational stations within whose Grade A contours the system operates, in whole or in part; and

(3) Third, all commercial and noncommercial, educational stations within whose Grade B contour the system operates, in whole or in part.

(b) *Exceptions.* Notwithstanding the requirements of paragraph (a) of this section,

(1) The system need not carry the signal of any station, if (i) that station's network programming is substantially duplicated by one or more stations of higher priority and (ii) carrying it would, because of limited channel capacity, prevent the system from carrying the signal of an independent commercial station or a noncommercial, educational station.

(2) In cases where (i) there are two or more signals of equal priority which substantially duplicate each other, and (ii) carrying all such signals would, because of limited channel capacity, prevent the system from carrying the signal of an independent commercial station or a noncommercial, educational station, the system need not carry all such substantially duplicating signals, but may select among them to the extent necessary to preserve its ability to carry the signals of independent commercial or noncommercial, educational stations.

(3) In cases where the system operates within the Grade B or higher priority contour of both a satellite station and its parent station, carriage of the signal of one of these stations will relieve the system of any obligation to carry the signal of the other.

(c) *Special requirements in the event of noncarriage.* Where the system does not carry the signals of one or more stations within whose Grade B or higher priority contour it operates, the system shall offer and maintain, for each subscriber, an adequate switching device to allow the subscriber to choose between cable and noncable reception, unless the subscriber affirmatively indicates in writing that he does not desire this device.

(d) *Manner of carriage.* Where the signal of any station is required to be carried under this section,

(1) The signal shall be carried without material degradation in quality (within the limitations imposed by the technical state of the art);

(2) The signal shall, upon request of the station licensee or permittee, be carried on the system on the channel on which the station is transmitting (where practicable without material degradation); and

(3) The signal shall, upon the request of the station licensee or permittee, be carried on the system on no more than one channel.

(e) *Stations entitled to program exclusivity.* Any such CATV system which operates, in whole or in part, within the Grade B or higher priority contour of any commercial television broadcast station and which carries the signal of such station shall, upon request of the station licensee or permittee, maintain the station's exclusivity as a program outlet in the manner and to the extent specified in paragraph (f) of this section: *Provided*, That:

(1) The system is not required to maintain the exclusivity of the network programming of any such station if the system carriers the signal(s) of one or more equal or higher priority stations (other than a satellite or parent of the station requesting exclusivity) which substantially duplicates the network programming of the station requesting exclusivity; and

(2) The system is not required to maintain the exclusivity of the non-network programming of any such station if the system carries the signal(s) of one or more equal or higher priority stations (other than a satellite or parent of the station requesting exclusivity) which operates in what are normally and usually considered other markets for purposes of television program distribution.

(3) In cases where the system operates within the Grade B or higher priority contour of both a satellite station and its parent station, protection of the program exclusivity of one of these stations will relieve the system of any obligation to protect the program exclusivity of the other.

(f) *Program exclusivity; extent of protection.* Where a station is entitled to program exclusivity, the CATV system shall, upon the request of the station licensee or permittee, refrain from duplicating any program broadcast by such station, simultaneously or within a period commencing 15 days prior to its broadcast by the station and ending 15 days after such broadcast, if the CATV operator has received notification from the requesting station of the date and time of its broadcast of the program and the date and time of any broadcast to be deleted, as soon as possible and in any event no later than 48 hours prior to the broadcast to be deleted.

(g) *Exceptions.* Notwithstanding the requirements of paragraph (f) of this section,

(1) The CATV system need not delete reception of a network program if, in so doing, it would leave available for reception by subscribers, at any time, less than two network programs (including those broadcast by any stations whose signals are being carried and whose program exclusivity is being protected pursuant to the requirements of this section);

(2) The system need not delete reception of a network program which is scheduled by the network between the hours of 6 and 11 p.m., e.t., but is broadcast by the station requesting deletion, in whole or in part, outside of the period which would normally be considered prime time for network programming in the time zone involved; and

(3) The system need not delete reception of any program consisting of the broadcast coverage of a speech or other event as to which the time of presentation is of special significance, except where the program is being simultaneously broadcast by a station entitled to program exclusivity.

NOTE: Whether or not a particular station which does not present a significant amount of locally originated programming is a "satellite", as that term is used in § 91.559, will be determined on the facts of the particular case.

§ 91.961 Notification by applicant.

An application for any authorization subject to § 91.557 shall contain a statement that the applicant has notified the licensee or permittee of any television broadcast station, within whose predicted Grade B contour the CATV system(s) served or to be served operate or will operate, of the filing of the application. Such statement shall be supported by copies of the letters of notification di-

rected to such television broadcast licensees or permittees. The notice shall include the fact of filing by the applicant, identification of each CATV system served or to be served under the authorization sought, identification of the community served or to be served by each such CATV system, and the television station(s) whose programs will be distributed by each such CATV system.

NOTE: As used in § 91.561, the term "predicted Grade B contour" means the field intensity contour defined in § 73.683(a) of this chapter, the location of which is determined exclusively by means of the calculations prescribed in § 73.684 of this chapter.

[F.R. Doc. 65-4438; Filed, Apr. 28, 1965; 8:45 a.m.]

[Docket No. 15817; FCC 65-330]

PART 73—RADIO BROADCAST SERVICES

Table of Assignments, FM Broadcast Stations; Beaumont and Port Arthur, Tex.

Report and order. In the matter of amendment of § 73.202, *Table of Assignments FM Broadcast Stations* (Beaumont and Port Arthur, Tex.); Docket No. 15817, RM-709.

1. The Commission has under consideration its notice of proposed rule making issued on January 28, 1965 in this proceeding (FCC 65-63) and published in the FEDERAL REGISTER on February 2, 1965 (30 F.R. 1057), inviting comments on a proposal to assign Channel 299 to Beaumont, Tex., by deleting it from Port Arthur, Tex., in response to a petition filed by KTRM, Inc., licensee of Station KTRM(AM) at Beaumont.

2. At the present time, the FM assignments in Beaumont are Channels 231, 236, and 248. Stations are in operation on the last two assignments and an application has been filed for Channel 231. Port Arthur has been assigned Channels 227, 253, and 299. Stations are in operation on the first two assignments but no application has as yet been filed for Channel 299. KTRM urges that since Beaumont is about twice as large as Port Arthur (119,175 as against 66,676) the assignment of four channels to Beaumont and two to Port Arthur would be consistent with the criteria used in setting up the FM Table of Assignments. It submits that due to the proximity of the two cities (they are about 25 miles apart) the reallocation of Channel 299 from Port Arthur to Beaumont will not deprive the residents of the former from getting the new FM service. Finally, petitioner states that the proposed amendment would permit the early institution of another FM service in the area. No oppositions to the proposal were filed.

3. The Commission is of the view that the proposal would serve the public interest and should be adopted. The assignment of a fourth channel to Beaumont rather than a third to Port Arthur would be a more fair and equitable distribution of available facilities, in view of the relative size of the two cities. It will further bring an additional service to the people in both cities and the surrounding areas at an early date.

4. In view of the foregoing: *It is ordered*, That effective May 31, 1965, the FM Table of Assignments contained in § 73.202 of the Commission's rules and regulations is amended, insofar as the communities named are concerned, to read as follows:

City	Channel No.
Beaumont, Tex	231, 236, 248, 299
Port Arthur, Tex	227, 253

5. Authority for the adoption of the amendments adopted herein is contained in sections 4(i), 303, and 307(b) of the Communications Act of 1934, as amended.

6. *It is further ordered*, That this proceeding is terminated.

(Sec. 4, 48 Stat. 1066, as amended; 47 U.S.C. 154. Interpret or apply secs. 303, 307, 48 Stat. 1082, 1083; 47 U.S.C. 303, 307)

Adopted: April 21, 1965.

Released: April 22, 1965.

FEDERAL COMMUNICATIONS COMMISSION,[1]
[SEAL] BEN F. WAPLE,
Secretary.

[F.R. Doc. 65-4497; Filed, Apr. 28, 1965; 8:48 a.m.]

Title 7—AGRICULTURE

Chapter I—Consumer and Marketing Service (Standards, Inspections, Marketing Practices), Department of Agriculture

PART 51—FRESH FRUITS, VEGETABLES AND OTHER PRODUCTS (INSPECTION, CERTIFICATION AND STANDARDS)

Subpart—United States Standards for Grades of Southern Peas for Processing [1a]

On January 7, 1965, a notice of proposed rule making was published in the FEDERAL REGISTER (30 F.R. 155) regarding the issuance of U.S. Standards for Grades of Southern Peas for Processing (7 CFR, §§ 51.3585-51.3601).

Statement of considerations leading to the issuance of the grade standards. Following the publication of the proposed standards, recommendations were received from interested persons that several changes be made in the standards at the time of final publication.

The major change is the deletion of the U.S. No. 3 grade. The standards for frozen field peas and blackeye peas contain only two grades, and it was recommended that only two grades be established for the raw product standards. The No. 2 grade as originally proposed was almost identical with the No. 1 grade, but it permitted a slightly more advanced stage of maturity. Because of the very slight difference between the two grades, the proposed No. 2 grade was considered to be of very little potential usefulness.

As now written, the U.S. No. 2 grade has been liberalized to make it conform very closely with the formerly proposed U.S. No. 3 grade. It will allow a much wider range of maturity and somewhat larger tolerances for defects than were permitted in the No. 2 grade originally proposed. It is believed that the U.S. No. 2 grade will suffice to describe most lots of reasonably acceptable quality which fail to meet U.S. No. 1 grade.

A definition of the term "recoverable seeds" has been added. This does not change the intent of the standards but should help clarify the meaning.

After consideration of all relevant matters presented, including the proposal set forth in the aforesaid notice, the following U.S. Standards for Grades of Southern Peas for Processing are hereby promulgated pursuant to the Agricultural Marketing Act of 1946 (60 Stat. 1087, as amended; 7 U.S.C. 1621-1627).

GENERAL

Sec.
51.3585 Application.
51.3586 Method of inspection.

GRADES

51.3587 U.S. No. 1.
51.3588 U.S. No. 2.

OFF GRADE

51.3589 Off grade.

TOLERANCES

51.3590 Tolerances.

DEFINITIONS

51.3591 Extraneous material.
51.3592 Fairly well matured.
51.3593 Excessively mature.
51.3594 Fairly fresh.
51.3595 Decay.
51.3596 Recoverable seeds.
51.3597 Similar varietal characteristics.
51.3598 Insects.
51.3599 Damage.
51.3600 Tinge of green.
51.3601 Serious defects.

AUTHORITY: The provisions of this subpart issued under secs. 203, 205, 60 Stat. 1087, as amended, 1090 as amended; 7 U.S.C. 1622, 1624.

GENERAL

§ 51.3585 Application.

These standards are intended to apply only to the seed pods of plants of the species Vigna sinensis, generally known as "southern peas" or "field peas" which are to be used for processing into frozen or canned products. The standards will serve as a basis for grading the quality of loads of peas delivered to processing plants, and thus establish a basis for a more equitable pricing structure. Pricing, for example, could be based upon either of the following formulas:

(a) A stated price per pound gross weight for loads meeting U.S. No. 1 grade, another price for loads meeting U.S. No. 2 grade, etc.

(b) A stated price per pound for the recoverable seeds in loads grading U.S. No. 1, another price for seeds of loads grading U.S. No. 2, etc.

Under this system the recoverable percentage of seeds would be determined

[1] Commissioners Lee and Cox absent.

[1a] Packing of the product in conformity with the requirements of these standards shall not excuse failure to comply with the provisions of the Federal Food, Drug, and Cosmetic Act or with applicable State laws and regulations.

from the inspection sample by use of a sample sheller.

§ 51.3586 Method of inspection.

In determining the grade of a load of peas, a composite sample should be obtained by drawing small amounts from numerous locations in the load. The sample should be thoroughly mixed, and an even-weighted portion of it inspected and analyzed for quality. Percentages of pod defects shall be calculated on the basis of the weight of the sample analyzed. Percentages of defective peas shall be calculated on the basis of the weight of recoverable peas shelled out of the sample.

GRADES

§ 51.3587 U.S. No. 1.

"U.S. No. 1" consists of southern peas which are free from extraneous material. The pods are at least fairly well matured but not excessively mature, and are fairly fresh and free from decay. The seeds are of similar varietal characteristics, free from sting scars, insects, insect eggs and decay, and free from damage caused by discoloration, splits, cracked skins or other means. Fifty percent or more, by weight, of the seeds of light colored seeded varieties in this grade have at least a tinge of green (see § 51.3590).

§ 51.3588 U.S. No. 2.

"U.S. No. 2" consists of southern peas which are free from extraneous material. The pods are at least fairly well matured and free from decay. The seeds are of similar varietal characteristics, free from sting scars, insects, insect eggs and decay, and free from damage caused by discoloration, splits, cracked skins or other means (see § 51.3590).

OFF GRADE

§ 51.3589 Off grade.

"Off grade" consists of lots of southern peas which fail to meet the requirements of either of the foregoing grades.

TOLERANCES

§ 51.3590 Tolerances.

In order to allow for variations incident to proper harvesting and handling, the following tolerances, by weight, are provided in each of the grades as specified:

TOLERANCES FOR GRADE DEFECTS

Grade	Extraneous material	External (pod) defects	Internal (seed) defects	Seed color
U.S. No. 1....	2 percent....	5 percent not fairly well matured. 5 percent excessively mature. 1 percent decay.	5 percent for seeds of dissimilar variety. 5 percent total for other defects including therein not more than 2 percent for serious defects, but not more than one-half of the latter amount or 1 percent for decay. No tolerance for seeds containing insects or insect eggs.	No tolerance to reduce the required 50 percent of seeds of light colored seeded varieties having a tinge of green.
U.S. No. 2....	5 percent....	25 percent not fairly well matured. 3 percent decay.	5 percent for seeds of dissimilar variety. 8 percent total for other defects, including therein not more than 4 percent for serious defects, but not more than one-half of the latter amount or 2 percent for decay or seeds containing insect eggs. No tolerance for seeds containing insects.	No requirement.

DEFINITIONS

§ 51.3591 Extraneous material.

"Extraneous material" means all substances other than southern peas in pods and loose peas. Included are pieces of vine, leaves, dirt, sticks, stones and other foreign material.

§ 51.3592 Fairly well matured.

"Fairly well matured" means that the pea has reached the stage of development at which the seeds generally separate cleanly from the lining of the pods as they are shelled.

§ 51.3593 Excessively mature.

"Excessively mature" means that the pea has reached an advanced stage of maturity at which the pod is dry or almost dry and the seeds are shrunken and doughy to hard in texture.

§ 51.3594 Fairly fresh.

"Fairly fresh" means that the lot as a whole is not materially heated and the pods are not becoming mushy.

§ 51.3595 Decay.

"Decay" means that the pod or the seed is affected by decomposition or rot.

§ 51.3596 Recoverable seeds.

"Recoverable seeds" means the seeds free from adhering pod tissue which are shelled out of the sample by the customary sample shelling machine method.

§ 51.3597 Similar varietal characteristics.

"Similar varietal characteristics" means that the seeds in any lot of peas are of one variety, or are of two or more varieties having seeds of similar size and color.

§ 51.3598 Insects.

(a) "Insects" means insects or insect larvae inside the seed.

(b) "Sting scars" means scars on the seed caused by insect punctures of the seed coat.

(c) "Insect eggs" means eggs embedded in or attached to the seed.

§ 51.3599 Damage.

"Damage" means any specific defect mentioned in this section; or an equally objectionable variation of any one of these defects, any other defect, or any combination of defects which materially detracts from the processing quality of the individual seed or of the seeds in the lot as a whole. The following specific defects shall be considered as damage:

(a) Discoloration when the seed coat is so stained or discolored that it will be conspicuously noticeable after blanching;

(b) Splits when the two halves of the seed separate in the usual shelling operation; and,

(c) Cracked skins when the seed coat is split open exposing the inner portion of the seed.

§ 51.3600 Tinge of green.

"Tinge of green" means that the seed retains at least a faintly greenish cast over part or all of the surface.

§ 51.3601 Serious defects.

"Serious defects" means seeds affected by decay, insects, sting scars, insect eggs or dark brown or black discoloration.

The U.S. Standards for Grades of Southern Peas for Processing contained in this subpart shall become effective June 1, 1965.

Dated: April 23, 1965.

G. R. GRANGE,
Deputy Administrator,
Marketing Services.

[F.R. Doc. 65-4512; Filed, Apr. 28, 1965; 8:49 a.m.]

PART 81—INSPECTION OF POULTRY AND POULTRY PRODUCTS

Further Postponement of Effective Date of Certain Amendments With Respect to Poultry Soups

The effective date of the provisions of §§ 81.134 and 81.208 of the regulations under the Poultry Products Inspection Act, as amended (21 U.S.C. 451 et seq.), as set forth in the amendments of the regulations published on July 7, 1964 (29 F.R. 8456), insofar as such provisions relate to soups (whether dehydrated, canned or otherwise prepared) containing poultry ingredients, is hereby postponed until June 1, 1965, pursuant to the authority of said Act. During such period of postponement, the provisions of subsections 81.208 (a) and (b) of the regulations, as published August 15, 1962 (27 F.R. 8098, 7 CFR 81.208 (Supp. 1963)), shall be in effect with respect to such soups.

This action is necessary in order to afford equitable treatment to all poultry soup processors in view of the issuance of a preliminary injunction on behalf of one processor of dehydrated soups in an action which is pending in the U.S. District Court for the District of New Jersey. In order to accomplish its purpose, this action must be made effective on May 1, 1965 when a prior order (30 F.R. 4053)

of postponement of effective date expires. Therefore, under section 4 of the Administrative Procedure Act (5 U.S.C. 1003), it is found for good cause that notice of rule-making and other public procedure with respect to this action are impracticable and good cause is found for making it effective less than 30 days after publication hereof in the FEDERAL REGISTER.

(Sec. 14, 71 Stat. 447, 21 U.S.C. 463; 29 F.R. 16210; 30 F.R. 1260; 30 F.R. 2160)

This action shall become effective on May 1, 1965.

Done at Washington, D.C., this 23d day of April 1965.

G. R. GRANGE,
Deputy Administrator,
Marketing Services.

[F.R. Doc. 65-4513; Filed, Apr. 28, 1965; 8:49 a.m.]

Chapter IX—Consumer and Marketing Service (Marketing Agreements and Orders; Fruits, Vegetables, Tree Nuts), Department of Agriculture

[Grapefruit Reg. 56]

PART 905—ORANGES, GRAPEFRUIT, TANGERINES, AND TANGELOS GROWN IN FLORIDA

Limitation of Shipments

§ 905.463 Grapefruit Regulation 56.

(a) *Findings.* (1) Pursuant to the marketing agreement, as amended, and Order No. 905, as amended (7 CFR Part 905), regulating the handling of oranges, grapefruit, tangerines, and tangelos grown in Florida, effective under the applicable provisions of the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601–674), and upon the basis of the recommendations of the committees established under the aforesaid amended marketing agreement and order, and upon other available information, it is hereby found and determined, in accordance with paragraph (5) of section 602 of the act, that the continuation of regulation of shipments of grapefruit, as hereinafter provided, is necessary and will tend to avoid a disruption of the orderly marketing of the remainder of the current crop of such grapefruit; and such continuation of regulation will be in the public interest.

(2) It is hereby further found that it is impracticable and contrary to the public interest to give preliminary notice, engage in public rule-making procedure, and postpone the effective date of this section until 30 days after publication thereof in the FEDERAL REGISTER (5 U.S.C. 1001–1011) because the time intervening between the date when information upon which this section is based became available and the time when this section must become effective in order to effectuate the declared policy of the act is insufficient; a reasonable time is permitted, under the circumstances, for preparation for such effective time; and good cause exists for making the provisions hereof effective as hereinafter set forth. Shipments of all grapefruit, grown in the production area, are presently subject to regulation by grades and sizes, pursuant to the amended marketing agreement and order; the recommendation and supporting information for regulation during the period specified herein were promptly submitted to the Department after an open meeting of the Growers Administrative Committee on April 27, 1965, such meeting was held to consider recommendations for regulation, after giving due notice of such meeting, and interested persons were afforded an opportunity to submit their views at this meeting; the provisions of this section, including the effective time hereof, are identical with the aforesaid recommendation of the committee, and information concerning such provisions and effective time has been disseminated among handlers of such grapefruit; it is necessary, in order to effectuate the declared policy of the act, to make this section effective during the period hereinafter set forth so as to provide for the continued regulation of the handling of grapefruit, and compliance with this section will not require any special preparation on the part of the persons subject thereto which cannot be completed by the effective time hereof.

(b) *Order.* (1) Terms used in the amended marketing agreement and order shall, when used herein, have the same meaning as is given to the respective term in said amended marketing agreement and order; and terms relating to grade, diameter, standard pack, and standard box, as used herein, shall have the same meaning as is given to the respective term in the U.S. Standards for Florida Grapefruit (§§ 51.750–51.783 of this title).

(2) Grapefruit Regulation 55 (30 F.R. 5358) is hereby terminated at 12:01 a.m., e.s.t, April 30, 1965.

(3) During the period beginning at 12:01 a.m., e.s.t., April 30, 1965, and ending at 12:01 a.m., e.s.t., May 17, 1965, no handler shall ship between the production area and any point outside thereof in the continental United States, Canada, or Mexico:

(i) Any seeded grapefruit, grown in the production area, which does not grade at least U.S. No. 1 Russet;

(ii) Any seeded grapefruit, grown in the production area, which are smaller than $3\frac{1}{16}$ inches in diameter, except that a tolerance of 10 percent, by count, of seeded grapefruit smaller than such minimum size shall be permitted, which tolerance shall be applied in accordance with the provisions for the application of tolerances, specified in the United States Standards for Florida Grapefruit;

(iii) Any seedless grapefruit, grown in Regulation Area I, which do not grade at least U.S. No. 1 Russet;

(iv) Any seedless grapefruit, grown in Regulation Area II, which do not grade at least U.S. No. 2 Russet; or

(v) Any seedless grapefruit, grown in the production area, which are smaller than $3\frac{5}{16}$ inches in diameter, except that a tolerance of 10 percent, by count, of seedless grapefruit smaller than such minimum size shall be permitted, which tolerance shall be applied in accordance with the provisions for the application of tolerances, specified in said United States Standards for Florida Grapefruit.

(Secs. 1–19, 48 Stat. 31, as amended; 7 U.S.C. 601–674)

Dated: April 28, 1965.

PAUL A. NICHOLSON,
Deputy Director, Fruit and Vegetable Division, Consumer and Marketing Service.

[F.R. Doc. 65-4589; Filed, Apr. 28, 1965; 11:37 a.m.]

[Grapefruit Regulation 7, Amdt. 6]

PART 944—FRUIT; IMPORT REGULATIONS

Prohibitions

Pursuant to the provisions of section 8e of the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601–674), the provisions of paragraph (a) of Grapefruit Regulation 7 (§ 944.103, 29 F.R. 12762, 13603, 30 F.R. 257, 754, 4055, 5359) are hereby amended to read as follows:

(a) On and after 12:01 a.m., e.s.t., April 30, 1965, the importation of any grapefruit into the United States is prohibited unless such grapefruit are inspected and meet the following applicable requirements:

(1) Seeded grapefruit shall grade at least U.S. No. 1 Russet and be of a size not smaller than $3\frac{1}{16}$ inches in diameter, except that a tolerance of 10 percent, by count, of seeded grapefruit smaller than such minimum size shall be permitted, which tolerance shall be applied in accordance with the provisions for the application of tolerances, specified in the U.S. Standards for Florida Grapefruit; or

(2) Seedless grapefruit shall grade at least U.S. No. 2 Russet and be of a size not smaller than $3\frac{5}{16}$ inches in diameter, except that a tolerance of 10 percent, by count, of seedless grapefruit smaller than such minimum size shall be permitted, which tolerance shall be applied in accordance with the provisions for the application of tolerances, specified in the United States Standards for Florida Grapefruit.

It is hereby found that it is impracticable, unnecessary, and contrary to the public interest to give preliminary notice, engage in public rule-making procedure, and postpone the effective time of this amendment beyond that hereinafter specified (5 U.S.C. 1001–1011) in that (a) the requirements of this amended import regulation are imposed pursuant to section 8e of the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601–674), which makes such regulation mandatory; (b) such regulation imposes the same restrictions on imports of all grapefruit as the grade and size restrictions being made applicable to the shipment of all grapefruit grown in Florida under Grapefruit Regulation 56 (§ 905.463); (c) compliance with this amended import regulation will not require any special preparation which cannot be completed by the effective time hereof; and (d) this regulation relieves

restrictions on the importation of grapefruit.

(Secs. 1–19, 48 Stat. 31, as amended; 7 U.S.C. 601–674)

Dated, April 28, 1965, to become effective at 12:01 a.m., e.s.t., April 30, 1965.

PAUL A. NICHOLSON,
Deputy Director, Fruit and Vegetable Division, Consumer and Marketing Service.

[F.R. Doc. 65–4590; Filed, Apr. 28, 1965; 11:37 a.m.]

Title 14—AERONAUTICS AND SPACE

Chapter I—Federal Aviation Agency

[Docket No. 5025; Amdts. 25–3, 121–4]

PART 25—AIRWORTHINESS STANDARDS: TRANSPORT CATEGORY AIRPLANES

PART 121—CERTIFICATION AND OPERATIONS: AIR CARRIERS AND COMMERCIAL OPERATORS OF LARGE AIRCRAFT

Minimum Flight Crewmember Requirements for Transport Category Airplanes

The purpose of this amendment to Parts 25 (formerly CAR Part 4b) and 121 (formerly CAR Parts 40, 41, and 42) of the Federal Aviation Regulations is to establish criteria for determining, during the type certification process, the minimum required flight crew for each transport category airplane type certificated after January 1, 1964.

For airplanes type certificated after that date the requirement for a flight engineer, as well as other flight crewmembers, will be determined under the minimum flight crew criteria of § 25.1523. The minimum flight crew so determined will be the minimum flight crew for operation of the airplane under Part 121 or under other operating rules. The minimum flight crew established during type certification does not, however, include those additional flight crewmembers required under the operating rules for compliance with the flight time limitations or the performance of certain functions such as celestial or other specialized means of navigation.

This amendment is based on a notice of proposed rule making (Notice 64–21) issued on April 27, 1964, and published in the FEDERAL REGISTER on May 1, 1964 (29 F.R. 5805). As stated in the notice, the Agency believes that to continue to require a flight engineer solely on the basis of airplane weight is unrealistic for airplanes being designed today.

This amendment adds to Part 25 an Appendix D that contains the criteria that would hereafter be considered in determining the minimum flight crew under § 25.1523. Most of these criteria were listed in the notice of proposed rule making.

The Agency received several comments in response to the notice of proposed rule making. These comments, as well as those received at meetings with various groups representing air carriers, manufacturers, pilots, and flight engineers before issuing the notice, were all given careful consideration. A discussion of the major comments received and the Agency's position thereon follows:

Generally, the comments received from the aviation industry and from the airlines supported the Agency's proposal.

The International Brotherhood of Teamsters (representing the flight engineers from certain airlines) generally opposed any immediate change in the present rule and specifically stated that the proposal should be held in abeyance until the Civil Aeronautics Board issued its findings in a cockpit safety analysis that was underway when the notice was issued. The CAB study has now been completed and the Agency has carefully considered the conclusions reached therein as more fully discussed hereafter in this preamble.

The Flight Engineers International Association agreed that operation of an airplane that weighed in excess of 80,000 pounds without a flight engineer would not necessarily be unsafe solely because of weight. The FEIA, however, did not feel that the Agency's proposal justified elimination of the 80,000 pound rule at this time. FEIA felt that the methods used in the present type certification determination under § 25.1523 (former CAR § 4b.720) are not adequate for determining the minimum flight crew that safety would require, when factors are considered such as weather, icing communications, navigation, terrain, airline operational requirements, degree of crewmember fatigue, emergencies in the passenger cabin, passenger problems or reaction to existing conditions, and incapacitation of a crewmember. The Agency believes that the appendix being added to Part 25 by this amendment includes all of the factors that the FEIA feels must be considered in the type certification process. The FEIA also felt that the Agency's issue of the notice might prejudice the CAB study previously mentioned.

The Civil Aeronautics Board, upon completion of its study, submitted a comment generally concurring with the changes proposed in Notice 64–21. In this comment, the Board stated that the minimum flight crew determined during type certification "should be compatible with safe continued operation for at least one-half of the airplane endurance in the event of incapacitation of one of the pilots". In addition to the CAB and the FEIA comment, the Agency also received several other comments that mentioned "incapacitation" as a specific item that should be considered during the type certification process. "Incapacitation" is to a limited extent considered in the emergency considerations described in items (6) and (9) of the workload factors discussed in the notice and that are being set forth in Appendix D. However, the Agency agrees that it is desirable to make it clear that the possible incapacitation of one of the minimum required flight crewmembers is given particular attention during the type certification of an airplane to be used in operations under Part 121 or under any other operating rule that requires a minimum flight crew of two pilots. Accordingly, a separate item on incapacitation has been included as item (10) of the workload factors in the appendix to make it clear that the minimum required flight crew established for such operations provides for the continued operation of the airplane to a safe landing in the event that a flight crewmember is incapacitated during flight.

The Air Transport Association stated that the determination as to the required number of crewmembers for a given airplane should be made at the design stage and that this determination should not be changed during later stages of the type certification process. While it is true that many decisions will be made at the drawing board and design stage, the Agency believes that the final determination of the required minimum flight crew can not, in all cases, be made based on a cockpit mockup. The Agency believes that the final determination of the minimum flight crew should remain open until all of the type certification flight tests are completed. Thus, for example, if preliminary design data and mockups indicate that a two-man crew is adequate and if later findings indicate that such a crew would be unsafe, the Agency would not hesitate to require a larger minimum crew. In this regard, the Agency does not agree with the Air Transport Association that an unchangeable decision as to the minimum flight crew should be made at the design stage.

While the Agency agrees that a decision to increase the minimum flight crew for a new airplane would cause numerous problems (both economic and other) if made at the flight test stage, nevertheless, for the reasons previously stated the Agency believes that a binding decision cannot, as a matter of safety, be made until the final stages of type certification are reached. Undoubtedly, in a vast majority of cases, the decision made at the design stage will prove to be correct but the opportunity to change an incorrect decision made at this stage must be retained by the Agency if it is to fulfill its duties under the Federal Aviation Act.

Furthermore, the Agency believes that it would not be justified in retaining the present arbitrary cutoff based on weight that almost all of the commentators admit is really irrelevant merely because the decisions that must be made in determining the minimum required flight crew under the type certification process will not always be easy.

FEIA also stated that, if the minimum crew is to be based solely on the type certification determination, the Agency should give all interested parties a formal opportunity to comment whenever during the type certification procedure the Agency formed the opinion that a flight engineer would not be required for an airplane having a maximum certificated takeoff weight of more than 80,000 pounds. The Agency does not agree that any formal procedure for receiving comments on any individual decision during the type certification procedure should be established. The Agency, as a matter of course, obtains the views of many interested parties dur-

ing type certification. In the absence of an arbitrary cutoff, such as the 80,000 pound rule, we believe that if anything, much more specific attention will be given to the minimum required crew in all future type certification processes.

The Air Line Pilots Association also stated that determinations now being made during type certification in establishing the minimum required flight crew are only a few of the determinations required to be made. This Association stated numerous items such as "weather", "runway conditions", "ATC and Traffic Conditions" that it felt could not be simulated. It further contended that the flights conducted during the certification process could not adequately determine such factors since such flying is "totally different from actual air line operating requirements."

The Agency does not agree that the flight tests conducted during type certification are totally different from actual air line operations. The Agency believes that a sufficient number of the 200 to 300 hours in type certification flight tests are operations representative of the kind in which the airplane will actually be used when type certificated. In view of the criteria that will be used in determining the minimum required flight crew as set forth in Appendix D added to Part 25 by this amendment, the Agency intends that future type certification flight tests will even more closely approximate actual operating conditions that would be experienced in a typical operation using the airplane being tested.

Civil Aeronautics Board study.[1] As previously mentioned briefly, pursuant to a recommendation of the House of Representatives Committee on Government Operations the CAB undertook a "fundamental study and review of commercial airliner flight deck or cockpit design and operations, including cockpit configuration, the division of duties, and qualifications of crewmembers." In conducting its study, the CAB consulted virtually every segment of the aviation community involved in air transportation and received from many of the interested organizations comments comparable to those received by the Agency in response to Notice 64-21. The Board also had before it the Agency's proposal in Notice 64-21 and further obtained comments from Agency personnel. The Board's conclusions with respect to crew complement were:

"a. Maximum takeoff weight is not the best basis for the determination of minimum flight crew.

"b. The basis for minimum flight crew complement should be operational complexity and resulting workload.

"c. The current turbojet transport aircraft requires a minimum of three flight crewmembers to maintain a satisfactory level of safety."

The Agency's position on the first two conclusions quoted above has already been discussed. With respect to the third conclusion, it is clear from the CAB study that by "current turbojet transport aircraft" the Board meant the B-707, DC-8, and other airplanes in the same class, since the Board elsewhere in its evaluation stated that "Our present jet transports are all certificated for weights at least two or three times greater than 80,000 pounds." These airplanes were all type certificated with minimum required flight crews of at least three flight crewmembers using substantially the same criteria that this amendment adds as an appendix to Part 25. Compliance with these criteria will continue to justify a minimum of three flight crewmembers and therefore this amendment will not change the minimum flight crew that was required for these airplanes when type certificated.

Interested persons have been afforded an opportunity to participate in the making of this amendment (29 F.R. 5805, Notice 64-21), and due consideration has been given to all relevant matter presented.

In consideration of the foregoing, Chapter I of Title 14 of the Code of Federal Regulations is amended as follows, effective May 28, 1965.

1. Part 25 is amended as follows:

(a) By adding a flush sentence to § 25.1523 reading as follows:

§ 25.1523 Minimum flight crew.

* * * * *

The criteria used in making the determinations required by this section are set forth in Appendix D.

(b) By adding an Appendix D reading as follows:

APPENDIX D

Criteria for determining minimum flight crew. The following are considered by the Agency in determining the minimum flight crew under § 25.1523:

a. *Basic workload functions.* The following basic workload functions are considered:

(1) Flight path control.
(2) Collision avoidance.
(3) Navigation.
(4) Communications.
(5) Operation and monitoring of aircraft engines and systems.
(6) Command decisions.

b. *Workload factors.* The following workload factors are considered significant when analyzing and demonstrating workload for minimum flight crew determination:

(1) The accessibility, ease, and simplicity of operation of all necessary flight, power, and equipment controls, including emergency fuel shutoff valves, electrical controls, electronic controls, pressurization system controls, and engine controls.

(2) The accessibility and conspicuity of all necessary instruments and failure warning devices such as fire warning, electrical system malfunction, and other failure or caution indicators. The extent to which such instruments or devices direct the proper corrective action is also considered.

(3) The number, urgency, and complexity of operating procedures with particular consideration given to the specific fuel management schedule imposed by center of gravity, structural or other considerations of an airworthiness nature, and to the ability of each engine to operate at all times from a single tank or source which is automatically replenished if fuel is also stored in other tanks.

(4) The degree and duration of concentrated mental and physical effort involved in normal operation and in diagnosing and coping with malfunctions and emergencies.

(5) The extent of required monitoring of the fuel, hydraulic, pressurization, electrical, electronic, deicing, and other systems while en route.

(6) The actions requiring a crewmember to be unavailable at his assigned duty station, including: observation of systems, emergency operation of any control, and emergencies in any compartment.

(7) The degree of automation provided in the aircraft systems to afford (after failures or malfunctions) automatic crossover or isolation of difficulties to minimize the need for flight crew action to guard against loss of hydraulic or electric power to flight controls or to other essential systems.

(8) The communications and navigation workload.

(9) The possibility of increased workload associated with any emergency that may lead to other emergencies.

(10) Incapacitation of a flight crewmember whenever the applicable operating rule requires a minimum flight crew of at least two pilots.

(c) *Kind of operation authorized.* The determination of the kind of operation authorized requires consideration of the operating rules under which the airplane will be operated. Unless an applicant desires approval for a more limited kind of operation, it is assumed that each airplane certificated under this Part will operate under IFR conditions.

2. Section 121.387 of Part 121 is amended to read as follows:

§ 121.387 Flight engineer.

No certificate holder may operate an airplane for which a type certificate was issued before January 2, 1964, having a maximum certificated takeoff weight of more than 80,000 pounds without a flight crewmember holding a current flight engineer certificate. For each airplane type certificated after January 1, 1964, the requirement for a flight engineer is determined under the type certification requirements of § 25.1523.

(Secs. 313(a), 601, 604, and 605, Federal Aviation Act of 1958; 49 U.S.C. 1354, 1421, 1424, 1425)

Issued in Washington, D.C., on April 21, 1965.

N. E. HALABY,
Administrator.

[F.R. Doc. 65-4484; Filed, Apr. 28, 1965; 8:47 a.m.]

[Docket No. 6236; Amdt. 39-61]

PART 39—AIRWORTHINESS DIRECTIVES

Boeing Model 707 Series Aircraft

A proposal to amend Part 507 of the regulations of the Administrator to include an airworthiness directive requiring inspection of the engine mount cone bolt nut for cracks or evidence of melted cadmium and replacement of the cadmium-plated nut and washer with silver-plated nut and washer on Boeing Model 707 Series aircraft was published in 29 F.R. 14036. Since the publication of that proposal, Part 507 has been recodified into Part 39 of the Federal Aviation Regulations, effective November 20, 1964; therefore, this amendment is being made to Part 39.

Interested persons have been afforded an opportunity to participate in the making of the amendment. No objections were received, however, there was

[1] Jet Transport Cockpit Review, BOSP-8-5-1, Civil Aeronautics Board, Bureau of Safety, Oct. 1, 1964.

a comment stating that incorrect part number information is shown in Service Bulletin 1874A. The manufacturer has advised the Agency that the part number information which appears in the service bulletin is correct. Boeing has prefaced the part number of nut, P/N 55602–S–1216, with the letters "SPS–N" to indicate the manufacturer of the nut. A footnote at the bottom of the page on which this part number appears identifies the manufacturer by name.

In consideration of the foregoing, and pursuant to the authority delegated to me by the Administrator (25 F.R. 6489), § 39.13 of Part 39 (14 CFR Part 39), is hereby amended by adding the following new airworthiness directive:

BOEING. Applies to Model 707 Series aircraft, Serial Nos. 17592 through 17608, 17614 through 17627, 17673 through 17690, 17692 through 17695, 17918 through 17924, 17928 through 17930, 18083 through 18085, 18245, 18246, 18374, 18375, and 18460.

Compliance required as indicated.

There have been failures of a rear engine mount nut attributed to embrittlement resulting from the nut being subject to temperatures which caused the cadmium to melt. To correct this condition, accomplish the following or an equivalent approved by the Aircraft Engineering Division, FAA Western Region.

(a) On all aircraft which have cadmium-plated rear engine mount cone bolt nut and washer, visually inspect the engine mount cone bolt nut for cracks or evidence of melted cadmium within 300 hours' time in service after the effective date of this AD and thereafter at periods not to exceed 300 hours' time in service.

(b) If a crack, or evidence of melted cadmium is found, replace the cadmium-plated nut and washer with a silver-plated nut and washer, before further flight, in accordance with the provisions of paragraph 3 of Boeing Service Bulletin No. 1874 or later FAA-approved revision, or an equivalent nut and washer approved by the Aircraft Engineering Division, FAA Western Region. If the installation of the silver-plated nut and washer is made in accordance with Service Bulletin No. 1874, visually check the installation for insufficient bolt thread exposure beyond the end of the nut as defined in paragraph 1 of Boeing Service Bulletin No. 1874A or later FAA-approved revision. If there is insufficient thread exposure, replace with new silver-plated nut and washer in accordance with paragraph 2 of Service Bulletin No. 1874A or later FAA-approved revision.

(c) Within 1,000 hours' time in service after the effective date of this AD, replace cadmium-plated nut and washer with silver-plated nut and washer in accordance with the provisions of paragraph (b).

(d) Unless already accomplished, on all aircraft that have complied with Service Bulletin No. 1874 prior to the effective date of this AD, visually inspect the silver-plated rear engine mount cone bolt and nut for insufficient bolt thread exposure beyond the end of the nut as defined in paragraph 1 of Boeing Service Bulletin No. 1874A or later FAA-approved revision within 300 hours' time in service after the effective date of this AD. If there is insufficient bolt thread exposure beyond the end of the nut, replace with new nut and washer in accordance with paragraph 2 of Service Bulletin No. 1874A or later FAA-approved revision before further flight.

(e) Upon request of the operator, an FAA maintenance inspector subject to prior approval of the Chief, Aircraft Engineering Division, FAA Western Region, may adjust the repetitive inspection intervals specified in this AD to permit compliance at an established inspection period of the operator if the request contains substantiating data to justify the increase for such operator.

This amendment becomes effective May 29, 1965.

(Secs. 313(a), 601, and 603, Federal Aviation Act of 1958; 49 U.S.C. 1354(a), 1421, 1423)

Issued in Washington, D.C., on April 22, 1965.

C. W. WALKER,
Acting Director,
Flight Standards Service.

[F.R. Doc. 65–4459; Filed, Apr. 28, 1965; 8:45 a.m.]

[Airspace Docket No. 63–SO–40]

PART 71—DESIGNATION OF FEDERAL AIRWAYS, CONTROLLED AIRSPACE, AND REPORTING POINTS

Alteration of Control Zone and Transition Area

On February 2, 1965, a notice of proposed rule making was published in the FEDERAL REGISTER (30 F.R. 1052) stating that the Federal Aviation Agency proposed to alter the control zone and transition area at Asheville, N.C.

Based upon objections received in response to the notice of proposed rule making, a supplemental notice of proposed rule making, altering the proposal, was issued and published in the FEDERAL REGISTER (30 F.R. 3664) on March 19, 1965.

Interested persons were afforded an opportunity to participate in the rule making through submission of comments. All comments, relative to the supplemental notice of proposed rule making, received were favorable.

In consideration of the foregoing, Part 71 of the Federal Aviation Regulations is amended, effective 0001 e.s.t., June 24, 1965, as hereinafter set forth.

1. In § 71.171 (29 F.R. 17581) the Asheville, N.C., control zone is amended to read:

ASHEVILLE, N.C.

Within a 5-mile radius of Asheville Airport (latitude 35°26'00" N, longitude 82°32'25" W); within 2 miles each side of a 341° bearing from the Broad River RBN extending from the 5-mile radius zone to 9 miles S of the airport; within 2 miles each side of a 159° bearing from the Asheville RBN extending from the 5-mile radius zone to 5.5 miles N of the airport; and within 2 miles each side of a 129° bearing from the Asheville Airport extending from the 5-mile radius zone to 7.5 miles SE of the airport.

2. In § 71.181 (29 F.R. 17643) the Asheville, N.C., transition area is amended to read:

ASHEVILLE, N.C.

That airspace extending upward from 700 feet above the surface within 2 miles W and 8 miles E of a 341° bearing from the Broad River RBN extending from the RBN to 7 miles N; within 2 miles E and 6 miles W of a 161° bearing from the Broad River RBN, extending from the RBN to 3 miles S of the RBN; within 2 miles each side of the Asheville VORTAC 244° radial extending from 1 mile SW to 8 miles SW; and within 5 miles W and 6 miles E of the 159° and 339° bearings from the Asheville RBN extending from 6 miles N to 10 miles S of the RBN; and that airspace extending upward from 1,200 feet above the surface bounded by a line beginning at the intersection of a 25-mile arc centered at the Asheville Airport (latitude 35°26'00" N, longitude 82°32'25" W) and a line 10 miles S of and parallel to the Asheville VORTAC 300° radial, extending clockwise along this arc to the Asheville VORTAC 061° radial, thence SE along a line perpendicular to the Asheville VORTAC 061° radial to the S boundary of V–222, thence SW along the S boundary of V–222 to a line 6 miles W of and parallel to the 161° bearing from the Broad River RBN, thence N along a line 6 miles W of and parallel to the 161° and 341° bearings from the Broad River RBN to a line 10 miles S of and parallel to the Asheville VORTAC 300° radial, thence NW along this line to the point of beginning; and that airspace bounded on the NW by V–222, on the NE by V–259, on the SE by V–20 and on the SW by V–296.

(Sec. 307(a), Federal Aviation Act of 1958; 49 U.S.C. 1348(a))

Issued in East Point, Ga., on April 21, 1965.

ARVIN O. BASNIGHT,
Director, Southern Region.

[F.R. Doc. 65–4460; Filed, Apr. 28, 1965; 8:45 a.m.]

[Airspace Docket No. 65–WA–27]

PART 71—DESIGNATION OF FEDERAL AIRWAYS, CONTROLLED AIRSPACE, AND REPORTING POINTS

Alteration of Control Area

The purpose of this amendment to Part 71 of the Federal Aviation Regulations is to alter the description of Control 1228.

Control 1228 is presently designated with reference to the Tampa, Fla., radio beacon. The Federal Aviation Agency has scheduled the relocation of this radio beacon on May 1, 1965. Accordingly, in order to retain the same amount of controlled airspace presently designated with Control 1228, action is being taken herein to substitute in the description of Control 1228 a set of geographical coordinates (latitude 27°53'18" N., longitude 82°29'29" W.) for the Tampa radio beacon at its present location.

Since this amendment is editorial in nature, notice and public procedure hereon are unnecessary and the amendment may become effective on less than 30 days' notice.

In consideration of the foregoing, Part 71 of the Federal Aviation Regulations is amended, effective upon publication in the FEDERAL REGISTER, as hereinafter set forth.

In § 71.163 (29 F.R. 17552), Control 1228 is amended by deleting "from the Tampa, Fla., RBN" and substituting "from latitude 27°53'18" N., longitude 82°29'29" W." therefor.

(Sec. 307(a), Federal Aviation Act of 1958; 49 U.S.C. 1348)

Issued in Washington, D.C., on April 23, 1965.

H. B. HELSTROM,
Acting Chief, Airspace Regulations and Procedures Division.

[F.R. Doc. 65–4461; Filed, Apr. 28, 1965; 8:45 a.m.]

[Airspace Docket No. 65-SO-15]

PART 71—DESIGNATION OF FEDERAL AIRWAYS, CONTROLLED AIRSPACE, AND REPORTING POINTS

Alteration of Transition Area

On March 19, 1965, a notice of proposed rule making was published in the FEDERAL REGISTER (30 F.R. 3665) stating that the Federal Aviation Agency proposed to alter the transition area at Winston-Salem, N.C.

Interested persons were afforded an opportunity to participate in the rule making through submission of comments. All comments received were favorable.

In consideration of the foregoing, Part 71 of the Federal Aviation Regulations is amended, effective 0001 e.s.t., June 24, 1965, as hereinafter set forth.

Section 71.181 is amended by altering the Winston-Salem, N.C., transition area (29 F.R. 16245) to read:

That airspace extending upward from 700 feet above the surface within a 5-mile radius of Smith-Reynolds Airport (latitude 36°08'-00" N., longitude 80°13'20" W.); within 2 miles each side of the Winston-Salem ILS localizer SE course, extending from the 5-mile radius area to 8 miles SE of the LOM.

(Sec. 307(a), Federal Aviation Act of 1958; 49 U.S.C. 1348(a))

Issued in East Point, Ga., April 21, 1965.

ARVIN O. BASNIGHT,
Director, Southern Region.

[F.R. Doc. 65-4462; Filed, Apr. 28, 1965; 8:45 a.m.]

[Airspace Docket No. 63-WE-95]

PART 71—DESIGNATION OF FEDERAL AIRWAYS, CONTROLLED AIRSPACE, AND REPORTING POINTS

Alteration of Control Zone, Revocation of Control Area Extension and Designation of Transition Areas; Correction

On March 5, 1965, Federal Register Document 65-2284 was published in the FEDERAL REGISTER (30 F.R. 2855) amending Part 71 of the Federal Aviation Regulations by altering the controlled airspace in the Boise, Idaho, terminal area.

In the description of the alteration, the degrees of latitude for the location of Boise Air Terminal was inadvertently given as 44° instead of 43°. Accordingly, action is taken herein to correct the latitude for Boise Air Terminal to 43°33'55" N.

Since this correction is editorial in nature, notice and public procedure hereon are unnecessary and impracticable, and the correction is effective immediately.

(Sec. 307(a), Federal Aviation Act of 1958, as amended; 72 Stat. 749; 49 U.S.C. 1348)

Issued in Los Angeles, Calif., on April 22, 1965.

JOSEPH H. TIPPETS,
Director, Western Region.

[F.R. Doc. 65-4463; Filed, Apr. 28, 1965; 8:45 a.m.]

[Airspace Docket No. 65-SO-8]

PART 71—DESIGNATION OF FEDERAL AIRWAYS, CONTROLLED AIRSPACE, AND REPORTING POINTS

Designation of Transition Area

On March 20, 1965, a notice of proposed rule making was published in the FEDERAL REGISTER (30 F.R. 3713) stating that the Federal Aviation Agency proposed to designate a transition area at Albemarle, N.C.

Interested persons were afforded an opportunity to participate in the rule making through submission of comments. All comments received were favorable.

In consideration of the foregoing, Part 71 of the Federal Aviation Regulations is amended effective 0001 e.s.t., June 24, 1965, as hereinfater set forth.

Section 71.181 (29 F.R. 17643) is amended by adding the following:

ALBEMARLE, N.C.

That airspace extending upward from 700 feet above the surface within a 4-mile radius of the Albemarle Airport (latitude 35°20'20" N., longtiude 80°10'30" W.); within 2 miles each side of a 331° bearing from a reference point located at latitude 35°22'40" N., longitude 80°11'38" W., extending from the 4-mile radius area to 8 miles NW of the reference point.

(Sec. 307(a), Federal Aviation Act of 1958; 49 U.S.C. 1348(a))

Issued in East Point, Ga., on April 21, 1965.

ARVIN O. BASNIGHT,
Director, Southern Region.

[F.R. Doc. 65-4464; Filed, Apr. 28, 1965; 8:45 a.m.]

[Airspace Docket No. 63-SO-77]

PART 71—DESIGNATION OF FEDERAL AIRWAYS, CONTROLLED AIRSPACE, AND REPORTING POINTS

Designation of Transition Area

On January 8, 1965, a notice of proposed rule making was published in the FEDERAL REGISTER (30 F.R. 234) stating that the Federal Aviation Agency proposed to designate a transition area at Ocala, Fla.

On March 19, 1965, a supplemental notice of proposed rule making was published in the FEDERAL REGISTER (30 F.R. 3665) altering the proposed transition area.

Interested persons were afforded an opportunity to participate in the rule making through submission of comments. All comments received were favorable.

In consideration of the foregoing, Part 71 of the Federal Aviation Regulations is amended, effective 0001 e.s.t., June 24, 1965, as hereinafter set forth.

In § 71.181 (29 F.R. 17643) the following transition area is added:

OCALA, FLA.

That airspace extending upward from 700 feet above the surface within a 5-mile radius of Ocala Municipal (Jim Taylor) Airport (latitude 29°10'20" N., longitude 82°13'25" W.); within 8 miles W and 5 miles E of the Ocala VORTAC 171° radial extending from the 5-mile radius area to 12 miles S of the VORTAC; that airspace extending upward from 1,200 feet above the surface within a 6-mile radius of Ocala Municipal Airport, including the area bounded on the S by a 15-mile radius arc centered on the Ocala VORTAC, on the NW by the NW boundary of V-441 and on the NE by the NE boundary of V-159.

(Sec. 307(a), Federal Aviation Act of 1958; 49 U.S.C. 1348(a))

Issued in East Point, Ga., on April 21, 1965.

ARVIN O. BASNIGHT,
Director, Southern Region.

[F.R. Doc. 65-4465; Filed, Apr. 28, 1965; 8:45 a.m.]

[Airspace Docket No. 65-CE-27]

PART 73—SPECIAL USE AIRSPACE

Alteration

On March 20, 1965, a rule was published in the FEDERAL REGISTER (30 F.R. 3705) as Federal Register Document 65-2843, stating that in § 73.43, R-4304 was amended by deleting "Time of designation. 0700 to 1700 e.s.t., May 1 through October 31." and substituting therefor "Time of designation. 0700 to 1700 hours e.s.t., Saturday and Sunday, July 1 through August 31." The above times should have been expressed as central standard time rather than eastern standard time. Therefore, action is taken herein to correct Federal Register Document 65-2843 by changing the time of designation to central standard time.

Since this amendment is editorial in nature, notice and public procedure hereon are unnecessary and the amendment may be made effective on less than 30 days' notice. The effective date of the rule, 0001 e.s.t., May 27, 1965, as originally adopted, is retained.

In consideration of the foregoing, effective immediately, Federal Register Document 65-2843 is amended as hereinafter set forth.

In § 73.43 (29 F.R. 17752, 30 F.R. 3705), Restricted Area R-4304 is amended by substituting c.s.t. for e.s.t. where it appears in the text of the time of designation.

(Sec. 307(a), Federal Aviation Act of 1958; 49 U.S.C. 1348)

Issued in Washington, D.C., on April 22, 1965.

CHARLES W. CARMODY,
Acting Director, Air Traffic Service.

[F.R. Doc. 65-4466; Filed, Apr. 28, 1965; 8:45 a.m.]

[Airspace Docket No. 65-WA-28]

PART 73—SPECIAL USE AIRSPACE

Alteration of Restricted Areas

The purpose of these amendments to Part 73 of the Federal Aviation Regulations is to change the Using Agency of Restricted Areas R-2525, Vernalis, Calif.; R-2528, Newman, Calif.; R-4802, Lone Rock, Nev.; R-4803, Fallon, Nev.; and R-4804, Twin Peaks, Nev.

The Department of the Navy has informed the Federal Aviation Agency that responsibility for the facilities and activi-

ties at the above restricted areas has been assumed by the Commander, Fleet Air, Alameda, Calif. For this reason, the U.S. Navy has requested appropriate amendments to R–2525, R–2528, R–4802, R–4803, and R–4804.

Since these amendments are editorial in nature, notice and public procedure hereon are unnecessary and these amendments may be made effective on less than 30 days' notice.

In consideration of the foregoing, Part 73 of the Federal Aviation Regulations is amended, effective immediately, as hereinafter set forth.

1. In § 73.25 (29 F.R. 17733, 30 F.R. 1036), Restricted Areas R–2525 and R–2528 are amended by deleting from the respective texts "Using agency. Commander, Naval Air Bases, 12th Naval District, Alameda, Calif." and substituting therefor "Using agency. Commander, Fleet Air, Alameda, Calif."

2. In § 73.48 (29 F.R. 17754), Restricted Areas R–4802, R–4803 and R–4804 are amended by deleting from the respective texts "Using agency. Commander, Naval Air Bases, 12th Naval District, Alameda, Calif." and substituting therefor "Using agency. Commander, Fleet Air, Alameda, Calif."

(Sec. 307(a), Federal Aviation Act of 1958; 49 U.S.C. 1348)

Issued in Washington, D.C., on April 23, 1965.

CHARLES W. CARMODY,
Acting Director,
Air Traffic Service.

[F.R. Doc. 65–4467; Filed, Apr. 28, 1965; 8:45 a.m.]

[Reg. Docket No. 6235; Amdt. 91–18]

PART 91—GENERAL OPERATING AND FLIGHT RULES

Alternate Airports

The purpose of this amendment to Part 91 of the Federal Aviation Regulations is to alter flight plan and fuel requirements pertaining to alternate airports. A notice of proposed rule making regarding this action was circulated as Federal Aviation Notice 64–45, and published in the FEDERAL REGISTER (29 F.R. 14034), on October 10, 1964.

Section 91.23 presently requires sufficient fuel be carried by civil aircraft operating in IFR conditions to fly from the first airport of intended landing to the alternate airport. Section 91.83 requires each person filing an IFR flight plan to include therein, an alternate airport, and sets forth criteria for the selection of an alternate airport.

In Notice 64–45 the Agency proposed to omit the requirement of including an alternate airport in the required flight plan information when the destination airport has an approach published in Part 97 and the weather there is forecast to be a ceiling at least 1,000 feet above the lowest initial approach altitude and the visibility to be at least three miles, or 2 miles more than the lowest authorized landing minimum visibility whichever is greater, from two hours before to two hours after the estimated time of arrival. Concomitantly, the Agency proposed to omit the requirement in § 91.23 for fuel to fly from the first airport of intended landing to an alternate airport if the same conditions are met that permit a pilot to omit an alternate from an IFR flight plan. The requirement of fuel for 45 minutes at normal cruise would remain unchanged.

The IFR alternate airport weather minimums presently contained in § 91.83 (b) would be revised to assure an instrument approach capability where the weather would require that an instrument approach be made.

Interested persons were afforded an opportunity to participate in the rule making through the submission of comments. Due consideration was given to all relevant matter presented.

Only one comment directly opposed adoption of the proposed amendments stating that the private pilot has no dispatching system comparable to air carriers or military flights that would advise the pilot of deteriorating weather at his destination, and the unreliability of weather forecasts was emphasized. Therefore, the unskilled, unwary pilot would be encouraged to rely upon a potentially unreliable forecast and would fly without current information and without a sufficient fuel reserve to a destination where a landing would be inadvisable, but no alternative action would then be available. Consequently, there must be an inherent impairment of flight safety without a corresponding benefit conferred.

The Agency does not believe that the proposed amendments will derogate safety by misleading the unskilled or unwary. The applicable sections of the regulations pertain only to those pilots possessing instrument ratings, who may not be characterized as unskilled or unwary. As stated in a comment by the Aircraft Owners and Pilots Association, the prudent pilot will periodically check marginal conditions through the facilities of the Flight Service Station network to ascertain that the weather is as forecast. There would be no prohibition against a pilot designating one or more suitable alternates on his own volition, regardless of the forecast weather at his destination, so the proposal cannot be said to derogate safety. This amendment will remove the burden of carrying extra fuel in order to receive the benefit of an IFR flight plan when the destination of an alternate is unnecessary, and should enhance safety by removing this deterrent to filing an IFR flight plan when en route weather conditions are marginal.

The National Business Aircraft Association endorsed the proposal but emphasized the need of cooperation between the pilot, the FAA, and the Weather Bureau to assure the availability of current weather information to the pilot.

Bonanza Air Lines suggested specifying the weather forecast at depature to obviate the need of adding fuel en route, in the event of deteriorating weather conditions at the destination. This suggested alteration would compromise a safety factor inherent in the proposal and is, therefore, not adopted.

All other responses, which constitute the preponderance of comments received, were favorable to the adoption of the proposal.

In consideration of the foregoing, and for the reasons stated in the notice of proposed rule making, Part 91 of the Federal Aviation Regulations is amended, effective May 28, 1965, as hereinafter set forth.

1. Section 91.23 is amended to read as follows:

§ 91.23 Fuel requirements for flight in IFR conditions.

No person may operate a civil aircraft in IFR conditions unless it carries enough fuel (considering weather reports and forecasts, and weather conditions) to—

(a) Complete the flight to the first airport of intended landing;

(b) Fly from that airport to the alternate airport; and

(c) Fly thereafter for 45 minutes at normal cruising speed.

However, the requirement for fuel to fly from the first airport of intended landing to the alternate airport does not apply if Part 97 of this subchapter prescribes a standard instrument approach procedure for the first airport of intended landing and the weather conditions at that airport are forecast to be, from 2 hours before to 2 hours after the estimated time of arrival, a ceiling of at least 1,000 feet above the lowest initial approach altitude for the airport and visibility at least 3 miles, or 2 miles more than the lowest authorized landing minimum visibility, whichever is greater.

2. Section 91.83 (a)(9) and (b) are amended and (c) is added to read as follows:

§ 91.83 Flight plan; information required.

(a) *Information required.* * * *

* * * * *

(9) In the case of an IFR flight plan, an alternate airport, except as provided in paragraph (b) of this section.

* * * * *

(b) Paragraph (a)(9) of this section does not apply if Part 97 of this subchapter prescribes a standard instrument approach procedure for the first airport of intended landing and the weather conditions at that airport are forecast to be, from 2 hours before to 2 hours after the estimated time of arrival, a ceiling of at least 1,000 feet above the lowest initial approach altitude for the airport and visibility at least 3 miles, or 2 miles more than the lowest authorized landing minimum visibility, whichever is greater.

(c) *IFR alternate airport weather minimums.* Unless otherwise authorized by the Administrator, no person may include an alternate airport in an IFR flight plan unless current weather forecasts indicate that, at the estimated time of arrival at the alternate airport, the ceiling and visibility at that airport will be at or above the alternate airport weather minimums prescribed for the airport in Part 97 of this subchapter, or, if no minimums are so prescribed, the ceiling and visibility at the airport will allow descent from the IFR minimum en route altitude, approach and landing in

basic VFR weather conditions for controlled airspace outside of the continental control area.

(Sec. 307 and 601, Federal Aviation Act of 1958; 49 U.S.C. 1348 and 1421)

Issued in Washington, D.C., on April 21, 1965.

N. E. HALABY,
Administrator.

[F.R. Doc. 65-4468; Filed, Apr. 28, 1965; 8:46 a.m.]

Title 21—FOOD AND DRUGS

Chapter I—Food and Drug Administration, Department of Health, Education, and Welfare

SUBCHAPTER A—GENERAL

PART 3—STATEMENTS OF GENERAL POLICY OR INTERPRETATION

Potassium Salt Preparations Intended for Oral Ingestion by Man

Correction

In F.R. Doc. 65-4302 appearing at page 5790 in the issue for Saturday, April 24, 1965, the following changes should be made in § 3.15:

1. In paragraph (a) (1) (iii) the phrase "in subparagraph (2) of this paragraph" should read "in subdivision (ii) of this subparagraph".

2. In the introductory text of paragraph (b) the phrase "or per single dose" which begins in the 8th line should be deleted; in the 11th line the figure "100" should be changed to "20"; and in the 13th line the words "single dose" should be changed to "milliliter".

SUBCHAPTER C—DRUGS

PART 144—ANTIBIOTIC DRUGS; EXEMPTION FROM LABELING AND CERTIFICATION REQUIREMENTS

Reduction of Permitted Levels of 3-Nitro-4-Hydroxyphenylarsonic Acid in Chicken and Turkey Feeds Containing Certifiable Antibiotic Drugs

No comments were received in response to the notice published in the FEDERAL REGISTER of November 25, 1964 (29 F.R. 15820), proposing that § 144.26 be amended by reducing the upper limit for 3-nitro-4-hydroxyphenylarsonic acid to 0.005 percent in the combinations authorized in that section for chicken and turkey feeds. Portions of the section involved do not specify the particular animals to which these combinations may be administered; consequently, in the reduction of the limit of 3-nitro-4-hydroxyphenylarsonic acid in chicken and turkey feeds, it is necessary to specify those animals to which the reduction must apply. Therefore, pursuant to the provisions of the Federal Food, Drug, and Cosmetic Act (sec. 507, 59 Stat. 463, as amended; 21 U.S.C. 357) and under the authority delegated to the Commissioner of Food and Drugs by the Secretary of Health, Education, and Welfare (21 CFR 2.90): *It is ordered*, That the proposed reduction be effected by changing § 144.26 (a) (3) and (5), (b) (1) (iv) and (v), and (b) (20) to read as follows:

§ 144.26 Animal feed containing certifiable antibiotic drugs.

* * * * *

(a) * * *

(3) 3-Nitro-4-hydroxyphenylarsonic acid; Not less than 0.0025 percent and not more than 0.0075 percent except in chicken or turkey feed which shall contain not less than 0.0025 percent and not more than 0.005 percent.

* * * * *

(5) Furazolidone 0.00083 percent, with or without nitrofurazone 0.0056 percent, and/or 3-nitro-4-hydroxyphenylarsonic acid not less than 0.0025 percent and not more than 0.0075 percent except in chicken or turkey feed in which the limit of 3-nitro-4-hydroxyphenylarsonic acid shall be not less than 0.0025 percent and not more than 0.005 percent.

(b) * * *

(1) * * *

(iv) N'-acetyl-N'-(4-nitrophenyl) sulfanilamide 0.03 percent and 3-nitro-4-hydroxyphenylarsonic acid 0.005 percent.

(v) Furazolidone 0.00083 percent, nitrofurazone 0.0056 percent, with or without 3-nitro-4-hydroxyphenylarsonic acid not less than 0.0025 percent and not more than 0.005 percent.

* * * * *

(20) It is intended as an aid in stimulating growth, the prevention of coccidiosis, large roundworms and tapeworms in chickens and turkeys and the prevention of hexamitiasis in turkeys, and it contains in a quantity by weight of feed acetyl (p-nitrophenyl) sulfanilamide 0.03 percent, dibutyltin dilaurate 0.02 percent, dinitrodiphenylsulfonylethylenediamine 0.02 percent, and 3-nitro-4-hydroxyphenylarsonic acid 0.005 percent.

* * * * *

Effective date. This order shall become effective 30 days from the date of its publication in the FEDERAL REGISTER.

(Sec. 507, 59 Stat. 463 as amended; 21 U.S.C. 357)

Dated: April 22, 1965.

GEO. P. LARRICK,
Commissioner of Food and Drugs.

[F.R. Doc. 65-4508; Filed, Apr. 28, 1965; 8:48 a.m.]

PART 146a—CERTIFICATION OF PENICILLIN AND PENICILLIN-CONTAINING DRUGS

Sodium Cloxacillin Monohydrate; Sodium Cloxacillin Monohydrate Capsules

Under the authority vested in the Secretary of Health, Education, and Welfare by the Federal Food, Drug, and Cosmetic Act (sec. 507, 59 Stat. 463 as amended; 21 U.S.C. 357) and delegated to the Commissioner of Food and Drugs by the Secretary (21 CFR 2.90), the regulations for the certification of sodium cloxacillin monohydrate and sodium cloxacillin monohydrate capsules (21 CFR 146a.114, 146a.115) are amended as follows to provide additional expiration periods under specified conditions:

1. Section 146a.114(c)(3) is amended by changing the words "or 30 months" to read "30 months, or 36 months." As amended, subparagraph (3) reads as follows:

§ 146a.114 Sodium cloxacillin monohydrate.

* * * * *

(c) *Labeling.* * * *

(3) The statement "Expiration date _____," the blank being filled in with the date that is 12 months after the month during which the batch was certified, except that the blank may be filled in with the date that is 18 months, 24 months, 30 months, or 36 months after the month during which the batch was certified if the person who requests certification has submitted to the Commissioner results of tests and assays showing that after having been stored for such period of time such drug as prepared by him complies with the standards prescribed by paragraph (a) of this section.

* * * * *

2. Section 146a.115(c) is amended by changing the final period to a comma and adding thereto a new clause. As amended, paragraph (c) reads as follows:

§ 146a.115 Sodium cloxacillin monohydrate capsules.

* * * * *

(c) *Labeling.* In addition to the labeling requirements prescribed by § 1.106(b) of this chapter (regulations issued under section 502(f) of the act), each package shall bear on the outside wrapper or container and the immediate container the statement "Expiration date _____," the blank being filled in with the date that is 12 months after the month during which the batch was certified, except that the blank may be filled in with the date that is 18 months, 24 months, 30 months, or 36 months after the month during which the batch was certified if the person who requests certification has submitted to the Commissioner results of tests and assays showing that after having been stored for such period of time such drug as prepared by him complies with the standards prescribed by paragraph (a) of this section.

* * * * *

Notice and public procedure and delayed effective date are unnecessary prerequisites to the promulgation of this order, and I so find, since the changes are such that they cannot be applied to any specific product unless the manufacturer thereof has supplied adequate data regarding that article.

Effective date. This order shall be effective on the date of its publication in the FEDERAL REGISTER.

(Sec. 507, 59 Stat. 463 as amended; 21 U.S.C. 357)

Dated: April 22, 1965.

GEO. P. LARRICK,
Commissioner of Food and Drugs.

[F.R. Doc. 65-4509; Filed, Apr. 28, 1965; 8:49 a.m.]

Title 42—PUBLIC HEALTH

Chapter I—Public Health Service, Department of Health, Education, and Welfare

SUBCHAPTER E—FELLOWSHIPS, INTERNSHIPS, TRAINING

PART 61—FELLOWSHIPS

PART 63—NATIONAL INSTITUTES OF HEALTH TRAINEESHIPS

Oath of Allegiance

Notice of proposed rule making, public rule making procedures and delay in effective date have been omitted in the issuance of the following amendments which relate exclusively to the award of fellowships and traineeships. The purpose in amending the regulations is to conform Public Health Service policy to the policy adopted by the Congress for comparable programs of the National Science Foundation (42 U.S.C. 1874) and the Office of Education (20 U.S.C. 581).

1. Amend § 61.9 of Part 61 by revising paragraph (e) and adding paragraph (f) to read as follows:

§ 61.9 Benefits.

* * * * *

(e) *Condition to payments; regular fellowships.* No payments shall be made to or for a citizen or a noncitizen national of the United States receiving a regular fellowship unless such citizen or noncitizen national has taken, subscribed to, and filed with the Public Health Service a written oath or affirmation in the following form: "I do solemnly swear (or affirm) that I bear true faith and allegiance to the United States of America and will support and defend the Constitution and laws of the United States against all its enemies, foreign and domestic."

(f) *Noncitizen national; definition.* A noncitizen national of the United States is a person, who, though not a citizen of the United States, owes permanent allegiance to the United States.

2. Amend § 63.5 of Part 63 by revising paragraph (c) and adding paragraph (e) to read as follows:

§ 63.5 Terms and conditions of award.

* * * * *

(c) No payment shall be made to any citizen or noncitizen national of the United States receiving an award under the regulations in this part unless such citizen or noncitizen national has taken, subscribed to, and filed with the Public Health Service a written oath or affirmation in the following terms: "I do solemnly swear (or affirm) that I bear true faith and allegiance to the United States of America and will support and defend the Constitution and laws of the United States against all its enemies, foreign and domestic."

* * * * *

(e) A noncitizen national of the United States is a person, who, though not a citizen of the United States, owes permanent allegiance to the United States.

3. These amendments shall be effective immediately upon publication in the FEDERAL REGISTER.

(Sec. 215, 58 Stat. 690, as amended, sec. 10, 62 Stat. 1160, as amended, 42 U.S.C. 216, 33 U.S.C. 466i; interpret or apply secs. 207, 301, 402, 403, 58 Stat. 686, as amended, 692, 707, sec. 303, 60 Stat. 423, secs. 412, 422, 62 Stat. 465, 598, sec. 433, 64 Stat. 444, sec. 308, 74 Stat. 364, sec. 444, 76 Stat. 1073, sec. 4, 70 Stat. 499; 42 U.S.C. 209, 241, 242a, 282, 283, 287a, 288a, 289c, 242f, 289g, 33 U.S.C. 466c)

Dated: February 25, 1965.

[SEAL] LUTHER L. TERRY,
Surgeon General.

Approved: April 23, 1965.

ANTHONY J. CELEBREZZE,
Secretary.

[F.R. Doc. 65-4507; Filed, Apr. 28, 1965; 8:48 a.m.]

Title 43—PUBLIC LANDS: INTERIOR

Chapter II—Bureau of Land Management, Department of the Interior

APPENDIX—PUBLIC LAND ORDERS

[Public Land Order 3652]

[Montana (S.D.) 066029]

SOUTH DAKOTA

Partial Revocation of Reclamation Withdrawals

By virtue of the authority contained in section 3 of the Act of June 17, 1902 (32 Stat. 388; 43 U.S.C. 416), as amended and supplemented, it is ordered as follows:

1. The departmental orders of September 27, 1909, March 8, 1909, and March 4, 1904, withdrawing lands for reclamation purposes in connection with the Belle Fourche project, are hereby revoked so far as they affect the following-described lands:

BLACK HILLS MERIDIAN

T. 7 N., R. 7 E.,
Sec. 12, N½NE¼.

The area described contains 80 acres in Meade County. It is relatively level, having a sandy loam soil.

2. Until 10 a.m. on October 19, 1965, the State of South Dakota shall have a preferred right of application to select the lands as provided by R.S. 2276, as amended (43 U.S.C. 852). After that date and hour the lands shall become subject to operation of the public land laws generally, subject to valid existing rights, the provisions of existing withdrawals and the requirements of applicable law. All valid applications received at or prior to 10 a.m. on May 26, 1965, shall be considered as simultaneously filed at that time. Those filed thereafter shall be considered in the order of filing.

3. The lands have been open to applications and offers under the mineral leasing laws. They will be open to location under the United States mining laws after 10 a.m. on October 19, 1965.

Inquiries concerning the lands should be addressed to the Manager, Land Office, Bureau of Land Management, Billings, Mont.

JOHN A. CARVER, Jr.,
Under Secretary of the Interior.

APRIL 20, 1965.

[F.R. Doc. 65-4479; Filed, Apr. 28, 1965; 8:47 a.m.]

[Public Land Order 3653]

[Wyoming 0312819]

WYOMING

Withdrawal for Public Recreation Site

By virtue of the authority vested in the President and pursuant to Executive Order No. 10355 of May 26, 1952 (17 F.R. 4831), it is ordered as follows:

Subject to valid existing rights the following-described public lands which are under the jurisdiction of the Secretary of the Interior are hereby withdrawn from all forms of appropriation under the public land laws including the mining laws (ch. 2, Title 30, U.S.C.), for protection of a public recreation site:

SIXTH PRINCIPAL MERIDIAN

T. 21 N., R. 105 W.,
Sec. 32, SW¼NE¼SE¼, SE¼NW¼SE¼, NE¼SW¼SE¼ and SE¼SE¼.

Containing 70 acres in Sweetwater County.

The withdrawal made by this order does not alter the applicability of the public land laws governing the use of the lands under lease, license, or permit, or governing the disposal of their mineral and vegetative resources other than under the mining laws.

JOHN A. CARVER, Jr.,
Under Secretary of the Interior.

APRIL 20, 1965.

[F.R. Doc. 65-4480; Filed, Apr. 28, 1965; 8:47 a.m.]

[Public Land Order 3654]

[Riverside 05707]

CALIFORNIA

Withdrawal for National Forest Administrative Site

By virtue of the authority vested in the President and pursuant to Executive Order No. 10355 of May 26, 1952 (17 F.R. 4831), it is ordered as follows:

1. Subject to valid existing rights, the following-described national forest lands are hereby withdrawn from appropriation under the U.S. mining laws (ch. 2, Title 30 U.S.C.), in aid of programs of the Department of Agriculture:

SAN BERNARDINO NATIONAL FOREST

SAN BERNARDINO MERIDIAN

Camp Angelus Administrative Site

T. 1 N., R. 1 W.,
Sec. 21, E½SE¼SE¼;
Sec. 22, lots 1, 2, 4, N½SW¼SW¼ and SE¼SW¼SW¼.

The areas described aggregate 57.50 acres in San Bernardino County.

2. The withdrawal made by this order does not alter the applicability of those public land laws governing the use of the

national forest lands under lease, license, or permit, or governing the disposal of their mineral and vegetative resources other than under the mining laws.

JOHN A. CARVER, Jr.
Under Secretary of the Interior.

APRIL 20, 1965.

[F.R. Doc. 65-4481; Filed, Apr. 28, 1965; 8:47 a.m.]

Title 50—WILDLIFE AND FISHERIES

Chapter I—Bureau of Sport Fisheries and Wildlife, Fish and Wildlife Service, Department of the Interior

PART 33—SPORT FISHING

Columbia National Wildlife Refuge, Washington

The following special regulation is issued and is effective on date of publication in the FEDERAL REGISTER.

§ 33.5 Special regulations; sport fishing; for individual wildlife refuge areas.

WASHINGTON

COLUMBIA NATIONAL WILDLIFE REFUGE

Sport fishing on the Columbia National Wildlife Refuge, Washington, is permitted only on the area designated by signs as open to fishing. This open area, comprising 1,500 acres of lakes and 41 miles of streams, is delineated on maps available at the refuge headquarters and from the office of the Regional Director, Bureau of Sport Fisheries and Wildlife, 1002 Northeast Holladay Street, Portland, Oreg., 97208. Sport fishing shall be in accordance with all applicable State regulations, subject to the following special conditions:

(1) Sport fishing shall be permitted on the refuge as follows:

Waters open April 25 through August 15, 1965: Bobcat Creek and ponds, Coyote Creek and ponds, Canal Lake, Cattail Lake, Falcon Lakes, Gadwall Lake, Goldeneye Lake, Hays Creek, and ponds, Hampton Lakes, Herman Lake, Heron Lake, Hourglass Lake, Hutchinson Lake, Lemna Lake, Mallard Lake, McMannaman Lake, North Teal Lake, Para Lake, Pillar Lake, Pit Lake, Poacher Lake, Quail Lake, Sage Lakes, Sago Lake, Shoveler Lake, Shiner Lake, Snipe Lake, South Teal Lake, and Widgeon Lake.

Waters open April 25 through October 31, 1965: Blythe Lake, Chukar Lake, and Scaup Lake.

Waters open April 25 through September 30, 1965: Royal Lake, Lower Crab Creek within management units II, IV, and V, as posted.

Waters open July 10 through September 30, 1965: Lower Crab Creek within management units I and III, as posted.

Waters open October 31, 1965, through March 15, 1966: Halfmoon Lake and Morgan Lake.

Waters open year around: Potholes Canal, including Soda Lake, Long Lake, Crescent Lake, and Corral Lake.

(2) The use of boats is permitted, except where posted otherwise, and only for the purpose of fishing designated Refuge waters. One outboard motor, not to exceed 10 hp on each boat, may be used except where posted otherwise. The use of racing crafts, hydroplanes, airthrust crafts or inboard motor boats is prohibited.

The provisions of this special regulation supplement the regulations which govern fishing on wildlife refuge areas generally which are set forth in Title 50, Code of Federal Regulations, Part 33, and are effective to April 15, 1966.

HENRY BAETKEY,
Acting Regional Director, Bureau of Sport Fisheries and Wildlife.

APRIL 20, 1965.

[F.R. Doc. 65-4485; Filed, Apr. 28, 1965; 8:47 a.m.]

Proposed Rule Making

DEPARTMENT OF THE TREASURY

Comptroller of the Currency

[12 CFR Part 17]

REQUIRED NOTIFICATION TO NOMINATE BANK DIRECTORS

Notice of Proposed Rule Making

Notice is hereby given that the Comptroller of the Currency, pursuant to the authority contained in the National Banking Laws (R.S. 324 et seq., as amended; 12 U.S.C. 1 et seq.), is considering the adoption of a new regulation to be designated 12 CFR Part 17, relating to the requirement that notice be given prior to the nomination of a national bank director.

Prior to the adoption of the regulation, consideration will be given to any written comments pertaining thereto which are submitted within 30 days of the publication hereof to the Comptroller of the Currency, Washington, D.C. All national banks and other interested parties are invited to submit such comments.

The proposed regulation follows:

A new Part 17 is added to read:

Required Notification To Nominate Bank Directors

Any national bank may provide in its articles of association or bylaws for a requirement that any shareholder who intends to nominate or to cause to have nominated any candidate for election to the board of directors (other than any candidate proposed by the bank's present management) shall notify the bank's chief executive officer and the Comptroller of the Currency. Such notification shall be sent by first class registered mail to each of the foregoing persons at least 21 days before the scheduled meeting of shareholders at which directors will be elected and shall contain to the extent known to the shareholder giving such notification:

(1) The names and addresses of all nominees;

(2) The principal present occupations of all such nominees;

(3) The total number of shares that to the knowledge of the nominating shareholders may be voted for each of the proposed nominees;

(4) The name and residence address of the nominating shareholder.

If a national bank duly adopts the foregoing notice requirements, any nomination for director not in accordance therewith, may be disregarded by the chairman of the meeting and the votes cast for each nominee may be disregarded by the vote tellers. In the event a person is nominated by more than one shareholder, the nomination shall be honored and all shares shall be counted if at least one nomination for that person complies with this regulation.

Dated: April 23, 1965.

[SEAL] JAMES J. SAXON,
Comptroller of the Currency.

[F.R. Doc. 65-4495; Filed, Apr. 28, 1965; 8:48 a.m.]

DEPARTMENT OF THE INTERIOR

Bureau of Indian Affairs

[25 CFR Part 221]

UINTAH INDIAN IRRIGATION PROJECT, UTAH

Operation and Maintenance Charges

Basis and purpose. Notice is hereby given that pursuant to the authority vested in the Secretary of the Interior by the Acts of June 21, 1906 (34 Stat. 375), August 1, 1914 (38 Stat. 583) and March 7, 1928 (45 Stat. 210), it is proposed to amend § 221.78 of Part 221 of Title 25 of the Code of Federal Regulation by adding § 221.78(e) as set forth below. The purpose of the amendment is to provide excess water to certain lands at no cost to the landowner or lessee for reclaiming by leaching lands temporarily nonassessable due to alkali conditions.

It is the policy of the Department of the Interior, whenever practicable, to afford the public an opportunity to participate in the rulemaking process. Accordingly, interested persons may submit written comments, suggestions or objections with respect to the proposed amendment to the Bureau of Indian Affairs, Washington, D.C., 20240, within 30 days of the date of publication of this notice in the FEDERAL REGISTER.

Section 221 is amended by the addition of a new paragraph to read as follows:

§ 221.78 Payment.

* * * * *

(e) The Superintendent may authorize the delivery of water without payment of Operation and Maintenance charges for the leaching of alkali and as an aid in reclaiming temporarily nonassessable land. The amount and delivery of free water will be made only under predetermined terms and conditions that have been mutually agreed to by the land operator and the Superintendent. Use of free water will be terminated and the land will be reclassified as assessable when, in the opinion of the Superintendent, the reclamation work is completed. In no event will free water be delivered for more than 2 years.

JOHN A. CARVER, Jr.,
Under Secretary of the Interior.

APRIL 22, 1965.

[F.R. Doc. 65-4477; Filed, Apr. 28, 1965; 8:46 a.m.]

FEDERAL AVIATION AGENCY

[14 CFR Parts 1, 23, 25, 27, 29, 37, 61, 71, 75, 91, 95, 97, 135]

[Docket No. 6606; Notice 65-9]

AIRBORNE RADIO NAVIGATION AND COMMUNICATIONS EQUIPMENT FOR GENERAL AVIATION AIRCRAFT, AND RELATED CONSIDERATIONS, 1965–75

Advance Notice of Proposed Rule Making

The Federal Aviation Agency is considering rule making that would affect various provisions of the Federal Aviation Regulations (FAR's) dealing with airborne radio (navigation and communications) equipment requirements and minimum performance requirements for that equipment, for general aviation aircraft, and with the related problems of airspace environment and pilot proficiency, during the period 1965 to 1975. Rule making will be needed because in the development and improvement of the National Airspace System it will be necessary to consider airborne as well as ground-based equipment requirements. The regulations affected will be those concerned with aircraft certification procedures, pilots, airspace, jet routes, general operating and flight rules, air taxi and commercial operator of small aircraft certification and operations, standard instrument approach procedures, definitions, and related rules.

This advance notice of proposed rule making is being issued pursuant to the Agency's policy for the early institution of public rule making proceedings. An "advance" notice is issued when it is found that the resources of the Agency and reasonable inquiry outside of the Agency do not yield a sufficient basis to identify and select a tentative course or alternate courses of action, or where it would be helpful to invite public participation in the identification and selection of a course or alternate courses of action.

Interested persons are invited to participate in the making of the proposed rules by submitting such written data, views, or arguments as they may desire. Communications should identify the notice or docket number, and be submitted in duplicate to the Federal Aviation Agency, Office of the General Counsel: Attention Rules Docket, 800 Independence Avenue SW., Washington, D.C., 20553. Communications should be received on or before July 28, 1965, in order to insure proper consideration. All comments submitted will be available both before and after the closing date for comments, in the Rules Docket for examination by interested persons. If it is determined to proceed further, after consideration in the light of the avail-

able data and the comments received in response to this notice, subsequent notice of proposed rule making will be issued.

The Agency's activity to improve the Federal Airway System (Federal ground-based systems for communications and navigation), and the structuring of the Nation's airspace, directly involves the airborne environment and the equipment required for safe and efficient operations in the airspace. Over the years, portions of the Agency's program for general aviation in this area have been presented through press releases, conferences, reports, speeches, and rule making. But nowhere have all elements been pulled together.

The Agency believes it should now indicate, primarily for the general aviation interests, its plans for ground radio communications and navigation equipment of the National Airspace System, and the associated airborne equipment requirements. Therefore, the Agency proposes through this Notice to inform aircraft owners and operators, manufacturers, and other interested persons, concerning its tentative plans, for the next 10 years, with timetables, that may have an impact on them, and at the same time provide an opportunity for them to submit comments to assist the Agency later in the rulemaking process. Emphasis is placed on requirements applicable to general aviation aircraft because information pertinent to this element of the aviation community is most needed. Extensive rule making and the issue of Technical Standard Orders have been accomplished where airborne equipment for air carrier operations is concerned.

In February 1962, a symposium on airborne equipment was held by the Agency in Washington, D.C. At that time the aviation community was informed of plans of the Agency that would impose certain requirements involving airborne equipment used in the nation's airspace. This notice reflects full consideration of the 1962 plans, brought up to date to meet changing requirements, as well as the needs of the future as they are envisioned for the 1965–75 period. The Agency is aware, however, that its plans directly affect many elements of aviation, and might overlook the needs of some or place undue burdens on others. In view of these possibilities, the opinions of all concerned are needed if a sound, comprehensive, and workable program is to be implemented. Therefore, the views of all interested persons are solicited on the subject of airborne radio equipment requirements for general aviation aircraft, as well as the requirements concerned with airspace structuring and pilot proficiency to the extent these are relevant. The Agency will review the comments, and will use all findings to undertake specific rule making action considered necessary and appropriate in the future.

Airspace structuring. At the outset, it must be noted that the Agency's plans for airspace structuring envisions equitable distribution of the national airspace consistent with safety and efficient use of that airspace. This contemplates maximum freedom for the pilot to operate visual flight rules (VFR) safely anywhere in the national airspace, with minimum restriction. Improved ground-based equipment and better airspace management may permit even more freedom than exists today. In general, the planned elements of the airspace structure will be the same as those known today:

(1) Uncontrolled airspace—where visual flight rules (VFR) and instrument flight rules (IFR) flights may be conducted.

(2) Controlled airspace—also where VFR and IFR flights may be conducted.

(3) Area positive controlled airspace—where only IFR flights and a planned new set of controlled visual rules (CVR) flights in VFR weather conditions will be allowed. Pilot proficiency for CVR flights is discussed later in this notice.

The designation and configuration of these areas quite possibly will be altered somewhat to assure safe and efficient operations. The Agency's planning has developed the following, subject of course to change should requirements change or new justifications arise:

The Agency has no plan to lower area positive control to the ground during the 1965–75 period. Some need is foreseen, however, to lower area positive controlled airspace to perhaps 10,000 feet, or possibly lower, along some routes that are heavily traveled, when required to assure the safety of all airspace users and the efficient handling of all air traffic in given areas. A precise time for this action cannot be forecast now, but the Agency intends to consider it for possible action at some time within the period 1965–75.

Safety of IFR operations outside of controlled airspace has been under study for some time. There are some indications that, for safety reasons, IFR operations in some areas should be restricted to controlled airspace only. This is most apparent in areas of dense population, where air traffic is heavy and uncontrolled airspace is relatively limited and surrounded by high activity in controlled areas.

Comments are invited on the plans for, and the problems inherent in, airspace structuring.

Airborne radio (communications and navigation) equipment to be required for operation of general aviation aircraft. This notice concerns four categories of airborne radio equipment. Each category is identified by the type of operation in which its use is required. A proposed date for required use of the equipment is given in view of the availability of the ground-based environment where appropriate. It is not expected that this equipment will be needed for VFR operation, where permitted inside controlled airspace, or outside of that airspace.

1. *VHF communications—transmitter and receiver.* This equipment involves two considerations: the basic need for it whenever communications are required, and the need for 50 kc. frequency spacing to be compatible with the ground-based communications system of the National Airspace System. In 1960, the Agency announced to the public certain plans for assignment of radio frequency in air traffic control (ATC). These plans provided for the use of both 100 kc. and 50 kc. frequency spaced communications channels for ATC, with 50 kc. channel assignments used as needed in areas of high density traffic including high density airports.

Present regulations require that a pilot conducting IFR flight in controlled airspace must maintain a continuous watch on the appropriate frequency and conduct certain communications. Although the airborne equipment normally is VHF radio equipment, the regulations presently do not require it. Fifty kc. frequency capability in the airborne equipment would assure adequate communications for the best possible service in the National Airspace System. Unless this airborne capability is provided, aircraft equipped with only 100 kc. frequency capability will be served, but at some locations service will be limited by inability to use the frequency assigned by ATC.

After January 1, 1966, the ground-based system will provide 50 kc. ATC channel spacing throughout the 118–136 megacycles band. The Agency's modernization plan for communications is progressing on schedule, therefore a complete 50 kc. frequency capability on the ground should be achieved by that date. Communications are required now for both VFR and IFR flight operating in and out of airports served by U.S. Government operated control towers. As a part of the National Airspace System and plans for the future, the Agency is considering the requirement of VHF airborne radio equipment with 50 kc. frequency capability after January 1, 1966, for all flight IFR in controlled airspace and CVR (when procedures for CVR are established) in area positive controlled airspace.

It is not contemplated that all aircraft would need to have 360 channel VHF radio equipment. Instead, it would be necessary that only the number of channels should be installed in a particular aircraft that are required for the environment in which it will be operated. Thus, an aircraft operated VFR in and out of a terminal served by a U.S. Government operated control tower might be able to communicate properly with equipment having only 6 channels with 50 kc. frequency spacing capability, while an aircraft operated IFR in the midwest might need 24-channel equipment with 50 kc. frequency spacing capability to properly communicate with ATC. Of course, 360 channel equipment would be useful, for it would provide the maximum in communications capability.

It will be helpful to receive comment, not only on whether 50 kc. frequency capability should be required, but also on whether it would be feasible to supply equipment having a 50 kc. capability with a variable number of channels from which the aircraft operator might choose to satisfy his specific operational needs.

2. *VOR/localizer receiver.* The national airspace is served by the VOR ground-based navigation aid. Some en route areas and many runways in the terminal areas are served by localizers, a component of the instrument landing system (ILS). Although most aircraft

have VOR/localizer receiver capability today, regulations do not specifically require this equipment. The Agency considers necessary, for safe operations with an acceptable degree of efficiency, that each aircraft operated IFR or CVR (when established) in the nation's controlled or area positive controlled airspace have VOR/localizer receiver with a 100 kc. frequency tuning capability after July 1, 1968. Comment is desired here also.

3. *Distance measuring equipment (DME).* The Agency has established a Rho-theta navigation system (VORTAC) that provides omnidirectional course guidance and distance measuring capability from the station. Distance measuring equipment (DME) coupled with the VOR receiver permits the pilot to determine his position over the ground with a high degree of accuracy and report that position to ground-based facilities. This capability to report position accurately assists ATC to identify the aircraft by use of surveillance radar and to assure overall separation for other known traffic.

Present regulations require United States civil aircraft operated at or above 24,000 feet m.s.l. using VOR navigational equipment for operations in the 48 contiguous States or in the District of Columbia to be equipped with DME. The Agency announced at its "Airspace Shareholders" meeting held on September 30 and October 1, 1964, that so far as it then could see the use of DME would be optional for general aviation aircraft in IFR flight in control areas below 24,000 feet. However, safety considerations may make it necessary to require this equipment for IFR flight regardless of altitude, at least in some areas, possibly after July 1, 1968. The Agency invites comment on whether, and to what extent, such a requirement should be instituted.

4. *Air traffic control radar beacon system (ATCRBS).* Ground-based long-range and terminal radar surveillance systems are used by ATC to assure safety of operations, and these permit it to separate aircraft from other observed air traffic with greatly reduced separation minimums. The ATCRBS is a valuable tool for identifying aircraft, as well as for providing radar target reinforcement.

Through the use of ATCRBS, air traffic control can safely handle a much greater volume of air traffic than without it. However, greater flexibility of aircraft identification is needed. This will be provided when improved ground-based equipment and airborne equipment in the National Airspace System permit the use of a greater number of identification codes. The improved system will provide approximately 4096 codes, as compared to 64 codes in use today.

Furthermore, automatic altitude reporting can be provided by an altitude encoder, coupled with the aircraft's altimeter system that, through the ATCRBS, transmits the information to the ground for the controller's use. This equipment will help to reduce voice communications to a lower level, and will do much to alleviate the increasing congestion of air-ground-air communications and provide the controller with more current information to use in giving better service to airspace users who are appropriately equipped.

Regulations now require ATCRBS as airborne equipment for operations in area positive controlled airspace. It is contemplated that both improved code and automatic altitude reporting capability will be required when they become available in both ground-based and airborne equipment. These will involve ATC transponders with 3-pulse side lobe suppression, 4096 selectable Mode 3/A codes, and automatic altitude reporting capability in 100-foot increments on Mode C.

In area positive controlled airspace, at the present time IFR operations are allowed, and other operations only by special arrangements. It is planned that CVR flights will be permitted in area positive controlled airspace at some time in the future, possibly after July 1, 1968. A pilot operating CVR in area positive controlled airspace will be expected to follow air traffic control instructions while operating in an IFR manner in VFR conditions. Aircraft operated CVR in area positive controlled airspace will need 4096 code ATCRBS airborne capability when available.

It is expected that automatic altitude reporting capability will be required for IFR operations in area positive controlled airspace, but not for CVR operations in that airspace, in which case it will be optional. The pilot who chooses to operate CVR need not be IFR rated, nor his aircraft fully equipped for IFR operations. In keeping with this, and in order to allow the greatest freedom of operation, it is desirable to keep airborne equipment to a minimum level essential to safety. Although it is necessary that the aircraft be continuously identified by use of the radar beacon, automatic altitude reporting by the radar beacon is not considered necessary, since ATC can assign an altitude and manually insert this information into the ground system.

With respect to actual target dates, it is contemplated that expanded coded capability (4096) should be available and required after July 1, 1968, at least for operations in some parts of area positive controlled airspace. As to automatic altitude reporting capability, it is contemplated that the ground-based system will be completed and an airborne equipment requirement will become effective for IFR flight shortly after January 1, 1970.

Pilot proficiency. The planned establishment of CVR procedures providing air traffic control services for visual operations in area positive controlled airspace directs attention to pilot proficiency. The pilot operating CVR will require, as a minimum, sufficient pilot proficiency to receive and comply with ATC instructions. Although CVR operations are IFR in nature so far as flight in the National Airspace System is concerned, they will be conducted in VFR conditions, and an IFR rating is not envisioned as a requirement. Proper response to ATC will depend upon the presence of certain airborne equipment, such as 50 kc. VHF communications, VOR receiver, and 4096 code ATCRBS. But it is not contemplated that operations other than CVR during the 1965–75 time period, such as VFR in or outside of controlled airspace or IFR in or outside of controlled and area positive controlled airspace, will require a level of pilot proficiency different from that needed for today's operations. Comments relative to the desirability of permitting visual flight in area positive controlled airspace under the circumstances outlined here will be very helpful. Comments also are invited with regard to the level of pilot proficiency.

Minimum performance requirements for airborne radio equipment. Whenever the Agency in the past has proposed to establish standards (Technical Standard Orders) for airborne radio equipment used on general aviation aircraft, public objection has arisen largely based on a belief that the standards would be not minimum but unreasonably high and would result in a severe economic burden on the aircraft owner or operator. The Agency recognizes the problems and concerns that are involved, and it is now considering a method to establish needed minimum standards that will not elicit this objection.

All airborne radio equipment must be capable of meeting a minimum level of performance if airborne equipment interference is to be avoided and safe passage of aircraft in the National Airspace System is to be realized, whether with or without ATC services. With this as a basic understanding, the Agency solicits the advice of general aviation representatives in formulating minimum performance requirements.

The method under consideration to establish minimum performance requirements for general aviation airborne radio equipment discussed in this notice contemplates the following:

(1) *Essential system characteristics.* Characteristics that airborne radio equipment must meet when installed in aircraft. For example, its use must neither impair the use of the airspace environment by others, nor create a hazard as a result of its use or operation.

(2) *Minimum performance standards.* Standards that will assure acceptable accuracy for IFR operations in controlled airspace. These standards will take into account such factors as compatibility with ground systems, and the operational environment of the aircraft. They will be designed both to be responsive to the operational limits of the aircraft and to relate directly to the intended functions of the equipment.

(3) *Rule making.* Minimum performance standards and essential system characteristics will be established and made applicable by appropriate rule making.

If it becomes necessary to phase out certain airborne radio equipment now installed, every effort will be made to establish reasonable timetables.

It is contemplated that aircraft operated solely VFR, or only outside of controlled airspace, will be allowed to use equipment that does not meet minimum performance standards but does meet the essential system characteristics referred to above.

Comments are invited regarding the formulation of these standards, applicability to airborne radio equipment now installed, and requirements for aircraft operated IFR or solely VFR.

Issued in Washington, D.C., on April 23, 1965.

G. S. MOORE,
Director,
Flight Standards Service.

[F.R. Doc. 65-4469; Filed, Apr. 28, 1965; 8:46 a.m.]

[14 CFR Part 71]

[Airspace Docket No. 65-CE-47]

TRANSITION AREAS AND CONTROL ZONES; CONTROL AREA EXTENSION

Proposed Designation and Revocation

The Federal Aviation Agency is considering amendments to Part 71 of the Federal Aviation Regulations which would alter the controlled airspace in the Olathe, Kans., and Grandview, Mo., terminal areas.

The following controlled airspace is presently designated in the Olathe, Kans., and Grandview, Mo., terminal areas:

1. The Olathe, Kans., control zone is designated as that airspace within a 5-mile radius of NAS Olathe (latitude 38°-50'00" N., longitude 94°53'30" W.); within 2 miles either side of the 180° bearing from the Olathe RBN extending from the 5-mile radius zone to 12 miles S of the RBN, and within 2 miles either side of the Olathe Navy TACAN 353°, 038°, 138°, and 233° radials extending from the 5-mile radius zone to 6 miles N, NE, S, and SW of the TACAN.

2. The Grandview, Mo., control zone is designated as that airspace within a 5-mile radius of Richards-Gebaur AFB, Grandview, Mo. (latitude 38°50'50" N., longitude 94°33'20" W.), and within 2 miles either side of the Grandview ILS localizer S course, extending from the 5-mile radius zone to the OM. The portions N of latitude 38°52'30" N., and W of longitude 94°35'50" W. are excluded.

3. The Olathe, Kans., control area extension is designated as that airspace bounded on the N by a line beginning at the INT of the Emporia, Kans., VORTAC 346° and the St. Joseph, Mo., VORTAC 258° radials; thence easterly along the St. Joseph VORTAC 258° radial to V-205, thence southeasterly along V-205 to latitude 38°12'00" N., thence W along latitude 38°12'00" N., to longitude 95°15'00" W., thence southerly to latitude 37°39'-45" N., longitude 95°21'00" W., thence westerly along V-132 to a line 10 miles SE of and parallel to the Emporia VORTAC 209° and 029° radials, thence northeasterly along this line to a line 10 miles N of and parallel to the Emporia VORTAC 079° and 259° radials, thence along this line to the Emporia VORTAC 346° radial, thence northwesterly along this radial to the point of beginning.

The Federal Aviation Agency, having completed a comprehensive review of the terminal airspace structural requirements in the Olathe, Kans., and Grandview, Mo., terminal areas, including studies attendant to the implementation of the provisions of the Civil Air Regulations Amendments 60-21/60-29, proposes the following airspace actions:

1. Redesignate the Olathe, Kans., control zone as that airspace within a 5-mile radius of NAS Olathe (latitude 38°50'00" N., longitude 94°53'30" W.), and within 2 miles each side of the 180° bearing from the Olathe RBN extending from the 5-mile radius zone to a point 12 miles S of the RBN.

2. Redesignate the Grandview, Mo., control zone as that airspace within a 5-mile radius of Richards-Gebaur AFB, Grandview, Mo (latitude 38°50'50" N., longitude 94°33'20" W.), and within 2 miles each side of the 356° radial of the Richards-Gebaur VOR extending from the 5-mile radius zone to the VOR, and within 2 miles each side of the 195° radial of the Richards-Gebaur TACAN extending from the 5-mile radius zone to a point 8 miles S of the TACAN, excluding that portion N of latitude 38°52'30" N., and W of longitude 94°35'50" W.

3. Designate the Grandview, Mo., transition area to comprise that airspace extending upward from 700 feet above the surface within an 8-mile radius of Richards-Gebaur AFB, Grandview, Mo. (latitude 38°50'50" N., longitude 94°33'-20" W.), within 2 miles each side of the Richards-Gebaur (AF) VOR 180° radial, extending from the 8-mile radius area to 12 miles S of the VOR, within 2 miles each side of the Richards-Gebaur AFB ILS localizer S course, extending from the 8-mile radius area to 12 miles S of the LOM, within 2 miles each side of the Richards-Gebaur AFB TACAN 195° radial, extending from the 8-mile radius area to 12 miles S of the TACAN, within 2 miles W and 6 miles E of Richards-Gebaur AFB Runway 36 centerline extended to the N, extending from the 8-mile radius area to 10 miles N of the N end of the runway, excluding the Kansas City, Mo., transition area, and within an 8-mile radius of the NAS Olathe Airport (latitude 38°50'00" N., longitude 94°53'-30" W.); and that airspace extending upward from 1,200 feet above the surface within the area bounded on the S by latitude 38°00'00" N., on the W by the W edge of V-12, on the N by the south arc of a 10-mile radius circle centered on the Kansas City, Mo., Municipal Airport (latitude 39°07'20" N., longitude 94°35'-30" W.), and on the E by the W edge of V-205, excluding the Emporia, Kans., and Wichita, Kans., transition areas.

4. Revoke the Olathe, Kans., control area extension in its entirety.

The proposed 5-mile radius control zone and extension will provide protection for aircraft executing instrument departures and missed approach procedures until reaching an altitude of 700 feet above the surface, and also for aircraft executing instrument approach procedures when descending below an altitude of 1,000 feet above the surface. The proposed transition area extending upward from 700 feet above the surface will provide protection for arriving and departing aircraft when operating between 700 feet and 1,500 feet above the surface. The proposed transition area extending upward from 1,200 feet above the surface is required for transitioning, holding, and random vectoring of aircraft by Olathe RAPCON and the Kansas City Air Route Traffic Control Center. This transition area compliments the Topeka, Kans., transition area for instrument procedures at Forbes AFB.

The floors of the airways that would traverse the transition area proposed herein would automatically coincide with the floors of the transition area.

Certain minor revisions to prescribed instrument procedures would be effected in conjunction with the actions proposed herein but operational complexity would not be increased nor would aircraft performance or landing minimums be adversely affected.

Specific details of the changes to procedures that would be required may be examined by contacting the Chief, Airspace Branch, Air Traffic Division, Central Region, Federal Aviation Agency, 4825 Troost Avenue, Kansas City, Mo., 64110.

Interested persons may submit such written data, views or arguments as they may desire. Communications should be submitted in triplicate to the Director, Central Region, Attention: Chief, Air Traffic Division, Federal Aviation Agency, 4825 Troost Avenue, Kansas City, Mo., 64110. All communications received within 45 days after publication of this notice in the FEDERAL REGISTER will be considered before action is taken on the proposed amendment. No public hearing is contemplated at this time, but arrangements for informal conferences with Federal Aviation Agency officials may be made by contacting the Regional Air Traffic Division Chief. Any data, views or arguments presented during such conferences must also be submitted in writing in accordance with this notice in order to become part of the record for consideration. The proposal contained in this notice may be changed in the light of comments received.

The public docket will be available for examination by interested persons in the office of the Regional Counsel, Federal Aviation Agency, 4825 Troost Avenue, Kansas City, Mo., 64110.

This amendment is proposed under the authority of section 307(a) of the Federal Aviation Act of 1958 (49 U.S.C. 1348).

Issued at Kansas City, Mo., on April 20, 1965.

EDWARD C. MARSH,
Director, Central Region.

[F.R. Doc. 65-4470; Filed, Apr. 28, 1965; 8:46 a.m.]

[14 CFR Part 71]

[Airspace Docket No. 65-CE-48]

TRANSITION AREA

Proposed Designation

The Federal Aviation Agency is considering an amendment to Part 71 of the Federal Aviation Regulations to designate controlled airspace at Robinson, Ill.

A public instrument approach procedure is planned for the Robinson, Ill., Municipal Airport. No controlled airspace presently exists in the Robinson, Ill, terminal area.

The Federal Aviation Agency, having completed a comprehensive review of the airspace structural requirements in the Robinson terminal area, proposes the following airspace action:

Designate the Robinson, Ill., transition area as that airspace extending upward from 700 feet above the surface within a 5-mile radius of Robinson, Ill., Municipal Airport (latitude 39°00'51" N., longitude 87°38'47" W.) and within 8 miles SW and 5 miles NE of the 333° bearing from Robinson Municipal Airport extending from the airport to 12 miles NW of the airport.

The proposed Robinson, Ill., transition area will provide protection for departing aircraft during climb from 700 feet to 1,200 feet above the surface. The extension to the NW will provide protection for arriving aircraft executing the proposed instrument approach during descent to 700 feet above the surface. The holding pattern at Robinson will be contained within the proposed transition area. The proposed public instrument approach procedure will be made effective concurrently with the designation of the proposed transition area.

The floors of the airways which would traverse the transition area proposed herein would automatically coincide with the floor of the transition area.

Specific details of the public instrument approach procedure to be used may be examined by contacting the Chief, Airspace Branch, Air Traffic Division, Central Region, Federal Aviation Agency, 4825 Troost Avenue, Kansas City, Mo., 64110.

Interested persons may submit such written data, views or arguments as they may desire. Communications should be submitted in triplicate to the Director, Central Region, Attention: Chief, Air Traffic Division, Federal Aviation Agency, 4825 Troost Avenue, Kansas City, Mo., 64110. All communications received within forty-five days after publication of this notice in the FEDERAL REGISTER will be considered before action is taken on the proposed amendment. No public hearing is contemplated at this time, but arrangements for informal conferences with Federal Aviation Agency officials may be made by contacting the Regional Air Traffic Division Chief. Any data, views or arguments presented during such conferences must also be submitted in writing in accordance with this notice in order to become part of of the record for consideration. The proposal contained in this notice may be changed in the light of comments received.

The public docket will be available for examination by interested persons in the office of the Regional Counsel, Federal Aviation Agency, 4825 Troost Avenue, Kansas City, Mo., 64110.

This amendment is proposed under the authority of section 307(a) of the Federal Aviation Act of 1958 (49 U.S.C. 1348).

Issued at Kansas City, Mo., on April 19, 1965.

HENRY L. NEWMAN,
Acting Director, Central Region.

[F.R. Doc. 65-4471; Filed, Apr. 28, 1965; 8:46 a.m.]

FEDERAL COMMUNICATIONS COMMISSION

[47 CFR Parts 21, 74, 91]

[Docket No. 15971; FCC 65-334]

DISTRIBUTION OF TELEVISION BROADCAST SIGNALS BY COMMUNITY ANTENNA TELEVISION SYSTEMS

Notice of Inquiry and Proposed Rule Making

1. Notice is hereby given of inquiry and proposed rule making in the above-entitled matter.

2. The Commission has received a number of requests that it assert jurisdiction over the distribution of television broadcast signals by community antenna television systems (CATVs) and promulgate rules and regulations governing such distribution. Many of these requests were made informally in comments on the rule making in Docket Nos. 14895 and 15233 with respect to the licensing of microwave facilities used to relay television signals to CATV systems.[1] In addition, five formal petitions have been filed.[2]

3. (a). On October 16, 1964, the American Broadcasting Co. (ABC) filed a "Petition for Commission Regulation of the Carriage of Television Signals by Community Antenna Television Systems," requesting the Commission to promulgate rules establishing areas and zones to be served by television stations and limiting the use of the stations' signals beyond such areas and zones (RM No. 672). Various pleadings in support of, or opposition to, the ABC petition have been submitted, and ABC has filed a reply. (b). On December 18, 1964, Springfield Television Broadcasting Corp. (Springfield) filed a "Request for Declaratory Ruling" that all CATV systems, whether utilizing microwave facilities or acquiring television signals off-the-air, are subject to the Commission's jurisdiction and required to comply with operating provisions similar to those proposed in Docket Nos. 14895 and 15233. (c). On January 22, 1965, Boise Valley Broadcasters, Inc., licensee of Station KBOI-TV, Boise, Idaho (Boise), filed a "Petition for Interim Relief," requesting the Commission to assume complete jurisdiction over all CATV systems and impose a "freeze" on all microwave applications for CATV use pending the promulgation of rules governing all CATV systems. (d). On February 12, 1965, Westinghouse Broadcasting Co., Inc., filed a "Petition for Consolidation of Proceedings and Assertion of Jurisdiction Over Community Antenna Television Systems," requesting the Commission to institute rule making governing all CATV systems, consolidate that proceeding with Docket Nos. 14895 and 15233, and stay immediately operations by CATVs in those areas which now or in the near future will be served by three commercial television stations pending the adoption of final regulations. (e). On March 10, 1965, the Association of Maximum Service Telecasters, Inc. (MST), filed a "Petition of Association of Maximum Service Telecasters, Inc., for Rule Making" (RM-742), calling for the immediate exercise of regulatory authority by the Commission over all CATV systems and the adoption of comprehensive rules of general applicability.[2a] The stated bases of the five petitions are summarized below.

4. (a) *The ABC petition.* ABC petitions the Commission to regulate the distribution of television signals by CATV systems on the ground that such action is essential to our ability to discharge statutory responsibilities and within the Commission's present authority. ABC urges that the present and likely future trend of CATV development threatens to undercut the discharge of our statutory responsibilities "to make available, so far as possible, to all the people of the United States a rapid, efficient, nationwide, and worldwide wire and radio communication service" (section 1 of the Communications Act, 47 U.S.C. 151), equitably apportioned "among the several States and communities" (section 307(b); 47 U.S.C. 307(b)).

5. In support of the claim of increasing CATV impact upon Commission and statutory policies, ABC points to major changes in CATV operations since the Commission's 1959 report and order in Docket No. 12443, "In the Matter of an Inquiry Into the Impact of Community Antenna Systems, TV Translators, TV 'Satellite' Stations, and TV 'Repeaters' on the Orderly Development of Television Broadcasting," 26 F.C.C. 403, 18 Pike & Fischer, R.R. 1573. According to ABC, the number of CATV systems has grown from approximately 550, serving an estimated 1,500,000 viewers, to approximately 1,300 CATV systems serving over 4 million viewers. Moreover, CATV franchises, sought or granted, have been running at the rate of one a day during the last 10 months, in 345 communities in 40 States. Whereas the number of channels offered to CATV subscribers was typically three in 1959, the emphasis now is on broad band systems with a capacity for 11 or 12 channels. In 1959, CATV operations were largely confined to small or fairly small markets; today there are plans to extend New York City stations to substantial communities many miles away in upstate New York and Pennsylvania. Predicting that the next step will be for CATV to bring New York City independent stations into major cities like Boston, Philadelphia, Baltimore, and Washington, ABC expresses fear that this might lead to combined CATV and Pay-

[1] The following specifically requested that the Commission assume jurisdiction over all CATVs: Aroostook Broadcasting Corp., Association for Competitive Television, Channel Seven, Inc., and WLUC-TV. Other parties filing comments indicated that they held the same views.

[2] Similar petitions have also been received from Capital Cities Broadcasting Corp. (RM-755, filed on Apr. 7, 1965), and Taft Broadcasting Co. (RM-766, filed on Apr. 13, 1965). Any further petitions of this nature will be placed in this Docket and treated as comments.

[2a] Thirteen dissenting members of AMST have filed comments expressing a contrary position.

TV operations which would siphon off top attractions from free TV.

6. Before summarizing the further bases for ABC's claim of adverse impact, we note in this connection that two UHF permittees in Philadelphia have expressed concern over the effect of pending CATV applications for franchises in that city. William Fox, permittee of a new UHF station, WIBF-TV, which expects to commence operation in Philadelphia in mid-1965, filed a statement supporting the ABC petition and commented inter alia as follows:

> As set forth in the ABC petition, there are now several applications pending for CATV franchises in Philadelphia. The successful operation of UHF station WIBF-TV in Philadelphia, which now has three operating VHF stations, will be dependent on its ability to bring outstanding programming not now available to the Philadelphia audience and on adequate protection of this programming from uncontrolled carriage of signals from other markets by CATV systems serving Philadelphia. Unregulated carriage of television signals by CATV systems in Philadelphia will prevent implementation of the Commission's basic television allocation policy which looks toward the operation of UHF and VHF stations in intermixed markets throughout the United States.

In addition, ABC points out that the permittee of UHF station WPHL-TV, which has suspended operation in Philadelphia but plans to go back on-the-air in mid-1965, wrote a syndicated film supplier on December 10, 1964 as follows:

> As you may know, a great deal of CATV activity has emerged in Philadelphia and vicinity. Rollins Broadcasting has just been granted an exclusive franchise for Wilmington, Delaware. Jerrold Electronics has applied for Camden, N.J.; and more than a half dozen applicants are seeking franchises for Philadelphia, including Triangle, Storer, the Bulletin Co., etc. All proposed systems would be operating within our principal coverage area. Their main offering is to be the programming of WNEW-TV, WOR-TV, and WPIX. The New York indies may represent damaging competition to Philadelphia UHF stations should their programming be admitted to this market. We, therefore, must ask that any film purchase permit WPHL-TV options for cancellation, without penalty, in the event the same film shows are available from New York indies via local cable systems. I am sure you will understand that this measure is a necessity.

7. The ABC petition notes further that the enactment of the all-channel receiver law in 1962 (76 Stat. 150, 151) has committed Congress and the Commission to a long-range television plan in which the expanded use of UHF will be paramount, and asserts that unregulated CATV poses a substantial threat to UHF development. By way of example, ABC notes that a Binghamton, N.Y., UHF station, in operation since 1957, has recently advised the Commission that UHF service would terminate there (leaving the city with one VHF station in place of one VHF and two UHF) if CATV were permitted to bring in four New York City independent stations. ABC also points to applications for CATV franchises in a number of Connecticut towns where UHF channels are either in use or allocated, noting that the CATVs propose to bring in New York City stations as well as others. ABC further lists 70 communities with UHF allocations where CATV franchises were sought between August 21 and November 26, 1964, and 95 communities with UHF allocations where CATV franchises were granted during the same period.

8. In addition to the impact on UHF, ABC urges that unregulated CATV has had, and will have, substantial adverse effect on service by local television stations, since the splitting of audience resulting from a multiplicity of additional signals brought in by CATV inevitably causes the station to lose audience and advertising revenues. ABC claims that the rule making in Docket Nos. 14895 and 15233 is wholly inadequate to insure that local television service can survive effectively, and that CATV cannot be an adequate substitute for local television broadcast service for three reasons: "First, CATV systems do not serve the public living in the sparsely populated areas that, because of low population density, are considered uneconomical for cable systems to reach; Second, CATV systems do not serve those who, though within the wired-up areas, cannot afford the subscription fee; and Third, CATV systems do not provide the benefits of a locally originated television service, available to all without a charge, benefits which are important to the continued welfare of our political, economic and social systems."

9. In sum, ABC states, the present and prospective trend of CATV growth poses a threat to the kind of local television service now enjoyed by a great many communities throughout the country and fostered by the Commission for many years. It asserts that if CATV "systems of the type now being proposed in many major markets of the country come into being, carrying a dozen or more channels, the ability of stations now serving these markets to provide local service will be substantially impaired and UHF stations scheduled to go on the air in these markets may never get off the ground." Fundamentally at stake, according to ABC, is the question of whether CATV is to be permitted to rework the basic framework of the established broadcasting system from a multiplicity of local stations into a nationwide distribution of signals from major metropolitan centers like New York, Chicago, and Los Angeles. If this were to become the objective of national communications policy, contrary to longstanding Commission and Congressional views as to the public interest, more efficient and satisfactory means than CATV distribution could be devised, such as space satellites.[3]

10. While taking the position that the Commission's general powers under the Communications Act include authority to prevent persons other than licensees from causing an undue burden on interstate commerce in conflict with the basic purpose of the Act and the responsibilities of the Commission,[4] ABC invokes particularly the specific authority conferred by section 303(h) to "establish areas or zones to be served by any station" (47 U.S.C. 303(h)). It requests the Commission to propose and adopt rules which would define the areas and zones normally to be served by television stations and prohibit the use of the stations' signals to serve other areas except upon prior consent of the Commission or in accordance with established regulations defining the basis upon which the signal could be extended beyond the normal service area of the station.[5] ABC urges that the power to determine the areas or zones to be served by any station necessarily includes the correlative power to make these determinations effective against nonlicensees pursuant to the provisions of section 4(i), 303(r), 312(b), and 502 of the Communications Act. It notes that these sections do not in terms restrict the Commission's authority to the imposition of limitations on licensees themselves, and that explicit authority to deal with specific practices is not required. National Broadcasting Co. v. United States, 319 U.S. 190, 218–219; American Trucking Association v. United States, 344 U.S. 298, 309–312; Federal Communications Commission v. Pottsville Broadcasting Co., 309 U.S. 134, 138; United States v. Pennsylvania R. Co., 323 U.S. 612. And, finally, ABC requests the Commission to exercise this authority promptly to prevent imminent frustration of the development and growth of local services through the uncontrolled use of station signals by CATV systems.

---

[3] ABC points out that the National Association of Broadcasters expressed a similar concern about the trend of CATV in its comments in Docket Nos. 14895 and 15233 as follows:

> "If multiple signal choices were to be the prime objective of communications policy of the United States, as developed by Congress and the Commission, it would have been a rather simple matter to provide for satellites scattered throughout the country, interconnected with New York and Los Angeles. By this means, every community would receive several television signals. But the Congress and the Commission have decided otherwise; that a paramount objective of television broadcasting is to provide each community with at least one local facility.
>
> "If the microwave complex is permitted to relay signals over long distances, an advertiser will soon find that he can secure wide coverage simply by buying a few stations in large metropolitan areas. Nonduplication prohibitions would not remedy this condition. This proliferation of distant signals will result in curtailed buying of local markets by advertisers, which in turn will soon exert economic pressure on countless local outlets with a corresponding depressing influence upon the ability to program locally.
>
> "Accordingly, we submit that the Commission should extend its consideration of microwave applications to include factors beyond simple nonduplication restrictions. It should examine and evaluate the effect the extension of a station's signal far beyond its designated service area would have on overall allocation policies."

[4] ABC notes that the National Community Television Association has taken the position before the Connecticut Public Utilities Commission that "a community antenna television system is directly concerned with television broadcasting" and that "the matter of protection of local television stations" lies in a "sensitive area of regulation which the Federal Government has wholly preempted."

[5] ABC also requests the Commission to issue a policy statement to the effect that local television broadcasters should be preferred in the issuance of CATV franchises in their communities.

11. (b). *The Springfield request for declaratory ruling.* Springfield, the licensee of UHF station WRLP (Channel 32) in Greenfield, Mass.,[4] requests a declaratory ruling that all CATV systems are subject to the Commission's jurisdiction on the ground that there is an immediate and urgent need for the Commission not only to assert jurisdiction over all CATV systems but also to provide provisional relief from unfair and prejudicial competition to local stations by off-the-air CATV systems. Using its own situation as an example, Springfield states that the number of CATV systems in competition with WRLP has grown from nine in 1957 to over 20 at present. These CATV systems bring into the WRLP service area television signals from such distant cities as Albany, Schenectady, Utica, and New York, N.Y.; Poland Spring, Maine; Manchester and Durham, N.H.; Boston, Mass.; and New Haven and Hartford, Conn. Since only one of the CATV systems uses microwave, the rule making in Dockets Nos. 14895 and 15233 will afford WRLP little relief. Springfield has been unable to reach any satisfactory arrangement with the off-the-air CATVs concerning the carriage and nonduplication of the WRLP signal, and, because of declining revenues, has been forced to discontinue local program origination on WRLP.

12. Springfield predicates Commission jurisdiction on the theory that CATV systems, in receiving and distributing television signals by wire to the public, are engaged in interstate communication by wire within the purview of sections 2(a) and 3(a) of the Communications Act. Section 2(a) states that the provisions of the Act "apply to all interstate and foreign communication by wire or radio" and section 3(a) defines "communication by wire" as the "transmission of writing, signs, signals, pictures, and sounds of all kinds by aid of wire, cable, or other like connection between the points of origin and reception of such transmission, including all instrumentalities, facilities, apparatus, and services (among other things, the receipt, forwarding, and delivery of communications) incidental to such transmission." Springfield asserts that CATV systems are an integral part or connecting link in the dissemination of television signals between the originating facility and the viewing public, and hence are incidental to interstate transmission. For, while the CATV systems themselves are usually located within one community within one State, it is established that the television signals intermediately received, forwarded and delivered by the CATV are interstate commerce.

13. Like ABC, Springfield finds ample basis for Commission jurisdiction over all CATV systems in sections 4(i), 303, and 307(b) of the Communications Act and the principles laid down in cases such as National Broadcasting, American Trucking, and Pennsylvania R. Co., in upholding a regulatory agency's use of the broad powers conferred in its enabling statute to protect the integrity of the regulatory scheme.[5] It requests the Commission to issue a declaratory ruling that all CATV systems are subject to the Commission's jurisdiction and to impose interim operating provisions similar to those adopted in Docket Nos. 14895 and 15233. Springfield claims that prompt action is essential to the success of the all-channel law and expanded use of UHF in small and medium size markets, as the rapid expansion of unregulated "off-the-air" CATV systems is inhibiting investor interest in UHF television and may permanently stunt the growth of UHF. Asserting further that relief accorded only after lengthy proceedings would come too late, Springfield states that interim provisions are required during the pendency of final rule making and, being "procedural" in nature, could be imposed summarily.

14. (c) *The Boise petition for interim relief.* Boise, the licensee of station KBOI–TV in Boise, Idaho, states that it has also filed a petition to deny pending applications for microwave facilities which would relay signals of four stations in Salt Lake City, Utah (approximately 250 miles from Boise), to CATV systems in two communities within KBOI–TV's Grade A contour. Conceding that the remedy there requested would be adequate for its own immediate purpose, Boise says that concern over the broader interests of the public has compelled it also to file the instant petition affirmatively supporting ABC's request and presenting additional considerations.

15. Boise states that by allowing CATV to operate uncontrolled, the Commission is, to a considerable extent abdicating its responsibilities under section 315 (political broadcasts), 317 (sponsorship identification), and 310 (citizen control requirements) of the Communications Act, as well as under its own "fairness doctrine" (controversial issues), enunciated in Report on Editorializing by Broadcast Licensees, Docket No. 8516, 13 FCC 1246, and policies against undue concentration of control of communications media (multiple ownership rules). It urges that these provisions were enacted by Congress or promulgated by the Commission to ensure that the public receives an equal presentation by legally qualified candidates for public office and a fair presentation of controversial issues, is advised of the origin of advertising claims, and is secure in the knowledge that the material it receives has been distributed over facilities controlled and operated by United States citizens, with diversification of ownership. The intent of Congress to protect the viewing public in these respects extends to all viewers, and it "is unrealistic to overlook the fact that, through the community systems" the subscribing members of the public "are receiving and are, in a sense, being served by the programs of the originating station." Clarksburg Publishing Co. v. Federal Communications Commission, 255 F. 2d 511, 517 (C.A.D.C.). CATV operators determine what their subscribers shall view, and being free of all regulation, need not be citizens, can achieve unlimited concentration of control, may censor, advertise without sponsorship identification, and ignore the "fairness doctrine" and equal time requirements for political broadcasts.

16. Boise accordingly urges that Commission jurisdiction over all CATV is necessary to achieve the purposes of sections 310, 315 and 317 of the Communications Act, as well as to effectuate the Commission's fairness and diversification policies, and can validly be asserted under the doctrine of American Trucking Association v. United States, 344 U.S. 298. Alternatively, in the event that the Commission decides against asserting jurisdiction on the basis of its present authority, Boise seeks the imposition of a freeze on all microwave grants for CATV use, or at least those which would extend station signals more than 100 miles from the transmitter, to protect the integrity of the Table of Assignments pending the enactment of legislation in this field and the finalization of administrative rules. It further suggests that translator stations and CATV systems should be accorded like treatment by the Commission; i.e., that translators should not be barred from obtaining microwave facilities if they are made available for CATV use and that the rebroadcast permission required for translators under section 325(a) of the Communications Act should similarly apply to CATV operations.

17. (d). *The Westinghouse petition.* Westinghouse[6] petitions the Commission to exercise plenary jurisdiction over all CATV systems, institute a new fact finding and rule making proceeding directed to all phases of CATV concern, and consolidate the proceedings in Docket Nos. 14895 and 15233, Docket No. 15415 (with respect to CATV ownership by broadcast licensees), and RM 672 (the ABC petition).[7] Specifically, Westinghouse recommends that CATV be limited to those areas outside the overlapping Grade A contours of three or more commercial television broadcast stations, except where it seeks only to provide better reception of local signals in poor reception pockets, and also that CATV be

[4] Springfield is also the licensee of UHF stations in Springfield and Worcester, Mass., and the permittee of a UHF facility in Dayton, Ohio. Previously, on July 23, 1964, Springfield filed a petition for rule making (RM–636) to establish technical standards for CATV operations. This petition, and comments already received, will be placed in this docket for further comment.

[5] Springfield also cites Federal Communications Commission v. Pottsville Broadcasting Co., 309 U.S. 134; Phelps Dodge Corp. v. NLRB, 313 U.S. 177; Houston, East and West Texas Railway Co. v. United States, 234 U.S. 342.

[6] Westinghouse bases its interest in this matter on its position as a licensee of television stations in Boston, Baltimore, Pittsburgh, Cleveland and San Francisco, and on the fact that a CATV microwave common carrier and four CATV systems are owned by its parent corporation, Westinghouse Electric Corp. Westinghouse also asserts an interest on the basis of its status as an independent program producer and distributor.

[7] A "Motion in Support of Petition for Consolidation of Proceedings and in Opposition to Assertion of Jurisdiction over Community Antenna Television Systems," filed by National Community Television Association Inc., on February 19, 1965, apparently also seeks consolidation of Docket No. 15586.

barred for a reasonable period from entering any two-station market where a construction permit has been secured for a third station.

18. Taking the position that CATV in its original role as an extension of service to inadequately served areas is a necessary and desirable adjunct of television broadcasting, Westinghouse states that the principal cause for alarm today is the altered direction of present CATV growth into larger and larger markets—many with three or more existing stations. It points, inter alia, to the six pending applications for CATV franchises in Philadelphia (noting that one of the applicants has announced his intention to spend approximately $40 million in the development of a Philadelphia system); to the contract signed by Mohawk Valley Community Antenna for installation of a CATV system with 60,000 possible connections; and to the award of a CATV franchise for the suburban Philadelphia community of Upper Darby which is intended to be "the nucleus of CATV systems to serve many additional areas in the Delaware Valley." Westinghouse predicts that within the next 3 months applications for CATV franchises will be filed in every major city of the country, and that the final step in the development of CATV will be a national CATV "network" making all the channels of New York, Los Angeles, and perhaps other major cities available from coast to coast.

19. In the view of Westinghouse, the rapid and unregulated growth of CATV in this direction endangers the Commission's blueprint for television service, as set forth in the Sixth Report and Order, and will frustrate Commission policy with regard to UHF. It has been established, Westinghouse claims, that UHF stations have a much better chance of success in the major metropolitan areas where the opportunity for broad advertising support exists. Because of the all-channel receiver legislation, the growth of UHF might be stabilized by the promise of steadily increasing audiences but for investor uncertainty about the trend of CATV. Westinghouse states that if allowed unrestricted growth, CATV will almost certainly impede the development of new stations in markets otherwise capable of supporting them.

20. Westinghouse further states that CATV entry into the larger markets will undoubtedly have an adverse effect upon much of the independent programming now presented by stations in those markets, and on Westinghouse's own activities as an independent program source. In keeping with the Commission's policy of fostering diversity of programming sources, Westinghouse has actively endeavored to develop independent programming, such as the "PM East and PM West" series, the "Mike Douglas" show, "The Steve Allen Show," the Civil War series, and "That Regis Philbin Show." If programs such as these, which ordinarily would be sold to many independent stations across the Nation, are carried by CATV into their markets, many of these stations would be unwilling to purchase the programs. Thus, Westinghouse's economic base, upon which such substantial programming efforts necessarily depend, would gradually be destroyed by inability to make sufficient sales. Assuming a 5-year growth of CATV systems in the East on the scale established during the last 2 years, Westinghouse states that the cumulative adverse effect on independent programming sources in the larger markets would indeed be serious.

21. Westinghouse contends that its proposal for barring CATV from areas which now or in the near future will be served by three commercial stations, would further the public interest and effect a reasonable accommodation of the conflicting interests of the television broadcast and CATV industries, in harmony with the Commission's policy on the development of stations. It urges that the millions of Americans throughout the United States living in areas not served by three or more television signals, and therefore unable to receive the major programming services, should not be compelled to wait indefinitely for service. CATV can fill the television needs of such areas today, and should be allowed to do so, since the larger, more densely populated areas offer more promise for new UHF stations in the near future than low density areas. While CATV would probably have some adverse economic impact on existing stations, this impact is offset in one and two station markets by the substantial benefit accruing to the public in the additional program choices provided by CATV.[10] No corresponding benefit can be demonstrated in three or more station markets, where the contribution of CATV is minimal. In such markets, CATV can offer the viewing public little more than a duplication of programming which either has been or soon will be available via the local stations. Moreover, the possible loss to the public is much greater because of the eroding effect CATV would have on the sources of independent programming. Accordingly, Westinghouse believes that barring CATV from such areas while permitting it to serve all areas not adequately receiving the three major programming sources would provide a tremendous benefit in terms of increased service to millions of Americans, while maintaining CATV in its traditional position as a fill-in service complementary to television broadcasting.

22. Westinghouse strongly urges that it is imperative for the Commission to stay immediately the commencement of operations by CATVs in those areas which now or in the near future will be served by three or more commercial stations pending the adoption of final regulations to this effect. It states that once CATV franchises are granted in the larger markets and construction is commenced pursuant to those grants, the Commission will in fact have lost effective control of television allocations in those areas. Should even a small part of the ambitious $40-million Philadelphia CATV plan be consummated, the practical and legal difficulties which the Commission would encounter in attempting to reverse the situation would be virtually insurmountable. Moreover, prompt Commission action is asserted to be essential to remove the uncertainty as to the future role of CATV which is discouraging investment in new UHF facilities. Westinghouse states that if the Commission fails to act within the reasonably near future, Westinghouse will be obliged to file "protective" applications for CATV franchises in those cities it now serves through television broadcasting when applications are filed by others, even though disagreeing in principle that these adequately served markets should be open to CATV.

23. (e). *The MST petition for rule making.* The MST petition for comprehensive rule making governing all CATV systems renews, with some amplification, the jurisdictional arguments made by the other petitioners. In support of its request for prompt rule making action and a stay of microwave grants pending the adoption of rules, MST urges that "CATV's rapidly accelerating movement away from its historic and proper role as an auxiliary, 'fill-in' service bringing television to areas unable to receive off-the-air broadcast service poses a grave threat to the growth of commercial and educational UHF television, to the integrity of the nationwide system of television allocations and to the continuation, improvement and expansion of free, competitive, local and area television broadcasting generally." MST states that regulation of microwave CATV only, and the imposition of carriage and nonduplication requirements alone, would be insufficient to avert the threat. It asserts that the present trend of CATV development, if unchecked and inadequately regulated, would disrupt the growth of UHF television and frustrate the goals of the all-channel receiver legislation; could lead to the destruction of the system of television allocation through fractionalization, blacking out or impairing local and area broadcasting service; and might prove to be the means of a gradual transition from advertiser-supported free television to pay TV. MST urges that CATV must be confined to its proper role as an auxiliary "fill-in" service, bringing television service into areas which cannot be expected to receive off-the-air broadcast service now or in the near future; for, CATV can appropriately supplement, but must not supplant, television broadcast service.

24. Accordingly, MST requests the Commission to assert jurisdiction over all CATV systems without further delay, pursuant to its existing authority, and to proceed expeditiously towards the adoption of rules which would achieve adequate regulation, since the "longer action is delayed, the more serious the impact of CATV, the more uncertain the rules of the game and the less effective the action." Pending the adoption of rules, MST seeks a stay on microwave grants for CATV use. It states: "Such a stay is warranted here because of the scope of the problem, because conditions are changing at a rapid pace and because

[10] Westinghouse would make an exception for two station markets where a construction permit for a third station has been granted, permitting CATV only in the event the third station was not on-the-air after a reasonable period like 6 months.

there are now no Commission rules dealing in any way with CATV except as to limited technical matters. Additionally, the Commission should put on notice all persons who now operate or who propose to operate CATV systems that CATV operations, whether or not microwave relay is used, will be subject to regulation, and that some CATV systems may be required to modify or cut back their operations."

25. Specifically, MST requests the Commission to initiate rule making of general applicability which would:

(1) Provide appropriate standards to govern the technical quality of signals distributed by CATV;

(2) Prevent CATV from duplicating within a specified period, the programing of television broadcast stations which serve, or which normally would be expected to serve, the community in question, and establish proper classifications to determine the circumstances under which CATV will not duplicate the programing of a station;

(3) Subject to nonduplication requirements, require the CATV system to carry the signal of any station within the Grade B or better contour of which the community served by the CATV is located;

(4) Permit a signal to be carried by CATV only if the community is located within a prescribed signal contour of the station carried, or is closer than a specified distance from the station, or is consistent with a standard combining both distance and signal contours; [11]

(5) Limit, with respect to television and visual material generally, CATV systems to reception and simultaneous retransmission of broadcast signals, without insertions or deletions;

(6) Require the filing of full information with respect to ownership interests in, direct and indirect control of, and officerships and directorships in CATV facilities.

Discussion

26. The above-described petitions raise substantial questions of fundamental importance to the Commission's responsibilities under the Communications Act. We discuss in Part I below the requests for Commission action to extend the requirements of Docket Nos. 14895 and 15233 to all CATV systems, and in Part II the additional questions presented by petitioners' requests for other measures.

PART I

27. Insofar as petitioners urge that the rules governing CATV systems using microwave should extend to all CATV systems, we are in agreement. It has already been determined in the report and order in Docket Nos. 14895 and 15233 that CATV systems should carry local stations without duplication. The considerations underlying our conclusion that this is necessary in the public interest to avoid unreasonable competitive disadvantage and prejudicial effect on existing and potential television broadcast service, apply equally to all CATV systems and need no elaboration here. The main questions are therefore (1) whether the Commission can appropriately proceed on the basis of its present statutory authority and (2) whether there are any special problems of substance or procedures inherent in an extension of the carriage and nonduplication requirements to non-microwave, or so-called "off-the-air" CATV systems.

28. The Commission's jurisdiction to regulate nonmicrowave CATV systems under the present provisions of the Communications Act is obviously subject to reasonable difference of opinion. We have on more than one occasion in the past concluded that the Communications Act, without amendment, probably would not support broad jurisdiction, though not disclaiming jurisdiction to prevent adverse CATV impact on television broadcasting.[12] Moreover, we have previously taken the position that clarifying legislation would be appropriate, even assuming present jurisdiction, and have recommended such legislation to Congress. While the 86th Congress gave extensive consideration to some of the various proposals submitted by the Commission and others, no legislation was enacted and bills introduced in subsequent Congresses received no action.[13] However, neither the Commission's prior pronouncements nor the failure of Congress to act favorably on clarifying proposals is determinative of the legal question of the Commission's jurisdiction and authority over off-the-air CATV systems under the existing provisions of the Communications Act. Helvering v. Clifford, 309 U.S. 311, 337–338; United States v. Price, 361 U.S. 304, 310–313; American Trucking Assoc. v. United States, 344 U.S. 298, 314; Carter Mountain Transmission Corp. v. F.C.C., 321 F. 2d 359, 364 (C.A.D.C.), cert. den. 375 U.S. 951 (1963).

29. Petitioners have made a strong case in support of present jurisdiction. We have carefully reexamined the pertinent provisions of the Communications Act in light of their arguments and the authorities cited. Upon such reconsideration, we conclude, for the reasons set forth in the attached memorandum as to jurisdiction, that CATV systems are engaged in interstate communication by wire to which the provisions of the Communications Act are applicable (sections 2(a) and 3(a), 47 U.S.C. 152(a) and 153(a)). It would further appear that the Commission's statutory powers, particularly under sections 4(i), 303 (f), (h), and (r), include authority to promulgate necessary and reasonable regulations to carry out the provisions of sections 1 and 307(b) of the act and to prevent frustration of the regulatory scheme by CATV operations, irrespective of the use of microwave.[14]

30. For the reasons set forth in the report and order in Docket Nos. 14895 and 15233, it is desirable to extend the requirements there adopted to all CATV systems. We have accordingly decided to institute rule making to that effect. Although no specific rules are appended, it is proposed to make the substantive provisions of the rules adopted in Docket Nos. 14895 and 15233 applicable to all CATV systems. We repeat that two particular issues are raised—(i) the Commission's authority to promulgate such rules and (ii) the problems of substance or procedure posed by rules going to nonmicrowave CATV systems. In the latter respect we also point out that we shall take into account the experience gained, or additional information received, as a result of interim operation under the revised provisions adopted in Docket Nos. 14895 and 15233, prior to their becoming generally applicable. In this way, we shall be in a position (assuming favorable resolution of the jurisdictional issue) to promulgate rules affecting all CATV systems and fully and fairly implementing the public interest both with respect to establishment and maintenance of local broadcast service and the provision of multiple television services. See par. 6, FCC 65—, issued this day.[15]

31. Other matters should be pointed up. While we have initially concluded that we have jurisdiction, we would carefully consider comments addressed to this aspect. The attached memorandum presents the case for jurisdiction—a strong one in our view—and is set out

---

[11] In a policy statement submitted to the Commission, MST suggested the Grade B contour of the station carried, or a distance of 80–90 miles.

[12] See Frontier Broadcasting Co. v. Collier, 16 Pike & Fischer, R.R. 1005; Report and Order in Docket No. 12443, 26 F.C.C. 403; Distribution of Television Programs by CATV Systems, FCC 62–871.

[13] Following the report and order in Docket No. 12443, supra, the Commission recommended that the Congress amend the Communications Act to require CATV systems to obtain the consent of the stations whose signals they transmit, and to carry the signal of the local station (without degradation) upon request. These proposals were embodied in S. 1801 and H.R. 6748, introduced in the 86th Congress, including S. 2653 (providing for the licensing of CATV systems) and S. 2303 (providing for the issuance of certificates of convenience and necessity). The Communications Subcommittee of the Senate Committee on Interstate and Foreign Commerce held hearings on these bills, and several other bills which involved CATV systems, including S. 1739, S. 1741, and S. 1886. On September 8, 1959, the Committee on Interstate and Foreign Commerce reported favorably on S. 2653. S. Rept. 923, 86th Cong., 1st sess. In 1960, following 2 days of debate on the floor of the Senate (106 Cong. Rec. 10326, 10344, 10407, and 10520), S. 2653 was recommitted to the Committee on Interstate and Foreign Commerce by one vote, 106 Congressional Record 10547. As a result, no legislation relating to CATV systems was enacted in the 86th Congress. In the 87th Congress, the Commission proposed S. 1044 and H.R. 6840, which would have expressly authorized the Commission to issue rules for the protection of stations providing locally originated television programs. These bills received no action. The Commission proposed no legislation to the 88th Congress, and no action was taken on any bills.

[14] In initially reaching this conclusion, we have considered the various comments submitted in opposition to the ABC and other petitions.

[15] Since there has been extensive examination of the matters in Docket Nos. 14895 and 15233, a shorter time for filing comments and reply comments on Part I will therefore be scheduled. We are unable to agree with Springfield's contention that immediate relief is procedural in nature or to conclude that summary procedures would be proper.

in order to afford the interested parties a full opportunity to direct their comments to that case. Second, we adhere to our position that clarifying legislation would be desirable, and have no intention of bypassing Congressional action in this field. We are clearly concerned here with new and important questions of policy and law in the communications field. That being the case, the Commission would welcome (i) a Congressional guidance as to policy and (ii) Congressional clarification of our authority, which would lay the troublesome jurisdictional question at rest. It is our understanding that hearings will shortly commence. The information gathered in this proceeding will, we think, be of assistance to the Congress in its consideration of the matter. In short, by instituting this proceeding, we shall gather essential data, both for the Commission and the Congress, and will have conserved valuable time and be in a position to take final effective action in either of two eventualities: (1) Congress has enacted legislation in this field which does not preclude the Commission from promulgating rules along the lines of those adopted in Docket Nos. 14895 and 15233; or (2) no legislation is forthcoming, and the comments in the rule making proceeding lead to the conclusion that the Commission does have present jurisdiction to extend the substantive provisions of the rules adopted in the above dockets to all CATV systems, whether or not they use microwave facilities. In the latter event, we would be remiss in our statutory duties if we had failed to exercise, without undue delay, our existing jurisdiction and authority to promote a public interest in this important area. The rule making proceeding instituted by this Notice will thus be conducted concurrently with legislative consideration, with final Commission decision withheld for an appropriate period to afford Congress an opportunity to act.

32. Third, in the event that it is ultimately determined that the Commission has jurisdiction over all CATV systems, we do not contemplate regulation of such matters as CATV rates to subscribers, the extent of the service to be provided, or the award of CATV franchises. Apart from the areas in which the Commission has specifically indicated concern and until such time as regulatory measures are proposed, no federal preemption is intended. Rather, we view our role as one of cooperating with local franchising authorities and state regulatory commissions to the maximum extent possible, such as by making information available to them, consulting with respect to technical standards for CATV operations, etc.

33. Fourth, in Docket Nos. 14895 and 15233 we decided that the public interest would be served by some accommodation which would permit a CATV system to duplicate the programs of a local station in color where the station transmits only in black and white (report and order in Docket Nos. 14895 and 15233, par. 143). However, we were unable to determine without further information whether this exception should apply across the board or whether the CATV system should be required to make a showing that a certain number or percentage of its subscribers possesses color receiving sets before color duplication would be permitted. Accordingly, comments are requested as to whether the rules should require a threshold showing by the CATV and, if so, what kind of showing would be appropriate. Whether or not the Commission adopts rules going to all CATV systems, the comments received will, in any event, be applicable to microwave CATV systems.

34. We will consider in this proceeding the question of whether there should be some kind of transition period before the carriage provisions are made fully applicable to microwave and nonmicrowave CATV systems with limited channel capacity. It is contemplated that a questionnaire will be mailed to every known CATV operator in the near future seeking specific information to assist in making this determination (see FCC 65– , par. 161). In the event that any CATV operator is inadvertently omitted from such distribution, a copy of the questionnaire will be supplied upon request to the Commission.

35. The proceedings in Docket Nos. 14895 and 15233 were primarily concerned with commercial rather than educational television stations (ETV). While the carriage requirements were made applicable to educational stations, the nonduplication provisions were not, since many of the pertinent considerations are obviously not present in the case of ETV. We recognize, however, that the carriage requirements alone may not be sufficient to promote the sound growth of local educational stations. Accordingly, information is requested in this proceeding as to the nature of any further problems of ETV arising from CATV operations and what Commission action might be appropriate.

36. We are also interested in such questions as whether the carriage and nonduplication requirements should be extended to protect station-owned translators, which are located outside the station's predicted Grade B contour, so as to encourage these off-the-air facilities. If protection were to be accorded such translator facilities, should the rules be along the lines of those adopted for local stations or would different provisions be more appropriate? Conversely, some of the comments in Docket Nos. 14895 and 15233 suggested that station-owned translators should be precluded from duplicating the programs of local stations. Interested persons are invited to address themselves in this proceeding to the question of whether there is a problem warranting action.[36]

PART II

37. The petitions also raise broader questions of substance concerning CATV development, both microwave and nonmicrowave, which were not involved or settled in Docket Nos. 14895 and 15233. Thus, it is asserted (1) that the trend of CATV entry into large population centers like Philadelphia and Cleveland poses a threat to the development of independent stations and program sources, which will not be averted by the carriage and nonduplication requirements and which may frustrate the goal of the all-channel receiver legislation in the communities with the most immediate promise for new UHF facilities. It is also asserted (2) that generalized restrictions on the distance the signal of a television station may be extended beyond the station's contour are necessary in order to prevent the multiplicity of local stations contemplated by the Sixth Report and Order from being ultimately displaced by a CATV "network" distributing the New York, Chicago, and Los Angeles stations nationwide. And it is asserted (3) that CATV systems should be required to select the stations they carry in an order of priority determined by the distance of each station from the system, i.e., that the system should carry nearer stations in preference to more distant ones, so as to avoid "leap-frogging". Next, the petitions raise a question (4) as to whether CATV systems should be limited to receiving and simultaneously retransmitting television broadcast signals without addition or deletion, or should be subject to sections 315, 317 and 310 of the Act and various Commission policies (e.g., the "fairness doctrine" and concentration of control policies). A related question is presented as to the possible development of combined CATV-Pay TV operations and the need for regulation to avoid adverse consequences to the free television broadcast service. And (5), it appears to the Commission that there are other areas of concern.

38. For the reasons next set forth, we believe that inquiry to ascertain the facts in each of these areas is warranted in the public interest. The inquiry will develop information upon which we can determine whether rules or legislative proposals to the Congress are appropriate.

(1) EFFECT ON DEVELOPMENT OF INDEPENDENT (NON-NETWORK) UHF STATIONS

39. Of concern to the Commission is the mushrooming entry of CATV into major centers of population insofar as this affects the opportunities for new UHF stations. The developing pattern of CATV described by petitioners is confirmed by the CATV industry itself as an augury of coming events. The largest CATV group, H&B American Corp., recently advised its stockholders that CATV activity in larger cities is of first importance among significant CATV developments, stating:

> First, and of overriding importance, is the shift of CATV strength to a new locus. The centers of the most intense CATV development now are the very large cities. In the past our attention was focused on the smaller markets and in these we reached about 2 percent of the Nation's television population.
>
> But today we are in the throes of spirited competition for the development of cities such as New York, Philadelphia, Cleveland, Birmingham, Syracuse, Rochester, Wilmington, Norfolk, the entire State of Connecticut and entire counties such as the 37 cities of Camden County, N.J., all of Montgomery and Chester County, Pa., etc. Baltimore will

[36] In this connection, comments are requested on the extent to which networks and other program suppliers, through contracts or otherwise, affirmatively restrict duplication by translators.

be the next large U.S. city to receive multiple CATV franchise applications.

The competition for CATV franchises is unparalled in the history of American communications. It exceeds even the pell-mell scramble for television broadcasting permits that occurred throughout the United States in the first few months after the long television freeze in the late forties and fifties. We learn that new CATV systems are being sought or authorized at the rate of one a day. It is reported that at the end of 1964, 700 cities throughout the Nation were entertaining CATV proposals.

In virtually every instance these authorizations are fought for in intensively competitive proceedings before local governing bodies. The applicants represent a cross section of the most prominent companies in the Nation. For example, in Philadelphia they include the Philadelphia Bulletin, Storer Broadcasting, the Philadelphia Inquirer-Triangle-Annenberg interests, a number of well financed influential local groups and a sprinkling of large CATV organizations.

40. The shift in the locus of CATV activities to the larger cities is cause for concern as to the effect on UHF and the stated goal of Congress in enacting the all-channel receiver legislation to make "provision for at least four commercial stations in all large centers of population" (H. Rept. No. 1559, 87th Cong., 2d sess., p. 3). The following are the underlying Congressional and Commission policy considerations as to development of the UHF:

41. (i) Congress has only recently reaffirmed the goal of "an effective national television" system through use of the UHF channels (id., p. 6; see also p. 3). As the first item in such an effective television system, Congress listed the need "for at least four commercial stations in all large centers of population" (id. at p. 3). Such a fourth station might make possible a fourth national network or the formation of FM-type "networks" in television, thus bringing added diversity to the field. Or, as both House and Senate reports stress, such a station might be "available particularly for local programming and self-expression * * *"—an important need in many markets "because all of the available stations are network affiliates" (H. Rept., p. 3; S. Rept. No. 1526, 87th Cong., 2d sess., p. 4). In short, the fourth commercial station is important both to make our system "truly competitive on a national scale" (H. Rept. p. 3) and to further better local service.

42. (ii) Congress has also determined that the way to achieve the above goal is through effective use of UHF channels, since most large centers of population now have three full network stations and no unoccupied VHF frequencies. While Congress was generally aware of CATV (e.g., the same Senate Committee which considered the all-channel television receiver law in 1962 had held extensive hearings on CATV in 1959), it stated its view that all-channel receiver legislation, because it would develop UHF, "is not only the best but the only practicable way of achieving an adequate commercial and educational system in the United States" (H. Rept. at p. 4; S. Rept. at p. 7). It therefore enacted this "unique" all-channel set legislation, stating the increased price which the consumer will have to pay, at least initially, for all-channel sets "will be well worth the cost if this is the only way in which the American people can be assured of the benefits of television service to the fullest degree" (H. Rept. at pp. 8–9). Since the sale of television sets now exceeds 9,000,000 a year, the American people are now paying those costs, in the substantial amount of many millions each year.

43. (iii) There is every present indication that the all-channel set requirement is having its desired effect, and that the legislative goal is in the process of being realized. There has been greatly increased interest in UHF, with many applications filed—preponderantly for the larger cities. See chart below (Appendix A) showing the markets with no commercial UHF station on the air but with commercial UHF construction permits granted and/or commercial UHF channels applied for. But as Congress noted in 1962, the all-channel law will not smooth the road for the UHF broadcaster overnight; rather, "Substantial time will have to elapse * * * before a large majority of the public becomes equipped with all-channel receivers" (H. Rept., at p. 7; S. Rept., at p. 6).

44. (iv) The Commission also has noted that UHF stations face considerable obstacles during this crucial period. UHF must overcome the psychological factor of its previous failure in intermixed markets. Further, apart from intermixture and the initial limitation on audience pending set conversion or turnover, independent UHF stations in these cities will compete with three network affiliates for audience attention without having the advantage of the attraction of the popular network programming. The Commission therefore has stressed that it will not now take action which would be inconsistent with the Congressional goal and which might jeopardize the "investment in all-channel receivers" (H. Rept., at p. 8) which has been asked of the American public.

45. The question before the Commission is what is the effect of CATV entry into the large markets upon the realization of the above goals for UHF. The problem is perhaps best pointed up by consideration of a specific case—Philadelphia. That city is a prime example of a potential UHF activity, with two UHF independent stations scheduled to go on the air in mid–1965. But Philadelphia is also a prime example of CATV activities, with the CATV applicants in Philadelphia proposing to carry the New York independents. The Philadelphia UHF stations, in competing with three network VHF stations, will be relying solely upon reaching an audience interested in independent (non-network) programming. Since the local competition is not only VHF but enjoys the advantage of popular network programming, unexpected fractionalization of the audience interested in independent programming could be particularly harmful to these independent stations.[17] And, the CATV will be doing just that—bringing in three New York stations which also direct their efforts to the audience interested in independent programming. The crucial question is thus whether the result will be that New York independents will, in effect, be replacing Philadelphia UHF independents, with a concomitant loss of local service or the other advantages noted in par. 41.

46. The Commission needs further information with respect to that question before reaching a conclusion. On the one hand, it is urged that CATV systems in Philadelphia or similar large cities will remain relatively small and do not pose any significant threat to the legislative goal noted in par. 41. See, e.g., Seiden Report, pp. 84–86. Indeed, it is urged that the CATV system will benefit the new UHF operation by bringing the UHF station's signal into homes which do not yet have all-channel receiver sets or where UHF reception might otherwise be difficult.[18] There are, however, indications running counter to the claim that CATV operations will have relatively little impact. Consider, for example, the extensive nature of the CATV operations proposed in some of the large cities (in Philadelphia, we are told that a 40 million dollar CATV investment is contemplated). And, generally, the spirited competition for CATV franchises in major cities by well-financed groups would appear to reflect the confidence of the CATV applicants in their success.[19]

47. It may be, after development and study of the facts and consideration of the arguments of interested persons, that the problem will appear less serious or take on new aspects. Or, it may be that CATV systems should not enter markets like Philadelphia for a period of four or five years—roughly the length of time remaining, which Congress specified as necessary in order to permit the substantial effects of the all-channel set law to be felt (i.e., to permit UHF independent stations to gain a proper foothold). We need further information be-

---

[17] Moreover, the nonduplication time period prescribed in Docket Nos. 14895 and 15233 is geared largely to the schedule of network program distribution, on the premise that network affiliates will have a reasonable opportunity for viable operation if their popular network programming is not subject to CATV duplication. The prohibition against duplication 15 days before or after the local broadcast will provide only partial relief, at best, to independent stations, which rely on non-network programming that is not presented simultaneously, or nearly so, nationwide.

[18] We note, however, in connection with the Philadelphia example which we have been pursuing above, that the franchise application of Jerrold Corp. in Philadelphia does not propose to carry the Philadelphia UHF stations on the CATV system, until such time as it might convert from a 12-channel to a 20-channel system.

[19] We also note, in this regard, that the Seiden Report (pp. 85–6) does not consider the likelihood that the Philadelphia audience which would be attracted to the programming of the New York independent stations is the very heart of the audience at which any independent Philadelphia UHF station must aim. Instead, it is assumed that the potential Philadelphia audience for New York independent stations is like any other part of the Philadelphia audience, from the standpoint of Philadelphia independent stations. This assumption, we think, raises a question as to the correctness of the conclusion reached in the report.

fore reaching a decision and, for that reason, are initiating this inquiry. For, we do know that we would be wholly remiss in our responsibilities if we ignored the problem—and simply permitted events to occur (indeed, often with the aid of our authorizations in the microwave services) which might jeopardize the Congressional goals just set, and the "investment in all-channel receivers" which the public is now making. If such goals are to be changed, that is a matter for Congress (with our task to collect the facts and make appropriate recommendations).

48. Accordingly, inquiry is warranted to determine the conditions under which CATV should be permitted to operate in areas with potential for independent stations. Such areas include not only communities with four or more commercial channel assignments but also those areas where any new station would rely very substantially upon independent programming sources because of overshadowing by three network services from nearby communities. Since we have no preconceived views as to the role of CATV in these areas or what conditions might be appropriate, comments furnishing full information as to pertinent factors and suggesting possible measures for achieving a reasonable accommodation are invited from all interested persons. As a starting point, comments are requested on the measures and proposals urged by petitioners in this respect.

49. While the proceeding is under way, we shall carefully examine applications coming before us which involve the above problem. This means that pending the outcome of this proceeding, applications for microwave facilities to be used to relay the signal of any television station to a CATV system in a community with four or more commercial channel assignments and three or more stations in operation (or with at least two stations in operation and one or more stations authorized or applied for) must be accompanied by a clear and full showing that in the particular circumstances a grant would not pose a substantial threat to the development of independent UHF service in the area. A like showing must be made in applications for microwave facilities to serve a CATV system in a community where, because of its proximity to another community (or communities) having three or more existing commercial stations (e.g., within the Grade B contour of such three or more commercial stations), any new UHF television station would be independent in operation.

50. The foregoing takes up the Commission's concern and course of action as to microwave applications coming before it during the interim period while the proceeding is under way.[25] The same concern is applicable, whether or not the CATV proposes to employ microwave facilities, to situations where there is proposed large-scale CATV operations in major cities with burgeoning UHF independent development. Indeed, we note that the large-scale CATV operations proposed for Philadelphia do not make use of microwave facilities. We therefore request comments on what interim course of action, if any, may be appropriately followed by the Commission in this respect.[26] Since the matter is of such short-term nature (i.e., pending resolution of the proceedings), the shorter time period for comments and reply comments applicable to Part I of the notice shall govern, and we will reach an early determination (see par. 30). In order to be in a position to take definitive action, if appropriate, we specifically invite comment on whether the foregoing course of action as to applications before the Commission should be extended to the nonmicrowave CATV system in the same type of situation (e.g., through a rule which would prohibit the extension of the signal of any television station beyond its Grade B contour into a community with the situation described above (par. 49), without there having been a clear and compelling showing that in the particular circumstances there is no threat to the development or maintenance of independent UHF service in the community). This is also one of the matters which we shall bring to the attention of the Congress. Finally, we believe that franchising authorities will give due regard to the fact that the matter is thus under Commission consideration.

(2) Generalized Restrictions on CATV Extension of Station Signals

51. Both the ABC and the AMST petitions urge that more general action is necessary to prevent fractionalization of audience and potential damage to the nationwide system of television broadcasting through a multiplicity of local stations contemplated by our allocations scheme. Accordingly, they propose general limitations upon a CATV's ability to extend the service area of any station—either in terms of distance from the station or of a specified signal contour or some combination of the two.[27] The issue is particularly raised whether the extension—perhaps for hundreds of miles—of the service of a powerful station operating in a very large market (and thus able to devote more resources to obtaining programming) may have an especially adverse impact upon the development or maintenance of the local stations contemplated by the allocations scheme.

52. We have reached no conclusion that broad scale restrictions along these lines are warranted.[28] Rather, as a part of our general inquiry, we invite comments directed to the proposals.

(3) "Leapfrogging"

53. Petitioners' assertions concerning the so-called "leapfrogging" issue (i.e., the distribution by the CATV system of distant signals in preference to signals of stations located much closer to the system) also raise a matter of future importance. Again we have reached no conclusion on this issue and would simply have the interested parties address themselves to it, both as to the facts and to pertinent policy considerations (and also the proposals which have been advanced by parties such as AMST in this respect). Thus, does it promote "the larger and more effective use of radio in the public interest" (section 303(g)) if the closer signals are carried (on the ground that carriage of such signals would bring a programming service more likely to come closer to meeting the CATV community's interests than those from a distant State)? Is such carriage called for in the public interest in order to extend the service area of UHF stations or VHF stations serving sparsely populated areas—and thus enhance, to some extent, their chances of successful operation and their ability to serve fully the needs and interests of these areas?[29] If a policy along the foregoing lines were to be adopted, should it be accompanied by a concomitant duty, on the part of the station carried, to provide some amount of programming of particular interest to the people in the CATV's community? Cf. Petersburg Television Corp., 10 Pike & Fischer, R.R. 567, 584j–584q; NTA, 22 Pike & Fischer, R.R. 273, 295. What kinds of disruption or other problems would such a requirement pose for CATV systems? If "leapfrogging" rules were adopted, is there a probability that the CATV, in order to meet the rules and still bring in desired distant signals, may distribute so many signals that the fractionalization of the audience aspect becomes much more serious (in the event there are local stations being carried pursuant to the requirements of the rules adopted in Docket Nos. 14895 and 15233)? These questions by no means exhaust the list of pertinent considerations to which we hope the interested parties will address themselves.[30]

---

[25] We have also taken into account, in our decision to adopt this interim policy, the fact that the areas to which the policy will be applicable to do have a significant amount of television service, with additional new UHF service in the offing.

[26] Such comments may discuss the jurisdictional as well as the policy considerations in any particular course of action.

[27] We note in this connection that plans are on the drawing board for a CATV system capacity of 20 channels. Interested persons may wish to address themselves to the question of what effect CATV operations of this or a similar nature might have on local stations in terms of fractionalization of audience, and whether some limitation as to the number of signals carried should be considered.

[28] Certainly, we have not concluded that there should be restrictions which might prevent areas now without the benefit of the basic services of the three national networks from ever obtaining those benefits. But here we note that AMST would appear to urge exceptions to the general restrictions it proposes where a CATV makes a showing of public need for its service.

[29] In this connection, we note our discussion in the report and order in Docket Nos. 14895 and 15233, par. 69, as to increased awareness by rating services and advertisers of CATV penetration and CATV extension of a station's service.

[30] We do not believe it necessary or appropriate, pending resolution of this issue, to hold up all applications for microwave facilities to relay television signals to CATV systems. Rather, parties may bring public interest considerations pertinent to this issue to our attention in connection with specific applications, and we ourselves shall examine such applications with this issue in mind.

(4) Program Origination or Alteration by CATV; Pay-TV or Combined CATV-Pay-TV Operations

54. A fourth area of concern is the question of program origination or alteration by CATV. There was some indication in Docket Nos. 14895 and 15233 that CATV systems may be originating advertising material in some instances and deleting advertising from the station signals carried. We believe that inquiry is appropriate to determine whether CATV systems should be subject to the provisions of sections 315 and 317 of the Communications Act and to a requirement that there be no deletion of the station identification announcement of any signals carried.

55. A related question is presented by the assertion of some of the petitioners that CATV might become a vehicle of Pay-TV or combined CATV-Pay-TV operations. They express a fear that the end result of such operations might be to siphon off top attractions from free television, if the fees obtained from large-scale CATV operations should enable CATV operators to outbid television broadcast stations in the program supply market, or that it might prove to be the means of a gradual transition from advertiser-supported free television to Pay-TV generally. It is further urged that CATV systems should not be permitted to use the distribution of free television signals as a base for engaging in Pay-TV operations. We have been advised of at least one instance where a CATV system has devoted a channel on the cable exclusively to the presentation of its own programming (both CATV originated local programs and films acquired from others).

56. The possible impact of subscription television on free television broadcast service has been a continuing subject of Commission and Congressional concern. See Third Report on Subscription Television, 26 F.C.C. 265; Connecticut Committee Against Pay TV v. Federal Communications Commission, 301 F. 2d 835 (C.A.D.C.), cert. den. 371 U.S. 816. In light of that concern, comments are requested on the feasibility or desirability of Pay-TV operations by CATV, whether any conditions would be required for the protection of the public interest in free television, and what conditions might be appropriate.[38]

57. In short, comments are requested as to whether CATV systems should be limited to simultaneous distribution of station signals without additions or deletions, or whether there should be no limitation on program origination by the CATV, or whether some intermediate position would be appropriate. The Commission has reached no conclusions in this area, and requests comments on all facets of the question. For example, in addition to the two basic issues posed above (i.e., complete restriction or complete freedom as to program origination), there are intermediate issues where comment might be helpful. Thus, comments are invited on the question of whether any such prohibition against CATV program and advertising origination should apply only where the CATV is operating in an area served by one or more television broadcast stations. In the absence of any local station, would the public interest be served if the CATV were not only permitted, but even encouraged, to serve the community by providing an outlet for local self-expression? Where there is but one local station, should the CATV be barred from carrying advertising but permitted and encouraged to present local programming, particularly in the news and public affairs field (on the ground that such local programming provides a needed diversity in a monopoly situation, and poses no threat to the viability of the local station)?

58. Some of the foregoing matters may be appropriate for Commission rulemaking (e.g., the section 315, section 317, or station identification requirements), while others may call for Congressional consideration and resolution. Again, we think that as a matter of "first things first," we should garner the facts and pertinent considerations.

(5) Other Areas of Concern

59. In view of the interest engendered concerning ownership and control of CATV systems, comments are requested on the proposals of petitioners with respect to the regular filing of information as to CATV ownership, control and management (see particularly the Boise and AMST petitions). Would it be appropriate to require the periodic filing of other information, such as the location of the CATV system, the number of subscribers, the signals carried, and the extent of program origination, if any? While much useful information was gathered in connection with Docket Nos. 14895 and 15233, the statistics will soon be out-of-date in a rapidly changing CATV field. Moreover, the questionnaire discussed in paragraph 34 above is occasioned by a lack of specific information with respect to each CATV system. It appears to us that it might be more efficient and serve the convenience of interested persons, as well as the Commission, if pertinent information were regularly supplied by each CATV operator on a current basis.

60. The general matter of cross-ownership of CATV systems and broadcast facilities is being pursued separately in Docket No. 15415. Interested persons are nevertheless invited to address themselves in this proceeding to those aspects of the cross-ownership question which may be pertinent to the overall policy questions raised here. For example, there is the question of whether grants for translator facilities or local stations should be made to CATV systems in communities which have no off-the-air television service where there is no imminent likelihood of an independent applicant. In other words, would the public interest be served by permitting, or even encouraging, CATV systems to provide an off-the-air service to areas which would otherwise have none? Should a similar policy be followed to provide a second off-the-air service, or would cross-ownership afford the CATV licensee an unfair competitive advantage over the independent licensee? (See, FCC 65- , pars. 91, 134.)

61. Another area of great interest to the Commission is the proposal in Dr. Seiden's Report that rulemaking action should be taken to afford potential and existing stations a sufficiently large service area to withstand CATV penetration. This proposal is set out in detail at pages 7, 89–90 of the report and will not, therefore, be repeated here. Comments are requested as to the feasibility and merits of the proposal and the most appropriate way of implementing it. More generally, we are of the opinion that all of our rules and policies should be reexamined to see if they are holding back or encouraging a variety of off-the-air services. In this connection, there is pending a proposal to facilitate the use of translators on allocated channels (FCC 65–129, Docket No. 15858).

62. Some of the petitioners have urged the Commission to establish appropriate technical standards to govern the operation of CATV systems; e.g., with respect to the technical quality of signals distributed by CATV. It appears to us that the matter of technical standards warrants inquiry. As a starting point, comments are requested on the proposals of petitioners (see RM–636 filed by Springfield, p. 6, footnote 6 above, and the proposal of AMST, p. 12, par. 25(1) above).

63. The foregoing discussion has been directed toward CATV operations vis-a-vis television broadcast facilities. It has been brought to our attention that a standard broadcast or FM radio station might face serious audience fractionalization if a CATV system were to bring a number of competing aural signals to its subscribers. Accordingly, comments are requested as to whether any serious problem exists, or is likely to exist, in this area and, if so, the nature of any regulatory measures which might be appropriate to govern the distribution of aural signals by CATV.

64. In sum, inquiry to ascertain the facts and appropriate policies in each of these areas is warranted in the public interest. Nor do we mean to restrict comments just to the above areas. Persons may, of course, point up other facets of this overall problem where remedial action may be appropriate (e.g., whether our policies with respect to other auxiliary services, such as translators or satellites, should be modified). The information developed might be useful to the legislative consideration of CATV and would assist the Commission in making recommendations to the Congress. Moreover, a sufficient basis has been shown to establish that additional rules may be required for adequate protection of the public interest and the regulatory scheme. In the absence of further information, we do not have a sound basis for specific rule proposals. However, in order to be in a position to take any rulemaking action found appropriate at the conclusion of this proceeding, without conducting new proceedings, comments are requested on the proposals of petitioners and the additional matters indi-

[38] This proceeding is in no way intended to be concerned with, or to affect, the question of whether there is a property right in the broadcast signals carried by CATV systems (see FCC 65 , par. 159).

cated above. Counterproposals as to possible alternative measures are also invited. We stress, however, that the main thrust of this proceeding is to gather the facts and to obtain the comments of the parties on the pertinent policy considerations. A further notice will in all likelihood be issued to afford an opportunity for comment on the specific rule proposals of the Commission.

65. The inquiry and proposed rule making are directed toward all CATV systems. The questions raised by petitioners or indicated by the Commission are pertinent to our responsibilities in licensing microwave facilities for CATV use, whether or not rules governing all CATV systems are ultimately adopted. Consideration of nonmicrowave CATV systems is included in order to conserve time and to avoid the necessity for a second proceeding, particularly in the event that no legislation is forthcoming and the comments in this proceeding confirm our initial conclusion that the Commission has present jurisdiction over all CATV systems. Moreover, we believe it appropriate, as requested by one of petitioners, to put all persons who now operate or who propose to operate CATV systems on notice that CATV operations may be subject to Commission regulation of the nature indicated, whether microwave is used or not. All Commission actions taken during the pendency of this proceeding will, of course, be subject to the outcome of the proceeding and any rules adopted will be made appropriately applicable, such as at license renewal time.

66. Accordingly, there is instituted herewith, pursuant to the provisions of section 403 of the Communications Act, an inquiry into the foregoing matters. Authority for the rulemaking proceeding instituted herein is contained in sections 2, 3, 4(i), 303, 307, 308, 309, 310, 315, and 317 of the Communications Act of 1934, as amended.

67. All interested persons are invited to file written comments on the rule amendments proposed in Part I, and on par. 50, on or before June 25, 1965, and reply comments on or before July 26, 1965. Comments on the inquiry and proposed rule making in Part II may be filed on or before August 27, 1965, with reply comments due on or before October 25, 1965. In reaching its decision in this matter, the Commission may also take into account any other relevant information before it, in addition to the comments invited by this notice.

68. After study of the comments, the Commission may, by subsequent order, specify a number of days for the presentation of oral argument on these important matters. It is also contemplated that oral testimony may be solicited, and appropriate orders specifying the nature and time may be issued at a later date. After comments have been received, the Commission may well spin-off portions of the rule making for early decision, since other portions may require lengthy consideration.

69. In accordance with the provisions of § 1.419 of the Commission's rules and regulations, an original and 15 copies of all comments, replies, pleadings, briefs, or other documents filed in this proceeding shall be furnished the Commission.

70. In light of the foregoing: *It is ordered*, That the various requests made in the pleadings filed by American Broadcasting Co., Springfield Television Broadcasting Corp., Boise Valley Broadcasters, Inc., Westinghouse Broadcasting Co., Inc., Association of Maximum Service Telecasters, Inc., Capital Cities Broadcasting Corp., Taft Broadcasting Co., and National Community Television Association, Inc., are granted in part, to the extent reflected in this notice, and are otherwise denied.

Adopted: April 22, 1965.

Released: April 23, 1965.

FEDERAL COMMUNICATIONS COMMISSION,[*]

[SEAL] BEN F. WAPLE, *Secretary.*

APPENDIX A

MARKETS WITH NO COMMERCIAL UHF STATION ON AIR BUT WITH COMMERCIAL UHF CONSTRUCTION PERMITS GRANTED AND/OR COMMERCIAL UHF CHANNELS APPLIED FOR

	Commercial VHF stations on air	Commercial UHF construction permits	Commercial UHF channels applied for	Vacant commercial UHF channels
Atlanta, Ga.	3	1		
Austin, Tex.	1	[1] 2		
Austin-Rochester, Minn.-Mason City, Iowa	3		1	2
Baltimore, Md.	3	1	1	
Birmingham, Ala.	2	1	1	
Charlotte, N.C.	2	[1] 1		
Charleston-Huntington, W. Va.	3	1		
Cincinnati, Ohio	3	1		
Cleveland, Ohio	3		2	
Columbus, Ohio	3		1	
Dallas-Fort Worth, Tex.	4		2	1
Detroit, Mich.	3	[1] 2	1	
Eugene, Oreg.	2			1
Houston-Galveston, Tex.	3	1	3	2
Indianapolis-Bloomington, Ind.	4		1	2
Jacksonville, Fla.	2	1	1	
Joplin, Mo.-Pittsburg, Kans.	2		1	2
Kansas City, Mo.	3		2	
Lubbock, Tex.	2		2	
Meridian, Miss.	1	1		
Miami-Fort Lauderdale, Fla.	3	[2] 2	1	
Midland, Tex.	1	1		
Minneapolis-St. Paul, Minn.	4		1	
New Orleans, La.	3	1	1	2
Norfolk-Portsmouth-Newport News, Va.	3	1		
Oklahoma City, Okla.	3	1		
Philadelphia, Pa.	3	3		
Pittsburgh, Pa.	3	2		
Providence, R.I.	2	1		
St. Louis, Mo.	4	1		1
San Diego, Calif.	2	1	1	
San Francisco-Oakland, Calif.	4	3	1	1
San Jose-Salinas-Monterey, Calif.	2	1		1
Toledo, Ohio	2	1		
Tulsa, Okla.	3	1		1
Ponce, P. R.	2	1	1	1
Total	90	34	25	17

[1] A permittee has gone on the air since Jan. 1, 1965.
[2] There is also a C.P. for a commercial VHF station.

APPENDIX B

COMMISSION'S MEMORANDUM ON ITS JURISDICTION AND AUTHORITY

Section 1 of the Communications Act (47 U.S.C. 151) states that the purpose of the act is the regulation of interstate and foreign commerce in communication by wire and radio, and that to efficiently achieve this purpose, authority over such commerce is centralized in the Commission. Section 2 (47 U.S.C. 152) states that the "provisions of this Act" shall apply to "all interstate communication by wire or radio * * * and to all persons engaged within the United States in such communication. * * *" These terms are defined in section 3 of the act. Section 3(a) defines wire communication as the "transmission of * * * pictures, and sounds of all kinds by aid of wire, cable, or other like connection between the points of origin and reception of such transmission, including all instrumentalities, facilities, apparatus, and services (among other things, the receipt, forwarding, and delivery of communications) incidental to such transmission." Section 3(b) defines communication by radio as the "transmission by radio of * * * pictures, and sounds of all kinds, including all instrumentalities, facilities, apparatus, and services (among other things, the receipt, forwarding, and delivery of communications) incidental to such transmission.".

From the plain language of these definitions, there would seem to be no question but that CATV systems are engaged in interstate communications by wire or radio. They transmit "pictures, and sounds * * * by aid of wire" and are "instrumentalities * * * [used for] * * * the receipt, forwarding, and delivery of communications * * * incidental to such transmission," and hence fall within the definition of wire communication under section 3(a).[1] Moreover, CATV systems constitute interstate communication by wire, since they form a connecting link in the chain of communication between the point of origin (the transmitting station) and reception by the viewing public (the CATV subscriber)—a chain which "is now well established * * * as interstate communication." Capital City Telephone Co., 3 FCC 189, 193 (citing Federal Radio Com-

[*] Statements of Commissioners Bartley and Loevinger concurring in part and dissenting in part filed as part of original document.

[1] It can be argued that CATV systems, in receiving, forwarding, and delivering the station's signal to the viewing public, are the instrumentalities incidental to the transmission of the signal and hence fall within the definition of "communication by radio" in sec. 3(b). However, it is unnecessary to consider this argument in view of the discussion above as to section 3(a) and the

mission v. Nelson Bros. Bond & Mortgage Co., 289 U.S. 266).[5] The law is clear that the mere location of communication facilities wholly within one state does not establish that the communication service rendered over such facilities is an intrastate service, and that a communications service can be interstate or foreign in nature and subject to the Commission's jurisdiction even though all the facilities are located within the confines of one state. California Interstate Telephone Company v. F.C.C., 328 F. 2d 556 (C.A.D.C.); Ward v. Northern Ohio Telephone Co., 300 F. 2d 816 (C.A. 6), cert. den. 371 U.S. 820; Pacific Telatronics, Inc., FCC 64-1180, 4 R.R. 2d 145 (1964). CATV systems are extensions of the interstate service of the television broadcast stations whose signals they carry, Clarksburg Publishing Co., v. F.C.C., 225 F. 2d 511, 517 (C.A.D.C.), and hence constitute "interstate communication by wire" to which the provisions of the Act are applicable (sec. 2(a), 3(a)). See American Trucking Association v. United States, 344 U.S. 298, 311.[6]

With respect to the Commission's authority to adopt the rules proposed in the notice of inquiry and proposed rule making; i.e., the "provisions of [the] Act" that are to be applied to CATV systems, there are the following sections: Sections 1, 4(i), 303 (f), (h), (p), and (r), 307(b), 315, 317, and 508. But the crucial sections would appear to be 1, 307(b), 4(i), and 303 (f), (h), and (r). As the notice and the report and order in Docket Nos. 14895 and 15233 make clear, the existence and growth of CATV systems threaten to impede realization of the Commission's television assignment plan and policies under section 1 and 307(b) (i.e., the Sixth Report and Order).[4] See Carter Mountain Transmission Corp. v. F.C.C., 321 F. 2d 359 (C.A.D.C.), cert. den. 375 U.S. 951 (1963). The Commission has authority under sections 4(i), 303(f), 303(h), and 303(r) to:

Perform any and all acts, make such rules and regulations and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions (4(i));

Make such regulations not inconsistent with law as it may deem necessary to prevent interference between stations and to carry out the provisions of this Act * * * (303(f));

Establish areas or zones to be served by any station (303(h));

Make such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this Act * * * (303(r)).[5]

The foregoing provisions (4(i), 303(f), 303(h), and 303(r)) give the Commission broad rulemaking authority to carry out the provisions of this Act (e.g., sections 1 and 307(b)) with respect to communications or persons coming within the Commission's jurisdiction (including CATV—section 2(a)). Section 303(h), in particular, was affirmatively designed to assist the Commission in effectuating the fair and equitable distribution of broadcast service called for by section 307(b).[6] The Commission's authority to issue rules establishing the area or zone to be served by any station for this purpose includes the power to prevent infringement of the rules by "any person" (sections 312(b) and 502 of the Communications Act). Hence, it clearly encompasses, we believe, the authority to prescribe by rule the conditions under which the station's signal may be extended beyond the area or zone to be served by the originating station, by means of CATV—an "interstate communication by wire" to which the Act's provisions are applicable (sections 2(a) and 3(a)).

Moreover, apart from section 303(h), the general rule making power of the Commission (sections 4(i) and 303(r)) includes authority to take necessary action, not inconsistent with the Act or law, to prevent frustration of section 307(b) by CATV. In National Broadcasting Co. v. U.S., 319 U.S. 190, 215-220, the Supreme Court citing, inter alia, sections 1, 303(f) and 303(r), stated that:

The avowed aim of the Communications Act of 1934 was to secure the maximum benefits of radio to all people of the United States. To that end Congress endowed the Communications Commission with comprehensive powers to promote and realize the vast potentialities of radio * * * In the context of the developing problems to which it was directed, the Act gave the Commission not niggardly but expansive powers.

Under such "expansive" and "comprehensive" powers,[7] the Commission has authority to take reasonable and appropriate action, including promulgation of rules, "as may be necessary" to carry out the provisions of section 307(b)—to ensure that the regulatory scheme embodied in that section (the equitable distribution of service) and section 303 is not frustrated by the operation of CATV, an "interstate communication by wire" to which the Act's provisions are applicable. This authority does not depend on a specific reference to CATV or CATV practices in the Act. United States v. Storer Broadcasting Co., 351 U.S. 192, 203. See also, National Broadcasting Co. v. United States, 319 U.S. 190, 218-219, where the Supreme Court stated:

True enough, the Act does not explicitly say that the Commission shall have power to deal with network practices found inimical to the public interest. But Congress was acting in a field of regulation which was both new and dynamic * * * While Congress did not give the Commission unfettered discretion to regulate all phases of the radio industry, it did not frustrate the purpose for which the Communications Act of 1934 was brought into being by attempting an itemized catalogue of the specific manifestations of the general problems for the solution of which it was establishing a regulatory agency. That would have stereotyped the powers of the Commission to specific details in regulating a field of enterprise the dominant characteristic of which was the rapid pace of its unfolding. And so Congress did what experience had taught it in similar attempts at regulation, even in fields far less fluid and dynamic than radio. The essence of that experience was to define broad areas for regulation and to establish standards for judgment adequately related in their application to the problems to be solved.[8]

To the same effect in other fields, see Houston, East and West Texas Railway Co. v. U.S., 234 U.S. 342; U.S. v. Wrightwood Dairy Co., 315 U.S. 110; U.S. v. Pennsylvania R. Co., 323 U.S. 612; American Trucking Assoc. v. U.S., 344 U.S. 298; Public Service Commission of State of New York v. Federal Power Commission, 327 F. 2d 893, 897 (C.A.D.C.).[9]

The American Trucking case is particularly pertinent. The Supreme Court there sustained ICC rules "aimed at conditions [trip-leasing] which may directly frustrate the success of the regulation undertaken by Congress." After citing sections analogous to section 307(b) in our situation, the Court stated (344 U.S. at 311):

Included in the Act as a duty of the Commission is that "to administer, execute, and enforce all provisions of this part, to make all necessary orders in connection therewith, and to prescribe rules, regulation, and procedure for such administration." And this necessary rule-making power, coterminous

---

scope of the Commission's proposals. Since CATV operations clearly fall within sec. 3(a) and/or sec. 3(b), a determination of their precise status is not essential to the question of the Commission's jurisdiction to proceed as proposed in the notice of inquiry and proposed rule making.

[5] Congressional approval of the Capital City doctrine was expressed in connection with the 1960 amendment to sec. 202(b). See 105 Cong. Rec. at 6256.

[6] It is, we believe, significant that in sustaining the jurisdiction of the Interstate Commerce Commission in American Trucking the Supreme Court relied solely upon provisions of the Motor Carrier Act that are, in the circumstances analogous to secs. 2 and 3 of the Communications Act. Compare 49 U.S.C. 302(a) and 303(a)(19) with 47 U.S.C. 152 and 153 (a) and (b).

[4] In addition, as noted in the notice, there exists the potential to frustrate the purposes of the Act embodied in secs. 303(p), 310, 315, 317, and 508 (and certain Commission regulations).

[5] Sections 303 (f), (h), and (r) are preceded by the following clause: "Except as otherwise provided in this Act, the Commission from time to time, as public convenience, interest, or necessity requires shall—"

[6] Section 303(h) was copied from the Radio Act of 1927 and originated in preceding bills to amend the Radio Act of 1912. For the legislative intent, see hearings on H.R. 5589 before the House Committee on Merchant Marine and Fisheries, 69th Cong., 1st sess., pp. 40-41.

[7] See also, Stahlman v. F.C.C., 126 F. 2d 124, 128 (C.A.D.C.). For the intended comprehensive scope of Commission authority see e.g., the following legislative history of the Radio Act of 1927, which was reenacted in all substantial respects in the Communications Act of 1934 (78 Cong. Rec. 8822-23, 10313-14, 10990): 66 Cong. Rec. 5479; S. Rep. 772, 69th Cong., 1st sess., pp. 2, 3.

[8] The Court, in referring to provisions of the Act such as sections 303 (g) and (r), stated (319 U.S. at 217-218):

"These provisions, individually and in the aggregate, preclude the notion that the Commission is empowered to deal only with technical and engineering impediments to the 'larger and more effective use of radio in the public interest.' We cannot find in the Act any such restriction of the Commission's authority. Suppose, for example, that a community can, because of physical limitations, be assigned only two stations. That community might be deprived of effective service in any one of several ways. More powerful stations in nearby cities might blanket out the signals of the local stations so that they could not be heard at all. One station might dominate the other with the power of its signal. But the community could be deprived of good radio service in ways less crude. One man, financially and technically qualified, might apply for and obtain the licenses of both stations and present a single service over the two stations, thus wasting a frequency otherwise available to the area. The language of the Act does not withdraw such a situation from the licensing and regulatory powers of the Commission, and there is no evidence that Congress did not mean its broad language to carry the authority it expresses."

[9] The Public Service Commission case sustained the power of the Federal Power Commission to issue temporary certificates to protect producers, although section 7(c) of the Federal Power Act expressly authorized such action only to protect customers, on the basis of the broad provisions of section 16 of that Act which are virtually the same as section 303(r) of the Communications Act. The Court stated (327 F. 2d at 897): "All authority of the Commission need not be found in explicit language. Section 16 demonstrates a realization by Congress that the Commission would be confronted with unforeseen problems of administration in regulating this huge industry and should have a basis for coping with such confrontation."

with the scope of agency regulation itself, must extend to the "transportation of passengers or property by motor carriers engaged in interstate or foreign commerce and to the procurement of and the provision of facilities for such transportation" regulation of which is vested in the Commission by 202(a). See also 203(a)(19).

We point out that section 204(a)(6) of the Motor Carrier Act is substantially similar to sections 303(r) and 4(i) of the Communications Act; while in the circumstances, sections 202(a) and 203(a)(19) of that Act are closely analogous to sections 2(b) and 3(a) of the Act. Further, the Court reached its conclusion "despite the absence of specific reference to leasing practices in the Act," stating (at pp. 309–310):

Our function, however, does not stop with a section-by-section search for the phrase "regulation of leasing practices" among the literal words of the statutory provisions. As a matter of principle, we might agree with appellants' contentions if we thought it a reasonable canon of interpretation that the draftsmen of acts delegating agency powers, as a practical and realistic matter, can or do include specific consideration of every evil sought to be corrected. But no great acquaintance with practical affairs is required to know that such prescience either in fact or in the minds of Congress, does not exist. National Broadcasting Co., v. United States, 319 U.S. 190, 219–220; * * * Its very absence, moreover, is precisely one of the reasons why regulatory agencies such as the Commission are created * * * *

See, also, Public Service Commission of New York v. FPC, 327 F. 2d 893, 896–97 (C.A.D.C.).

Of course, the rules must be "reasonably necessary and fairly appropriate" for the protection of the regulatory scheme. Colorado Interstate Gas Co., v. Federal Power Commission, 142 F. 2d 943, 952 (C.A. 10). See also, American Trucking Association, v. U.S., 344 U.S., at 314–315; National Broadcasting Co., v. U.S., 319 U.S. at 219 ("Generalities unrelated to the living problems of radio communication cannot justify exercises of power by the Commission").[10] The report and order in Docket Nos. 14895 and 15233 demonstrates the appropriateness and necessity of rules requiring all CATVs to carry local stations without duplication for a reasonable period. Moreover, the Carter Mountain decision establishes the reasonableness of the requirements. In affirming the Commission, the Court stated that "this does not appear to us an unreasonable condition" but rather "a legitimate measure of protection for the local station and the public interest" (321 F. 2d 359, at 363–364). The notice of inquiry and proposed rule making similarly demonstrates the validity of the Commission's concern as to the effect of CATV on independent stations and programming sources, as well as on the development of UHF in the larger markets.

In conclusion, it would appear that under the broad regulatory powers vested in it by the Communications Act, the Commission presently has jurisdiction over all CATV systems, whether microwave is used or not; that there are pertinent provisions of the Act applicable to the exercise of authority over such systems (in particular, sections 1, 4(i), 303(f), 303(h), 303(r), 307(b), and 403); and that the proposed rules and inquiry represent a reasonable exercise of that authority in the circumstances.

[F.R. Doc. 65–4439; Filed, Apr. 28, 1965; 8:45 a.m.]

[10] The Commission clearly has no jurisdiction over bowling alleys or theatres, for example, as an administrative agency has no greater power than has been conferred by Congress. Stark v. Wickard, 321 U.S. 288; NLRB v. Atlantic Metallic Casket Co., 205 F. 2d 931 (C.A. 5). Cf. Peters v. Hobby, 349 U.S. 331. However, unlike bowling alleys and theatres, CATV systems intercept and extend the signals of television stations, and thus have a uniquely close relationship to the regulatory scheme. Moreover, CATV systems are engaged in interstate communication by wire to which the Act's provisions are expressly applicable.

Notices

DEPARTMENT OF THE TREASURY

Foreign Assets Control

IMPORTATION OF CERTAIN MERCHANDISE DIRECTLY FROM TAIWAN (FORMOSA)

Available Certification by the Government of the Republic of China

Notice is hereby given that certificates of origin issued by the Ministry of Economic Affairs of the Republic of China under procedures agreed upon between that Government and the Foreign Assets Control are now available with respect to the importation into the United States directly, or on a through bill of lading, from Taiwan (Formosa) of the following additional commodity:

Palm raffia hoods (hat bodies).

Inasmuch as certificates are presently available for bakou and hemp hoods (hat bodies) this commodity item will be amended to read:

Hoods (hat bodies), bakou, hemp and palm raffia.

MARGARET W. SCHWARTZ,
Director, Office of Foreign Assets Control.

[F.R. Doc. 65-4528; Filed Apr. 28, 1965; 8:49 a.m.]

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

ALASKA

Notice of Filing of Plat of Survey

APRIL 23, 1965.

1. Plat of survey of the lands described below will be officially filed in the Anchorage District and Land Office, Anchorage, Alaska, effective at 10 a.m., May 15, 1965.

U.S. Survey 3970.
Containing 6,109.90 acres.

2. This land is situated along the shores of the Chakachatna River approximately 20 miles northwesterly of Tyonek, Alaska.

The land ranges from gravel bars and swamp in the lower elevations to rocky bare slopes in the higher elevations. The vegetation consists of birch and spruce timber and alder on the slopes and cottonwoods and willows near the river.

3. Power Site Classification No. 395 dated April 22, 1948, withdraws all public lands lying within one-fourth mile of the Chakachamna Lake and Kenibuna Lake and Chakachatna River from the outlet of Chakachamna Lake to the mouth of Straight Creek, subject to the provisions of section 24 of the Federal Power Act dated June 10, 1920, as amended by section 211 of the Act of August 26, 1935 (16 U.S.C. Supp. 5812) and subject to prior valid existing rights.

4. This survey was made to delineate a tract of land comprising a portion of Power Site Classification No. 395, to exclude it from lands selected by the State of Alaska.

5. Inquiries concerning these lands shall be addressed to the Manager, Anchorage District and Land Office, 555 Cordova Street, Anchorage, Alaska.

JAMES W. SCOTT,
Manager, Anchorage District and Land Office.

[F.R. Doc. 65-4482; Filed, Apr. 28, 1965; 8:47 a.m.]

ALASKA

Small Tract Classification Orders Cancelled in Their Entirety

APRIL 22, 1965.

1. Pursuant to the authority delegated to me by the Alaska State Director and published in 29 F.R. 3015, March 5, 1964, it is hereby ordered that effective immediately the following Small Tract Classification Orders are cancelled in their entirety:

a. No. 46: dated December 19, 1951.
b. No. 54: dated March 5, 1952.
c. No. 77: dated November 20, 1953.
d. No. 81: dated April 14, 1954.
e. No. 131: dated August 3, 1964.
f. No. 132: dated September 2, 1964.
g. No. 133: dated October 1, 1964.
h. No. 134: dated November 9, 1964.
i. No. 135: dated February 25, 1965.

2. The above orders affect approximately 3,003.84 acres of land, all of which is patented or has been selected by the State of Alaska.

JAMES W. SCOTT,
Manager, Anchorage District and Land Office.

[F.R. Doc. 65-4483; Filed, Apr. 28, 1965; 8:47 a.m.]

COLORADO

Notice of Proposed Withdrawal and Reservation of Lands

APRIL 22, 1965.

The Bureau of Reclamation of the Department of Interior has filed an application, Serial No. Colorado C-0125220, for the withdrawal from location and entry under the general mining laws, and the mineral leasing laws except oil and gas, subject to existing valid claims, certain public lands in the Uncompahgre National Forest in the sections and townships described below.

The applicant desires the land for use in connection with the Bostwick Park Project.

For a period of 30 days from the date of publication of this notice, all persons who wish to submit comments, suggestions, or objections in connection with the proposed withdrawal may present their views in writing to the Land Office Manager, Bureau of Land Management, Department of the Interior, Colorado Land Office, Insurance Exchange Building, 910 15th Street, Denver, Colo., 80202.

If circumstances warrant it, a public hearing will be held at a convenient time and place, which will be announced.

The determination of the Secretary on the application will be published in the FEDERAL REGISTER. A separate notice will be sent to each interested party of record.

The lands affected are:

NEW MEXICO PRINCIPAL MERIDIAN, COLORADO

T. 46 N., R. 6 W.,
In sections 17, 20, 21, 28, 29.

Lands proposed to be withdrawn in the above designated areas aggregate approximately 890.0 acres.

IOLA M. CLARK,
Acting Land Office Manager.

[F.R. Doc. 65-4486; Filed, Apr. 28, 1965; 8:47 a.m.]

NEW MEXICO

Notice of Proposed Withdrawal and Reservation of Lands

APRIL 21, 1965.

The Forest Service, U.S. Department of Agriculture, has filed an application, Serial No. New Mexico 0556912, for the withdrawal of lands described below, from all forms of appropriation including the general mining but not the mineral leasing laws. The applicant desires the land for the expansion of their Grants Job Corps Camp which is near the town of Grants, N. Mex.

For a period of 30 days from the date of publication of this notice, all persons who wish to submit comments, suggestions, or objections in connection with the proposed withdrawal may present their views in writing to the undersigned officer of the Bureau of Land Management, Department of the Interior, Manager, Post Office Box 1449, Santa Fe, N. Mex.

The authorized officer of the Bureau of Land Management will undertake such investigations as are necessary to determine the existing and potential demand for the lands and their resources. He will also undertake negotiations with the applicant agency with the view of adjusting the application to reduce the area to the minimum essential to meet the applicant's needs, to provide for the maximum concurrent utilization of the lands for purposes other than the applicant's, to eliminate lands needed for purposes more essential than the applicant's, and to reach agreement on the concurrent management of the lands and their resources.

He will also prepare a report for consideration by the Secretary of the Interior who will determine whether or not the lands will be withdrawn as requested by the Forest Service.

The determination of the Secretary on the application will be published in the FEDERAL REGISTER. A separate notice will be sent to each interested party of record.

If circumstances warrant it, a public hearing will be held at a convenient time and place, which will be announced.

The lands involved in the application are:

NEW MEXICO PRINCIPAL MERIDIAN, NEW MEXICO

T. 11 N., R. 10 W.,
Sec. 24, N½ of lot 1 and all lot 9.

The area described contains 40 acres.

MICHAEL T. SOLAN,
Manager.

[F.R. Doc. 65-4487; Filed, Apr. 28, 1965; 8:47 a.m.]

[Classification 136]

ALASKA

Small Tract Classification

APRIL 23, 1965.

1. Pursuant to the authority delegated to me by the Alaska State Director and published in 29 F.R. 3015, March 15, 1964, I hereby classify the following described lands in the vicinity of Girdwood, Alaska, as suitable for lease and for sale under the Small Tract Act of June 1, 1938 (52 Stat. 609; 43 U.S.C. 682a), as amended.

SEWARD MERIDIAN

U.S. Survey 3043,
Lots 14A, 22A, 29A, 62A, and 69A.
U.S. Survey 3044,
Lots 37A, 39, 40, and 54A.
U.S. Survey 3045,
Lots 46A and 49A.

The areas described aggregate 14.07 acres.

2. Classification of the above described lands by this order is subject to valid existing rights and segregates the lands from all appropriations including locations under the mining laws, except to applications under the mineral leasing laws and to selections by the State of Alaska in accordance with and subject to the limitations and requirements of the Act of July 28, 1956 (Stat. 709; 48 U.S.C. 46-3b), section 6g of the Alaska Statehood Act of July 7, 1958 (72 Stat. 339), and the regulations in 43 CFR 2222.9 (formerly 43 CFR Part 76).

3. The lands were excluded from the Chugach National Forest by Public Land Order No. 797 of January 25, 1952. They have been retained in a reserve status pending an order of classification to be issued by an authorized officer opening the lands to application under the Small Tract Act of June 1, 1938 (52 Stat. 609; 43 U.S.C. 682a).

4. The lands classified by this order will not become subject to application under the Small Tract Act of June 1, 1938 (52 Stat. 609; 43 U.S.C. 682a) as amended, until it is so provided by authorized officer opening the lands to applications or bids.

JAMES W. SCOTT,
Manager, Anchorage District and Land Office.

[F.R. Doc. 65-4494; Filed, Apr. 28, 1965; 8:48 a.m.]

DEPARTMENT OF COMMERCE

Maritime Administration

DELTA STEAMSHIP LINES, INC., AND FARRELL LINES, INC.

Notice of Application

Notice is hereby given that Delta Steamship Lines, Inc., and Farrell Lines, Inc., have filed applications dated March 26, 1965, and April 1, 1965, respectively, for waivers under the provisions of section 804 of the Merchant Marine Act, 1936, as amended, for permission to purchase minimal shares of Compagnie Maritime Congolaise (CMC) and to have designated company representatives become members of the Board of Directors of CMC.

The Republic of Congo is desirous of having international representation in CMC and has invited Delta and Farrell to take token ownership in its steamship line and to furnish, where possible, some small degree of managerial assistance. The Republic of Congo intends to develop CMC as its national steamship line and to operate its national flag vessels in the United States/West African trade, among others.

Any person, firm or corporation having an interest under section 804 in such application who desires to offer views and comments thereon for consideration by the Maritime Administrator, should submit same in writing, in triplicate, to the Secretary, Maritime Administration, Washington, D.C., 20235, by close of business on May 14, 1965. The Maritime Administrator will consider these views and take such action with respect thereto as may be deemed appropriate.

Dated: April 28, 1965.

By order of the Maritime Administrator.

JAMES S. DAWSON, Jr.,
Secretary.

[F.R. Doc. 65-4593; Filed, Apr. 28, 1965; 11:48 a.m.]

National Bureau of Standards

STANDARD FREQUENCY AND TIME TRANSMISSIONS FROM NBS STATIONS

WWV, Greenbelt, Md.; WWVH, Maui, Hawaii; WWVL, Fort Collins, Colo.; and WWVB, Fort Collins, Colo.

Because of the wide interest in the presently available WWV frequency values and as a result of improved monitoring and control techniques, the National Bureau of Standards will now furnish frequency correction data on all of its broadcasts from radio stations WWV, WWVH, WWVB, WWVL. These data, starting with the values for January 1, 1965, will be published in the Proceedings of the IEEE, published monthly by the Institute of Electrical and Electronics Engineers.

Frequency. The frequencies of the National Bureau of Standards radio stations WWV and WWVH are kept in agreement with each other within the following limits: Daily fractional frequency offset values for WWV, Greenbelt, Md., are controlled to be within $\pm 5 \times 10^{-11}$ of the nominal value, -150×10^{-10} in 1965, offset from the United States Frequency Standard (USFS) at Boulder, Colo. Daily fractional frequency offset values for WWVH, Maui, Hawaii, are controlled to be within $\pm 1 \times 10^{-10}$ of the same nominal value. The values for WWV and WWVH are 5-day running averages of the daily 24-hour values. The averaging period ends at 1800 UT for WWV and at 2000 UT for WWVH. The actual fractional frequency offset values are derived from improved measurement methods based on transmissions from NBS stations WWVL (20 kHz) and WWVB (60 kHz). The published values for WWV and WWVH have an uncertainty of $\pm 2 \times 10^{-11}$. The values for WWVL and WWVB are daily 24-hour values for the period ending at 1800 UT for each day listed. All values are traceable to the USFS.

Time. The time signals of WWV and WWVH are kept in agreement with each other. Since these signals are locked to the frequency of the transmissions, a continuous departure from UT2 may occur. Differences are determined and published by the U.S. Naval Observatory. The time signals are maintained in close agreement with UT2 by offsetting the broadcast frequency from the USFS at the beginning of each year when necessary and making step adjustments in phase on the first of each month when necessary. Because of the offset in frequency now in use, the time intervals are longer than one second (150 parts in 10^{10} for 1965). This system was initiated on 1 January 1960. The time signals of WWVB give, since 1 January 1965, the international unit of time—the second. These signals are also locked to the broadcast frequency, which in this case is not offset. A continuous departure from UT2 also occurs, and the differences are coded on the broadcasts. The time signals are also maintained in close agreement with UT2 by making step adjustments in the phase on the first of a month when necessary. Experimental studies are being made to determine the most effective technique for transmitting time from WWVL.

A. V. ASTIN,
Director.

[F.R. Doc. 65-4472; Filed, Apr. 28, 1965; 8:46 a.m.]

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE

Office of Education

INSTITUTIONS OF HIGHER EDUCATION

Cutoff Date for Filing Applications for Federal Capital Contributions

April 30, 1965, is hereby established as the date on or before which all applications for Federal Capital Contributions from States' allotments or reallotments under title II of the National Defense Education Act of 1958 (Public Law 88-864, as amended, 72 Stat. 1583, 20 U.S.C. 421) must be filed by institutions of higher education in order to be considered for payments from the appropriation for such purpose in the Department of Health, Education, and Welfare Appropriation Act, 1966.

All applications shall be submitted to: Student Loan Branch, Division of Student Financial Aid, Bureau of Higher Education, Office of Education, Department of Health, Education, and Welfare, Washington, D.C., 20202.

Applications received by mail will be considered filed as of the date of postmark.

Forms for application may be obtained from the above address.

Dated: April 16, 1965.

[SEAL] FRANCIS KEPPEL,
U.S. Commissioner of Education.

Approved: April 23, 1965.

ANTHONY J. CELEBREZZE,
Secretary of Health, Education, and Welfare.

[F.R. Doc. 65-4510; Filed, Apr. 28, 1965; 8:49 a.m.]

ATOMIC ENERGY COMMISSION

[Docket No. 50-237]

COMMONWEALTH EDISON CO.

Notice of Application for Construction Permit and Facility License

Please take notice that Commonwealth Edison Co., 72 West Adams Street, Chicago, Ill., pursuant to section 104b of the Atomic Energy Act of 1954, as amended, has filed an application dated April 15, 1965, for a construction permit and facility license to authorize construction and operation of a single cycle, forced circulation, boiling water nuclear reactor at its Dresden Station Site in Grundy County, Ill. The technical information filed with the application contains site information and a summary description of the proposed facility. The applicant has stated that the additional technical information needed to complete the application for a construction permit will be submitted approximately May 15, 1965.

The proposed reactor, designated by the applicant as the Dresden Nuclear Power Station (DNPS) Unit 2, is to be located adjacent to and west of the existing Dresden Nuclear Power Station Unit 1. The DNPS Unit 2 will have a design capacity of approximately 2600 megawatts (thermal), but will be operated initially at 2300 megawatts (thermal).

A copy of the application is available for public inspection in the Commission's Public Document Room, 1717 H Street NW., Washington, D.C.

Dated at Bethesda, Md. this 22d day of April 1965.

For the Atomic Energy Commission.

R. L. DOAN,
Director, Division of Reactor Licensing.

[F.R. Doc. 65-4493; Filed, Apr. 28, 1965; 8:48 a.m.]

[Docket No. 115-1]

RURAL COOPERATIVE POWER ASSOCIATION

Elk River Demonstration Reactor Program Project; Notice of Proposed Issuance of Operating Authorization

Notice is hereby given pursuant to § 115.46(b), 10 CFR Part 115, that unless within thirty (30) days after publication of this notice in the FEDERAL REGISTER, a request for a hearing is filed with the U.S. Atomic Energy Commission by the applicant, or a petition for leave to intervene is filed by any person whose interest may be affected, as provided by and in accordance with the Commission's "Rules of Practice", 10 CFR Part 2, the Commission proposes to issue an operating authorization (substantially as set forth below) to the Rural Cooperative Power Association, which would authorize the Rural Cooperative Power Association to use and operate the Elk River reactor at powers up to 58.2 megawatts thermal. This authorization was requested by the Rural Cooperative Power Association in its application dated October 15, 1964, and supplements thereto.

The Elk River reactor is located near the village of Elk River, Minn. The indirect cycle, natural circulation, boiling water reactor was constructed by Allis-Chalmers Manufacturing Co. for the Atomic Energy Commission and has been operated by Allis-Chalmers Manufacturing Co. since November 6, 1962, under a provisional operating authorization, which will be superseded by the proposed operating authorization to the Rural Cooperative Power Association.

Pursuant to regulations contained in Title 10, CFR, Chapter 1, Part 115 and having considered the record in this matter, the Commission finds that:

A. The application for this operating authorization meets the standards and requirements of the Commission's regulations;

B. There is reasonable assurance (i) that the activities authorized by this operating authorization can be conducted without endangering the health and safety of the public, and (ii) that such activities will be conducted in compliance with the rules and regulations of the Commission;

C. The Rural Cooperative Power Association is technically qualified to engage in the activities authorized by this operating authorization in accordance with the rules and regulations of the Commission;

D. The issuance of this operating authorization is not inimical to the health and safety of the public.

For further details with respect to this proposed issuance, see (1) the application filed by Rural Cooperative Power Association dated October 15, 1964, and supplements thereto dated October 17, 1964, and January 6, 1965, (2) the report of the Advisory Committee on Reactor Safeguards (ACRS) dated March 17, 1965, (3) a related safety evaluation prepared by the Research and Power Reactor Safety Branch of the Division of Reactor Licensing, and (4) the Technical Specifications designated as Appendix "A" to the authorization, which will be available for public inspection at the Commission's Public Document Room, 1717 H Street NW., Washington, D.C. A copy of the safety evaluation of the Division of Reactor Licensing and a copy of the report of the ACRS dated March 17, 1965, may be obtained at the Public Document Room, or upon request addressed to the Atomic Energy Commission, Washington, D.C., 20545, Attention: Director, Division of Reactor Licensing.

Dated at Bethesda, Md., this 27th day of April 1965.

For the Atomic Energy Commission.

R. L. DOAN,
Director,
Division of Reactor Licensing.

[No. DPRA-3]

PROPOSED OPERATING AUTHORIZATION

1. This provisional operating authorization applies to the indirect cycle, natural circulation, boiling water reactor owned by the U.S. Atomic Energy Commission (hereinafter referred to as the "Commission") and to be operated by Rural Cooperative Power Association (hereinafter referred to as "RCPA") under contract with the Commission. The reactor is located approximately one-quarter mile from the village of Elk River, Minn., and is described in the Final Hazards Report, dated July 8, 1960, as amended (hereinafter referred to as the "final hazards report").

2. Subject to the conditions and requirements incorporated herein, the Commission hereby authorizes RCPA, pursuant to the Atomic Energy Act of 1954, as amended (hereinafter referred to as the "Act"), and Title 10, Code of Federal Regulations, Chapter 1, Part 115, "Procedures for Review of Certain Nuclear Reactors Exempted from Licensing Requirements," to use and operate the Elk River reactor.

3. This authorization shall be deemed to contain and be subject to the conditions specified in §§ 115.42 and 115.47 of Part 115 and is subject to all applicable provisions of the Act and rules, regulations, and orders of the Commission now or hereafter in effect; and is subject to the additional conditions specified below:

A. RCPA shall not operate the reactor at power levels in excess of 58.2 megawatts thermal.

B. *Technical specifications.* The technical specifications contained in Appendix "A" hereto are hereby incorporated into this au-

thorization. Except as hereinafter provided, RCPA shall operate the facility in accordance with the technical specifications. No changes shall be made in the technical specifications unless authorized by the Commission as provided in § 115.47 of Part 115.

C. *Records.* In addition to those otherwise required under this authorization and applicable regulations, RCPA shall keep the following records:

(1) Reactor operating records, including power levels and period of operations at each power level.

(2) Records showing the radioactivity released or discharged into the air or water beyond the effective control of RCPA as measured at or prior to the point of such release or discharge.

(3) Records of radioactivity levels at both on-site monitoring stations and off-site sampling stations.

(4) Records of scrams, including reasons therefor.

(5) Records of principal maintenance operations involving substitution or replacement of facility equipment or components and the reasons therefor.

(6) Records of facility tests and measurements performed pursuant to the requirements of the technical specifications.

D. *Reports.* (1) In addition to reports otherwise required under this authorization and applicable regulations, RCPA shall make an immediate report in writing to the Division of Reactor Licensing of any indication or occurrence of a possible unsafe condition relating to the operation of the facility including, without implied limitations any accidental release of radioactivity, whether or not resulting in personal injury or property damage or exposure above permissible limits.

(2) RCPA shall immediately report to the Division of Reactor Licensing in writing any substantial variance disclosed by operation of the facility from performance specifications of the facility contained in the technical specifications and shall submit a report of the results of all tests required in the technical specifications within 45 days after completion of each test.

(3) RCPA shall report to the Commission in writing significant changes in operating procedures, plant organization, and transient or accident analyses, as described in the final hazards report.

(4) RCPA shall make a report in writing to the Division of Reactor Licensing at the end of each monthly period which summarizes the following:

(a) Total number of hours of operation and total energy generated by the reactor.

(b) Number of shutdowns of the reactor with a brief explanation of the cause of each shutdown.

(c) Operating experience including a summary of the number of malfunctions in the control and safety systems with brief explanation of each.

(d) Measurements and tests performed relative to the reactor core and results thereof.

(e) Principal maintenance performed and replacements made in the reactor and associated systems including a report on various tests performed on components of the reactor and associated systems.

(f) A description of the tests performed to demonstrate that the leak rates meet the technical specifications, the results of such tests, and a description of any necessary corrective measures taken to meet the requirements of the technical specifications.

(g) Changes made in the facility design and operating procedures pursuant to Section 115.47.

(h) Significant changes made in plant organization.

(i) Radiation levels recorded at both on-site monitoring stations and off-site sampling stations.

4. This authorization shall be effective as of the date of issuance and, unless extended for good cause shown, shall expire ten (10) years from the said date; provided, however, that this authorization shall expire in any event upon termination of the contract between RCPA and the Commission for operation of the reactor.

5. Effective with its issuance, this authorization terminates and supersedes Provisional Operating Authorization DPRA-3, as amended, heretofore issued for Allis-Chalmers Manufacturing Co.

For the Atomic Energy Commission.

Director,
Division of Reactor Licensing.

[F.R. Doc. 65-4565; Filed, Apr. 28, 1965; 8:50 a.m.]

CIVIL AERONAUTICS BOARD

[Docket No. 15838; Order E-22079]

CERTAIN INDIRECT AIR CARRIERS TO PERFORM CONTRACTS FOR DEPARTMENT OF DEFENSE

Order Granting Temporary Relief

Adopted by the Civil Aeronautics Board at its office in Washington, D.C., on the 26th day of April 1965.

At the request of the Department of Defense (DOD), the Board on March 9, 1965 (Order E-21883), granted temporary relief from certain provisions of the Federal Aviation Act of 1958 to a number of persons who had been operating without Board authorization as indirect air carriers of used household goods pursuant to DOD contracts. The relief, which allowed these carriers an opportunity to apply for operating authorizations to engage in indirect air transportation as air freight forwarders of used household goods,[1] was granted upon the condition that such carriers file applications in accordance with the provisions of Parts 296 and/or 297 of the Board's economic regulations on or before April 15, 1965. The relief granted each applicant terminates August 16, 1965, or upon the date the application is granted, denied, or dismissed, whichever occurs first.

By letter dated April 6, 1965, the Department of the Army (acting on behalf of DOD) requests that two additional carriers be granted similar relief. The Department of the Army states that, when DOD made its request for relief, two carriers were inadvertently omitted from the list of carriers authorized to transport used household goods for DOD.

In view of the foregoing, and for the reasons given in Order E-21883, the Board finds that it is in the public interest to grant the requested temporary relief.[2]

Accordingly, it is ordered, That:

1. Pursuant to sections 101(3) and 204 of the Federal Aviation Act of 1958, as amended, each person listed in appendix A attached below is relieved from the provisions of Title IV and section 610(a)(4) of the Act from the date of this order through August 16, 1965, or until the date the application of such person for Board authorization is granted, denied, or dismissed, whichever occurs first, to the extent necessary to transport by air used household goods of personnel of the Department of Defense upon tender by the Department.

2. The relief granted in ordering paragraph 1 will not be renewed or extended beyond the termination date of August 16, 1965, for any applicant who has not been granted operating authorization by that date; *Provided:* That the Board may extend such relief in cases in which an applicant has filed timely response to requests for supplemental information necessary to process his application.

3. The transportation services performed pursuant to the authority granted herein do not constitute an activity of a continuing nature within the meaning of section 9(b) of the Administrative Procedure Act, 5 U.S.C. 1008(b).

4. This order may be amended or revoked at any time, in the discretion of the Board, without hearing.

5. Copies of this order, copies of Order E-21883, copies of Parts 296, 297, and 302 of the Board's regulations, and application forms shall be served upon the persons listed in appendix A.

6. Copies of this order shall be served on the Military Traffic Management and Terminal Service, U.S. Army.

This order will be published in the FEDERAL REGISTER.

By the Civil Aeronautics Board.

[SEAL] HAROLD R. SANDERSON,
Secretary.

APPENDIX A

Container Transport International, Inc.,
17 State Street,
New York, N.Y.

HC&D Moving & Storage,
800 South Street,
Honolulu, Hawaii.

[F.R. Doc. 65-4514; Filed, Apr. 28, 1965; 8:49 a.m.]

[1] The term "used household goods" means personal effects (including unaccompanied baggage) and property used or to be used in a dwelling, when a part of the equipment or supply of such dwelling, but specifically excludes (1) furniture, fixtures, equipment, and the property of stores, offices, museums, institutions, hospitals, or other establishments, when a part of the stock, equipment, or supply of such stores, offices, museums, institutions, hospitals or other establishments, and (2) objects of art (other than personal effects), displays, and exhibits.

[2] Inasmuch as the carriers relieved by this order are presently performing the service covered by the exemption, the order will not result in a grant of authority to persons not previously so engaged. Under the circumstances, the Board concludes that issuing this limited relief without prior notice will not prejudice other carriers. The Board will, of course, consider timely filed petitions for reconsideration of this order. Nothing in this order should be construed as a determination of the final disposition to be made of applications for air freight forwarder authority filed, or to be filed.

FEDERAL COMMUNICATIONS COMMISSION

[Docket Nos. 15856, 15857; FCC 65M-501]

CHAPMAN RADIO & TELEVISION CO. AND ANNISTON BROADCASTING CO.

Order Continuing Hearing

In re applications of William A. Chapman and George K. Chapman d/b as Chapman Radio & Television Co., Anniston, Ala., Docket No. 15856, File No. BPCT-3317; Anniston Broadcasting Co., Anniston, Ala., Docket No. 15857, File No. BPCT-3320; for construction permit for new television broadcast station (Channel 70).

On the unopposed oral request of counsel for Anniston Broadcasting Co., because of the pendency of a pleading which may obviate a hearing: *It is ordered*, This 22d day of April 1965, that the hearing is rescheduled from April 28 to June 22, 1965, subject to action on that pleading.

Released: April 26, 1965.

FEDERAL COMMUNICATIONS COMMISSION,
[SEAL] BEN F. WAPLE,
Secretary.

[F.R. Doc. 65-4499; Filed, Apr. 28, 1965; 8:48 a.m.]

[Docket Nos. 15751-15766; FCC 65M-505]

KFOX, INC. (KFOX), ET AL.

Order Continuing Hearing

In re applications of KFOX, Inc. (KFOX), Pasadena, Calif., Docket No. 15751, File No. BP-16149; Charles W. Jobbins, Costa Mesa-Newport Beach, Calif., Docket No. 15752, File No. BP-16157; Radio Southern California, Inc., Pasadena, Calif., Docket No. 15753, File No. BP-16158; Goodson-Todman Broadcasting, Inc., Pasadena, Calif., Docket No. 15754, File No. BP-16159; Orange Radio, Inc., Fullerton, Calif., Docket No. 15755, File No. BP-16160; Pacific Fine Music, Inc., Whittier, Calif., Docket No. 15756, File No. BP-16161; The Bible Institute of Los Angeles, Inc., Pasadena, Calif., Docket No. 15757, File No. BP-16162; C. D. Funk and George A. Baron, a partnership d/b as Topanga Malibu Broadcasting Co., Topanga, Calif., Docket No. 15758, File No. BP-16164; California Regional Broadcasting Corp., Pasadena, Calif., Docket No. 15759 File No. BP-16165; Storer Broadcasting Co., (KGBS), Pasadena, Calif., Docket No. 15760, File No. BP-16166; Mitchell B. Howe, Peter Davis, Edwin M. Dillhoefer and C. Hunter Shelden d/b as Pasadena Civic Broadcasting Co., Pasadena, Calif., Docket No. 15761, File No. BP-16167; Robert S. Morton, Arthur Hanisch, Macdonald Carey, Ben F. Smith, Donald C. McBain, Robert Breckner, Louis R. Vincenti, Robert C. Mardian, James B. Boyle, Robert M. Vaillancourt and Edwin Earl, d/b as Crown City Broadcasting Co., Pasadena, Calif., Docket No. 15762, File No. BP-16168; Pasadena Community Station, Inc., Pasadena, Calif., Docket No. 15763, File No. BP-16170; Voice of Pasadena, Inc., Pasadena, Calif., Docket No. 15764, File No. BP-16172; Western Broadcasting Corp., Pasadena, Calif., Docket No. 15765, File No. BP-16173; Pasadena Broadcasting Co., Pasadena, Calif., Docket No. 15766, File No. BP-16174; for construction permits.

To formalize change of procedural dates agreed to herein at the prehearing conference held on April 22, 1965: *It is ordered*, This 22d day of April 1965 that:

(1) The date for exchange of preliminary drafts of the applicant's technical engineering exhibits is extended from April 29, 1965, to May 24, 1965;

(2) The date for exchange of all exhibits to be offered in evidence in the presentation of the direct affirmative cases is extended from June 10, 1965, to June 28, 1965;

(3) The date for notification of witnesses to be called for cross-examination is extended from June 21, 1965, to July 6, 1965;

(4) The date of hearing is extended from June 28, 1965, to July 12, 1965, commencing at 10 a.m. in the offices of the Commission at Washington, D.C.

Released: April 26, 1965.

FEDERAL COMMUNICATIONS COMMISSION,
[SEAL] BEN F. WAPLE,
Secretary.

[F.R. Doc. 65-4500; Filed, Apr. 28, 1965; 8:48 a.m.]

[Docket Nos. 15944-15946]

OCEAN COUNTY RADIO BROADCASTING CO. ET AL.

Order Designating Applications for Consolidated Hearing on Stated Issues

In re applications of Ocean County Radio Broadcasting Co., Toms River, N.J., Docket No. 15944, File No. BPH-4078, Requests: 92.7 mc, #224; 3 kw; 300 ft.; Seashore Broadcasting Corp., Toms River, N.J., Docket No. 15945, File No. BPH-4632, Requests: 92.7 mc, #224; 3 kw; 300 ft.; Beach Broadcasting Corp., Toms River, N.J., Docket No. 15946, File No. BPH-4638, Requests: 92.7 mc, #224; 3 kw (H); 3 kw (V); 300 ft.; for construction permits.

The Commission, by the Chief of the Broadcast Bureau under delegated authority, considered the captioned applications on April 21, 1965;

It appearing, that, except as indicated by the issues specified below, each of the applicants is legally, technically, financially, and otherwise qualified to construct and operate as proposed; and

It further appearing, that the above-captioned applications are mutually exclusive in that concurrent operation would result in mutually destructive interference; and

It further appearing, that, in view of the foregoing, the Commission is unable to make the statutory finding that a grant of the subject applications would serve the public interest, convenience, and necessity, and is of the opinion that the applications must be designated for hearing in a consolidated proceeding on the issues set forth below.

It is ordered, That, pursuant to section 309(e) of the Communications Act of 1934, as amended, the applications are designated for hearing in a consolidated proceeding at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine which of the operations proposed in the above-captioned applications would better serve the public interest, in light of the evidence adduced and the records made with respect to the significant differences between the applicants as to:

(a) The background and experience of each having a bearing on the applicant's ability to own and operate the proposed FM broadcast station.

(b) The proposals of each of the applicants with respect to management and operation of the proposed station.

(c) The programming services proposed in each of the applications.

2. To determine, in the light of the evidence adduced pursuant to the foregoing issue, which of the applications should be granted.

It is further ordered, That, to avail themselves of the opportunity to be heard, the applicants herein, pursuant to § 1.221(c) of the Commission rules, in person or by attorney, shall, within 20 days of the mailing of this order, file with the Commission in triplicate, a written appearance stating an intention to appear on the date fixed for the hearing and present evidence on the issues specified in this Order.

It is further ordered, That the applicants herein shall, pursuant to section 311(a)(2) of the Communications Act of 1934, as amended, and § 1.594 of the Commission's rules, give notice of the hearing, either individually or, if feasible and consistent with the rules, jointly, within the time and in the manner prescribed in such rule, and shall advise the Commission of the publication of such notice as required by § 1.594(g) of the rules.

It is further ordered, That, the issues in the above-captioned proceeding may be enlarged by the Examiner, on his own motion or on petition properly filed by a party to the proceeding, and upon sufficient allegations of fact in support thereof, by the addition of the following issue: To determine whether the funds available to the applicant will give reasonable assurance that the proposals set forth in the application will be effectuated.

Released: April 26, 1965.

FEDERAL COMMUNICATIONS COMMISSION,
[SEAL] BEN F. WAPLE,
Secretary.

[F.R. Doc. 65-4501; Filed, Apr. 28, 1965; 8:48 a.m.]

[Docket Nos. 15965, 15966; FCC 65-321]

PARISH BROADCASTING CO. AND CLINTON BROADCASTING CO.

Order Designating Applications for Consolidated Hearing on Stated Issues

In re applications of James A. Gatewood tr/as Parish Broadcasting Co.,

Franklinton, La., Docket No. 15965, File No. BP-16360, Requests: 1110 kc, 1 kw, day, class II; William E. Hardy and James E. Myers d/b as Clinton Broadcasting Co., Clinton, Miss., Docket No. 15966, File No. BP-16425, Requests: 1110 kc, 1 kw, day, class II; for construction permits.

At a session of the Federal Communications Commission held at its offices in Washington, D.C., on the 21st day of April 1965;

The Commission having under consideration the above-captioned and described applications;

It appearing, that, except as indicated by the issues specified below, both of the applicants are legally, technically, and otherwise qualified to construct and operate as proposed but that neither of the applicants heretofore has demonstrated the requisite financial qualifications; and

It further appearing, that the following matters are to be considered in connection with the aforementioned issues specified below:

1. Section 73.24 of the Commission's rules provides, inter alia, that an authorization for a new standard broadcast station will be issued only after a satisfactory showing has been made that the assignment would meet the separation criteria set forth in § 73.37. For applications which propose to establish the first standard broadcast facility in a community—as do the applications herein—§ 73.37 specifies a cochannel separation of the 1 mv/m and 0.05 mv/m contours. Clinton, Miss., and Franklinton, La., are approximately 100 miles apart and a grant of both applications would result in prohibited overlap of the respective 1 mv/m and 0.05 mv/m contours. Thus, since a grant of one of the applications would effectively preclude a grant of the other, they are mutually exclusive and must be consolidated for hearing.

2. An examination of the Parish Broadcasting Co. application shows that funds of approximately $18,975 would be needed to cover construction costs and 3 months working capital. The applicant plans to use existing capital, secure funds through a bank loan, and to purchase equipment on deferred credit. The applicant's balance sheet fails to segregate liabilities to show current liabilities as well as the current amounts payable during the next year on long-term liabilities. Therefore, it cannot be determined if cash over and above that needed to meet current expenditures is available. In addition, the enclosed bank letter fails to specify the terms of repayment and the security needed, nor has the applicant furnished a letter of commitment from an equipment manufacturer. Accordingly, it cannot be concluded that the applicant has cash and/or liquid assets available in the amount required to finance the construction and to operate the station, without revenues, for at least 3 months.

3. The Clinton Broadcasting Co. application indicates that funds of approximately $18,550 would be needed to cover construction costs and 3 months working capital. Each of the partners have agreed to contribute one-half of the required amount. However, since their balance sheets, dated August 31, 1964, do not appear to show any cash and/or liquid assets available—over and above those needed to meet current expenditures—the source of the requisite funds cannot be determined. Accordingly, it cannot now be concluded that the applicant is financially qualified.

It further appearing, that, in view of the foregoing, the Commission is unable to make the statutory finding that a grant of the subject applications would serve the public interest, convenience, and necessity, and is of the opinion that the applications must be designated for hearing in a consolidated proceeding on the issues set forth below:

It is ordered, That, pursuant to section 309(e) of the Communications Act of 1934, as amended, the applications are designated for hearing in a consolidated proceeding, at a time and place to be specified in a subsequent order, upon the following issues:

1. To determine the areas and populations which would receive primary service from the proposals herein and the availability of other primary service to such areas and populations.

2. To determine whether either of the applicants is financially qualified to construct and operate its proposed station.

3. To determine, in the light of section 307(b) of the Communications Act of 1934, as amended, which of the proposals would better provide a fair, efficient, and equitable distribution of radio service.

4. To determine, in the light of the evidence adduced pursuant to the foregoing issues which, if either, of the applications should be granted.

It is further ordered, That, in the event of a grant of either of the applications herein, the construction permit shall contain the following condition: Pending a final decision in Docket No. 14419 with respect to presunrise operation with daytime facilities, the present provisions of § 73.87 of the Commission rules are not extended to this authorization, and such operation is precluded.

It is further ordered, That, to avail themselves of the opportunity to be heard, the applicants herein, pursuant to § 1.221(c) of the Commission rules, in person or by attorney, shall, within 20 days of the mailing of this order, file with the Commission in triplicate a written appearance stating an intention to appear on the date fixed for the hearing and present evidence on the issues specified in this order.

It is further ordered, That the applicants herein shall, pursuant to section 311(a)(2) of the Communications Act of 1934, as amended, and § 1.594 of the Commission's rules, give notice of the hearing, either individually or, if feasible and consistent with the rules, jointly, within the time and in the manner prescribed in such rule, and shall advise the Commission of the publication of such notice as required by § 1.594(g) of the rules.

Released: April 26, 1965.

FEDERAL COMMUNICATIONS COMMISSION,[1]

[SEAL] BEN F. WAPLE, *Secretary.*

[F.R. Doc. 65-4502; Filed, Apr. 28, 1965; 8:48 a.m.]

[1] Commissioner Lee absent.

[Docket Nos. 15849, 15850; FCC 65M-509]

RADIO STATION WKEU AND TELERAD, INC.

Order Continuing Hearing

In re applications of Radio Station WKEU, Griffin, Ga., Docket No. 15849, File No. BPH-4663; Telerad, Inc., Griffin, Ga., Docket No. 15850, File No. BPH-4664; for construction permits.

The Hearing Examiner having under consideration the informal request filed herein on April 22, 1965, by Radio Station WKEU for continuance of procedural dates;

It appearing, that all parties have consented to immediate consideration and grant of said request and good cause is present for a grant thereof in that the parties have entered into an agreement looking toward termination of the proceeding without hearing:

It is ordered, This 23d day of April 1965 that the said request is granted; the date for exchange of all exhibits to be offered into evidence is extended from April 28, 1965, to May 28, 1965; the date for notification of witnesses to be called for cross-examination is extended from May 7, 1965, to June 7, 1965; and the hearing presently scheduled to commence on May 18, 1965, is continued to June 21, 1965.

Released: April 26, 1965.

FEDERAL COMMUNICATIONS COMMISSION,

[SEAL] BEN F. WAPLE, *Secretary.*

[F.R. Doc. 65-4503; Filed, Apr. 28, 1965; 8:48 a.m.]

[Docket Nos. 15967, 15968; FCC 65-323]

WAYNESBORO BROADCASTING CORP. AND MUSIC PRODUCTIONS, INC.

Order Designating Applications for Consolidated Hearing on Stated Issues

In re applications of Waynesboro Broadcasting Corp., Waynesboro, Va., Docket No. 15967, File No. BPH-4533, requests: 92.7mc, No. 224, 170w(H); 170w(V); 1024 feet; Music Productions, Inc., Waynesboro, Va., Docket No. 15968, File No. BPH-4613, requests: 92.7mc, No. 224; 3kw; 179 feet; for construction permits.

At a session of the Federal Communications Commission held at its offices in Washington, D.C., on the 21st day of April 1965;

The Commission having under consideration the above-captioned and described applications;

It appearing, that, except as indicated by the issues specified below, each of the applicants is legally, technically, financially, and otherwise qualified to construct and operate as proposed; and

It further appearing, that the above-captioned applications are mutually exclusive in that operation by the applicants as proposed would result in mutually destructive interference; and

It further appearing, that inasmuch as objections have been raised by the

Naval Radio Research Observatory with respect to each of the above-captioned applications, an issue will be specified to determine whether the proposals would cause interference to operations at the Naval Radio Research Observatory; and

It further appearing, that, in view of the foregoing, the Commission is unable to make the statutory finding that a grant of the subject applications would serve the public interest, convenience, and necessity, and is of the opinion that the applications must be designated for hearing in a consolidated proceeding on the issues set forth below:

It is ordered, That, pursuant to section 309(e) of the Communications Act of 1934, as amended, the applications are designated for hearing in a consolidated proceeding, at a time and place to be specified in a subsequent order, upon the following issues:

1. To determine whether the proposals would cause interference to operations at the Naval Radio Research Observatory.

2. To determine, on a comparative basis, which of the proposals would better serve the public interest, convenience, and necessity in light of the evidence adduced pursuant to the foregoing issues and the record made with respect to the significant differences between the applicants as to:

(a) The background and experience of each having a bearing on the applicant's ability to own and operate the FM station as proposed.

(b) Proposals of each of the applicants with respect to the management and operation of the FM broadcast station as proposed.

(c) The programming services proposed in each of the above-captioned applications.

3. To determine, in the light of the evidence adduced pursuant to the foregoing issues which, if either, of the applications should be granted.

It is further ordered, That the Naval Radio Research Observatory, Sugar Grove, W. Va., is made a party to the proceeding.

It is further ordered, That, to avail themselves of the opportunity to be heard, the applicants and party respondent herein, pursuant to § 1.221(c) of the Commission's rules, in person or by attorney, shall, within 20 days of the mailing of this order, file with the Commission in triplicate, a written appearance stating an intention to appear on the date fixed for the hearing and present evidence on the issues specified in this order.

It is further ordered, That the applicants herein shall, pursuant to section 311(a)(2) of the Communications Act of 1934, as amended, and § 1.594 of the Commission's rules, give notice of the hearing, either individually or, if feasible and consistent with the rules, jointly, within the time and in the manner prescribed in such rule, and shall advise the Commission of the publication of such notice as required by § 1.594(g) of the rules.

It is further ordered, That, the issues in the above-captioned proceeding may be enlarged by the examiner, on his own motion or on petition properly filed by a party to the proceeding, and upon sufficient allegations of fact in support thereof, by the addition of the following issue: To determine whether the funds available to the applicant will give reasonable assurance that the proposals set forth in the application will be effectuated.

Released: April 26, 1965.

FEDERAL COMMUNICATIONS COMMISSION,[1]
[SEAL] BEN F. WAPLE,
Secretary.

[F.R. Doc. 65-4504; Filed, Apr. 28, 1965; 8:48 a.m.]

[Docket Nos. 15886, 15887; FCC 65M-510]

WMEN, INC., AND TALLAHASSEE APPLIANCE CORP.

Order Scheduling Further Prehearing Conference

In re applications of WMEN, Inc., Tallahassee, Fla., Docket No. 15886, File No. BPH-4127; Tallahassee Appliance Corp., Tallahassee, Fla., Docket No. 15887, File No. BPH-4228; for construction permits.

For reasons stated on the record at the prehearing conference held herein this day and incorporated herein by reference:

It is ordered, This 23d day of April 1965, that the hearing, presently scheduled for May 12, 1965, is continued to a date to be established by further order; and

It is further ordered, That a further prehearing conference is scheduled for 9 a.m., July 23, 1965.

Released: April 26, 1965.

FEDERAL COMMUNICATIONS COMMISSION,
[SEAL] BEN F. WAPLE,
Secretary.

[F.R. Doc. 65-4505; Filed, Apr. 28, 1965; 8:48 a.m.]

[Docket Nos. 14208, 14228; FCC 65M-496]

WMOZ, INC.

Statement and Order After Prehearing Conference

In re application of WMOZ, Inc., Mobile, Ala., Docket No. 14208, File No. BR-2797, for renewal of license of Station WMOZ, Mobile, Ala.; Docket No. 14228, revocation of license of Edwin H. Estes for Standard Broadcast Station WPFA, Pensacola, Fla.

At today's prehearing conference, among other things the following schedule was adopted:

Further prehearing conference—May 14, 1965, at 9 a.m.

Hearing (where ordered by Chief Hearing Examiner)—June 15, 1965.

So ordered, This 22d day of April 1965.

Released: April 26, 1965.

FEDERAL COMMUNICATIONS COMMISSION,
[SEAL] BEN F. WAPLE,
Secretary.

[F.R. Doc. 65-4506; Filed, Apr. 28, 1965; 8:48 a.m.]

[1] Commissioner Lee absent.

DEPARTMENT OF LABOR

Office of the Secretary

ADVISORY COUNCIL ON EMPLOYEE WELFARE AND PENSION BENEFIT PLANS

Recommendations for Appointment

Section 14 of the Welfare and Pension Plans Disclosure Act Amendments of 1962 (76 Stat. 40, 41, 29 U.S.C. 308e) provides for the establishment of an "Advisory Council on Employees Welfare and Pension Benefit Plans" which is to consist of 13 members to be appointed as follows: One from the insurance field, one from the corporate trust field, two from management, four from labor, and two from other interested groups, all of whom are to be appointed by the Secretary from among persons recommended by organizations in the respective groups. The additional three representatives are to be appointed from the general public by the Secretary. The prescribed duties of the Council are to advise the Secretary with respect to the carrying out of his functions under the Welfare and Pension Plans Disclosure Act, as amended, and to submit to the Secretary recommendations with respect thereto. The Council is required to meet at least twice each year and at such other times as the Secretary requests.

To assure continuity in the handling of the business of the Council, a rotation system is provided whereby the 2-year terms of approximately half the members expire each year. The groups represented by the members whose terms expire on June 30, 1965, are as follows: labor (2), the insurance field (1), management (2) and the public (1). Appointments of new members will be for 2-year terms, beginning July 1, 1965.

Accordingly, notice is hereby given that any organization desiring to recommend persons for appointment to the "Advisory Council on Employee Welfare and Pension Benefit Plans" may submit recommendations to the Secretary of Labor, 14th Street and Constitution Avenue NW., Washington, D.C., 20210, on or before May 30, 1965. The recommendation may be in the form of a letter, reso-

lution, or petition, signed by an authorized official of the organization. Each recommendation shall identify the candidate by name, occupation or position, and address. It shall specify the field or group which he would represent for purposes of section 14 of the Act, and whether he is available and would accept.

Signed at Washington, D.C., this 26th day of April 1965.

JAMES J. REYNOLDS,
Assistant Secretary
for Labor-Management Relations.

[F.R. Doc. 65-4526; Filed, Apr. 28, 1965; 8:49 a.m.]

FEDERAL POWER COMMISSION

[Docket No. G-3058 etc.]

SIGNAL OIL & GAS CO. ET AL.

Notice of Applications for Certificates, Abandonment of Service and Petitions To Amend Certificates [1]

APRIL 20, 1965.

Take notice that each of the Applicants listed herein has filed an application or petition pursuant to section 7 of the Natural Gas Act for authorization to sell natural gas in interstate commerce or to abandon service heretofore authorized as described herein, all as more fully described in the respective applications and amendments which are on file with the Commission and open to public inspection.

Protests or petitions to intervene may be filed with the Federal Power Commission, Washington, D.C., 20426, in accordance with the rules of practice and procedure (18 CFR 1.8 or 1.10) on or before May 12, 1965.

Take further notice that, pursuant to the authority contained in and subject to the jurisdiction conferred upon the Federal Power Commission by sections 7 and 15 of the Natural Gas Act and the Commission's rules of practice and procedure, a hearing will be held without further notice before the Commission on all applications in which no protest or petition to intervene is filed within the time required herein, if the Commission on its own review of the matter believes that a grant of the certificates or the authorization for the proposed abandonment is required by the public convenience and necessity. Where a protest or petition for leave to intervene is timely filed, or where the Commission on its own motion believes that a formal hearing is required, further notice of such hearing will be duly given.

Under the procedure herein provided for, unless otherwise advised, it will be unnecessary for Applicants to appear or be represented at the hearing.

JOSEPH H. GUTRIDE,
Secretary.

[1] This notice does not provide for consolidation for hearing of the several matters covered herein, nor should it be so construed.

Docket No. and date filed	Applicant	Purchaser, field, and location	Price per Mcf	Pressure base
G-3058 E 4-8-65	Signal Oil & Gas Co. (successor to John I. Moore, et al.), 1010 Wilshire Blvd. Los Angeles, Calif., 90017.	El Paso Natural Gas Co., Northwest Todd Field, Crockett County, Tex.	[2] 9.5	14.65
G-8325 E 4-12-65	Petroleum Corp. of Texas (successor to Texola Drilling Co., Inc.), Post Office Box 752, Breckenridge, Tex.	Kansas-Nebraska Natural Gas Co., Inc., Hugoton Field, Texas County, Okla.	11.0	14.65
G-8817 C 4-12-65	The California Co., a division of California Oil Co., 1111 Tulane Ave., New Orleans, La., 70112.	Tennessee Gas Transmission Co., Little Temple Field, Lafourche Parish, La.	22.78333	15.025
G-14152 D 3-30-65	Union Oil Co., of California, Union Oil Center, Los Angeles, Calif., 90017.	Natural Gas Pipeline Co. of America, Camrick Southeast Gas Pool, Beaver County, Okla.	(3)	
CI60-419 A 4-1-60	Helbing and Podpechan, 418 Hinkle Bldg., Roswell, N. Mex.	Elpaso Natural Gas Co., Aneth Field, San Juan County, Utah.	[2] 17.7	14.65
CI62-366 E 4-13-65	Calvert Exploration Co. (Operator), et al. (successor to Mid-America Minerals, Inc.), National Bank of Tulsa Bldg., Tulsa 3, Okla.	Panhandle Eastern Pipe Line Co., Six Mile Field, Beaver County, Okla.	17.0	14.65
CI62-409 E 3-15-65	E. J. Dunigan, Jr., Trustee (successor to E. J. Dunigan, Jr.), Post Office Box 261, Pampa, Tex.	El Paso Natural Gas Co., South Erick Field, Beckham County, Okla.	[4] 13.0	14.65
CI62-1218 E 3-29-65	Oil & Gas Property Management, Inc. (Operator), et al. (successor to Lignum Oil Co.), 6th Floor, C&I Life Bldg., Houston, Tex.	El Paso Natural Gas Co., San Juan Basin, Rio Arriba and San Juan Counties, N. Mex.	10.0	15.025
CI62-1377 E 4-13-65	Calvert Exploration Co. (Operator), et al. (successor to Mid-America Minerals, Inc.), National Bank of Tulsa Bldg., Tulsa 3, Okla.	Northern Natural Gas Co., Six Mile Field, Beaver County, Okla.	17.0	14.65
CI63-444 E 4-13-65	do	Kansas-Nebraska Natural Gas Co., Inc. Camrick Field, Beaver County, Okla.	17.0	14.65
CI63-1041 C 4-12-65	Shell Oil Co. (Operator), 50 West 50th St., New York, N.Y., 10020.	Northern Natural Gas Co., Tippett Plant, Crockett County, Tex.	14.58784	14.65
CI64-332 C 4-12-65	Sunland Refining Corp., Post Office Box 1512, Fresno, Calif.	El Paso Natural Gas Co., Huerfano-Dakota Unit, San Juan County, N. Mex.	13.0	15.025
CI64-519 E 4-13-65	Calvert Exploration Co. (Operator), et al. (successor to Mid-America Minerals, Inc.), National Bank of Tulsa Bldg., Tulsa 3, Okla.	Northern Natural Gas Co., East Balko Field, Beaver County, Okla.	15.0	14.65
CI64-593 E 4-13-65	do	Natural Gas Pipeline Co. of America, Camrick Southeast Gas Pool, Beaver County, Okla.	[5] 18.0	14.65
CI64-1284 E 4-13-65	do	Transcontinental Gas Pipe Line Corp., South Tilden Field, McMullen County, Tex.	14.189	14.65
CI65-30 E 4-13-65	do	Northern Natural Gas Co., Mocane Field, Beaver County, Okla.	17.0	14.65
CI65-232 E 4-6-65	A. M. Rozeman, et al. (successor to Javelin Oil Co., Inc.), Post Office Box 302, Shreveport, La.	United Gas Pipe Line Co., Bethany Field, Panola County, Tex.	10.3876	14.65
CI65-318 C 4-9-65	D. J. Simmons, et al., 3590 McCart St., Ft. Worth, Tex.	United Gas Pipe Line Co., Monroe Gas Field, Ouachita Parish, La.	11.0	14.65
CI65-984 F 4-5-65	Great Plains Land Co., et al., c/o Martin L. Allday, Esq., Lynch & Chappell, 201 Wall Bldg., Midland, Tex.	United Gas Pipe Line Co., Ada Field, Bienville Parish, La.	18.25	15.025
		Arkansas Louisiana Gas Co., Ada Field, Bienville Parish, La.	13.453	15.025
CI65-992 A 4-8-65	Thomas N. Berry & Co., and The Greenlee Children Trust No. 1, Post Office Box 111, Stillwater, Okla.	Panhandle Eastern Pipe Line Co., South Teagarden Field, Woods County, Okla.	17.0	14.65
CI65-997 A 4-8-65	Continental Oil Co., Post Office Box 2197, Houston, Tex., 77001.	El Paso Natural Gas Co., various fields, Rio Arriba and San Juan Counties, N. Mex.	13.0	15.025
CI65-998 A 4-8-65	Texaco Inc., Post Office Box 52332, Houston, Tex., 77052.	Panhandle Eastern Pipe Line Co., Guymon Southeast Field, Texas County, Okla.	17.0	14.65
CI65-999 A 4-8-65	do	Panhandle Eastern Pipe Line Co., Sampsel Northeast Field, Cimarron County, Okla.	17.0	14.65
CI65-1000 A 4-9-65	Gulf Oil Corp., Post Office Box 1589, Tulsa, Okla., 74102.	Panhandle Eastern Pipe Line Co., Frantz Field, Ochiltree and Hansford Counties, Tex.	17.0	14.65
CI65-1001 A 4-12-65	Amerada Petroleum Corp. (Operator), et al., Post Office Box 2040, Tulsa, Okla., 74102.	Natural Gas Pipeline Co. of America, Putnam Field, Dewey County, Okla.	17.0	14.65
CI65-1002 A 4-9-65	Continental Oil Co., Post Office Box 2197, Houston, Tex., 77001.	Montana-Dakota Utilities Co., Alkali Creek Field, Fremont County, Wyo.	15.384	15.025
CI65-1003 B 4-12-65	Tidewater Oil Co., Post Office Box, 1404, Houston, Tex., 77001.	Tennessee Gas Transmission Co., West Rock Island, Colorado County, Tex.	Depleted	----------
CI65-1004 F 4-13-65	Calvert Exploration Co. (Operator), et al. (successor to Mid-America Minerals, Inc.), National Bank of Tulsa Bldg., Tulsa 3, Okla.	Colorado Interstate Gas Co., Mocane Field, Beaver County, Okla.	17.0	14.65
CI65-1005 A 4-12-65	Phillips Petroleum Co., Bartlesville, Okla.	Michigan Wisconsin Pipe Line Co., Gageby Creek Field, Wheeler County, Tex.	17.0	14.65
CI65-1006 B 4-12-65	Greenville Gasoline Co., Inc. (Operator), Post Office Box 758, Ardmore, Okla., 73401.	Lone Star Gas Co., Northeast Greenville Oil Field, Love County, Okla.	Depleted	----------

Filing code: A—Initial service.
B—Abandonment.
C—Amendment to add acreage.
D—Amendment to delete acreage.
E—Succession.
F—Partial succession.

See footnotes at end of table.

Docket No. and date filed	Applicant	Purchaser, field, and location	Price per Mcf	Pressure base
CI65-1007 B 4-12-65	Skelly Oil Co., Post Office Box 1650, Tulsa, Okla.	Champlin Petroleum Co., East Guthrie Lake Field, Logan County, Okla.	Depleted	-------
CI65-1008 A 4-12-65	Shell Oil Co., 50 West 50th St., New York, N.Y., 10020.	Panhandle Eastern Pipe Line Co., Northwest Oakdale Field, Woods County, Okla.	17.0	14.65
CI65-1009 A 4-12-65	Continental Oil Co., Post Office Box 2197, Houston, Tex., 77001.	Natural Gas Pipeline Co. of America, Mobeetie Area, Wheeler County, Tex.	17.0	14.65
CI65-1010 B 4-7-65	Sohio Petroleum Co., 970 First National Office Bldg., Oklahoma City, Okla., 73102.	United Gas Pipe Line Co., Cameron School Board Lease, Cameron Parish, La.	(5)	-------
CI65-1011 F 4-12-65	Rutter & Co., Ltd., et al., 500 North Big Spring, Midland, Tex.	El Paso Natural Gas Co., Spraberry Trend Field, Glasscock County, Tex.	16.0	14.65
CI65-1012 B 4-13-65	Socony Mobil Oil Co., Inc., 150 East 42d St., New York, N.Y., 10017.	Colorado Interstate Gas Co., Adams Ranch Field, Meade County, Kans.	Assigned	-------
CI65-1013 A 4-14-65	Standard Oil Co. of Texas, a division of California Oil Co., Post Office Box 1249, Houston, Tex., 77001.	Natural Gas Pipeline Co. of America, Sejita Yegua Field, Duval County, Tex.	16.0	14.65
CI65-1014 A 4-14-65	N. G. Clark, Post Office Box 427, Charleston, W. Va.	Equitable Gas Co., acreage in Lewis County, W. Va.	25.0	15.325
CI65-1015 A 4-14-65	Colorado Oil & Gas Corp., Box 749, Denver, Colo., 80201.	Cities Service Gas Co., Nurse, Northeast Field, Barber County, Kans.	14.0	14.65
CI65-1016 A 4-14-65	Longhorn Production Co. (Operator), et al., 540 Meadows Bldg., Dallas, Tex.	Natural Gas Pipeline Co. of America, acreage in Wise County, Tex.	16.0	14.65
CI65-1017 A 4-14-65	Sklar Producing Co., Inc., 2925 Mansfield Rd., Shreveport, La.	Bluebonnet Gas Corp., South Bayou Mallet Field, Acadia Parish, La.	15.0	15.025
CI65-1018 A 4-14-65	Standard Oil Co. of Texas, a division of California Oil Co., Post Office Box 1249, Houston, Tex., 77001.	Natural Gas Pipeline Co. of America, Dagger Draw Area, Eddy County, N. Mex.	16.0	14.65

[1] An increase in rate to 15.5 cents per Mcf was filed for and suspended in Docket No. RI60-120, but has not been made effective.
[2] Deletes certain acreage released from contract.
[3] Temporary certificate issued June 3, 1960, as amended July 15, 1960, permitted collection of rate of 20.0 cents per Mcf subject to refund to floor of 17.7 cents per Mcf. By letter dated Aug. 27, 1964, Applicant agreed to accept permanent certificate at 17.7 cents per Mcf and agreed to refund moneys collected in excess thereof.
[4] Rate in effect subject to refund in Docket No. RI64-586.
[5] Rate in effect subject to refund in Docket No. RI63-409.
[6] Applicant has no contract for sale of gas.

[F.R. Doc. 65-4380; Filed, Apr. 28, 1965; 8:45 a.m.]

[Docket No. RP61-18 etc.]

UNITED GAS PIPE LINE CO. ET AL.

Order Releasing Certain Refunds and Requiring Reports of Intended Disposition of Other Refundable Amounts

APRIL 21, 1965.

United Gas Pipe Line Co., Docket No. RP61-18, RP63-1, RP65-1; Natural Gas Pipeline Co. of America, Docket No. RP65-54; Southern Natural Gas Co., Docket No. RP65-55; Tennessee Gas Transmission Corp., Docket No. RP65-56; Texas Gas Transmission Corp., Docket No. RP65-57.

The Commission by order issued December 23, 1964, approved a rate settlement in the United Gas Pipe Line Co. dockets captioned above, and among other things, directed United to retain all amounts refundable to its customers, pending further order prescribing the disposition of those amounts. That order also provided for certain procedures and the filing of reports to aid us in the disposition of the retained amounts. The procedures prescribed contemplated effectuation of our purpose that there be a proper and equitable distribution of the funds of money created by our own process (Opinion No. 428A, issued September 2, 1964, mimeo. ed. p. 9).

On January 6, 1965, United filed the report required by paragraph (C) of our order issued December 23, 1964. No objections thereto have been received. United sells natural gas for resale at rates subject to our jurisdiction to the distributor customers listed in that report and to the following natural gas pipeline companies: Mississippi River Fuel Corp., Mississippi River Transmission Corp., Natural Gas Pipeline Co. of America, Southern Natural Gas Co., Texas Eastern Transmission Corp., and Texas Gas Transmission Corp. United also renders a transportation service, at rates subject to our jurisdiction, to Southern Natural Gas Co. and Tennessee Gas Transmission Co. Pursuant to our order issued December 23, 1964, United has retained the amounts refundable to its jurisdictional distributor customers and to the listed pipeline customers applicable to gas purchased or transportation service received during the period June 15, 1961, through August 31, 1964. In Appendix A to the settlement agreement approved by that order, the amount thus being retained by United is shown to aggregate $17,053,785.

In addition, that appendix also reveals that certain producer suppliers of United are retaining $3,104,097 of refundable amounts. This sum includes some $2,187,315 refundable to United by Humble Oil & Refining Co. pursuant to the rate settlement in Docket No. G-9287, et al., approved by our order issued July 8, 1964, which will be separately dealt with in orders to be issued in that producer docket. Accordingly the actions taken in the instant order have no application to monies which United or its customers may receive as an outgrowth of the release of the retained refunds now in the hands of Humble.

It now appears that it would be appropriate to authorize United to flow-through the amounts refundable to those of its jurisdictional customers which are distribution companies, and to Mississippi River Fuel Corp. (Fuel) and Mississippi River Transmission (Transmission)[1] Co. Fuel and Transmission, by the terms of the agreement in Docket Nos. RP61-21, et al. and the Commission's order issued August 7, 1964, in those dockets, are obligated to flow-through the total amount of such refunds allocable to their jurisdictional customers and none of those customers are subject to the rate regulatory authority of this Commission with respect to the transmission herein involved.

The refunds thus released to Fuel or Transmission and United's immediate distributor customers, amount to more than $6,684,000 as indicated in Appendix A to the stipulation and agreement dated December 16, 1964. Such released refunds include those suppliers refunds already paid to United subject to the express condition that they shall be retained by United until further order of the Commission.

It is also our purpose to expedite the release and payment of refundable amounts presently being retained by producer-suppliers of United. Accordingly, United is hereby authorized to flow-through to its distributor customers and to Fuel and Transmission the proportionate part of the amounts received by way of refund from such producer-suppliers attributable to gas purchases between June 15, 1961, and August 31, 1964.

Our action in requiring retention by suppliers of refundable amounts is intended to serve only the limited purpose of eliminating the possibility that the immediate release and payment of refunds to a pipeline which claims that it is not obligated to flow through such refunds, or portions thereof, to its own customers would create a permanent and irremediable gap in the refund line.[2] Where no such gap in the refund line is indicated, we will authorize the release and payment of retained amounts to the pipeline customers of United to the extent that the recipient pipeline will actually flow-through the refunds to its own distributor customers. Further, if one of United's primary pipeline customers is obligated to refund certain amounts to another pipeline within our rate regulatory jurisdiction which is, in turn, similarly obligated to flow-through to its own jurisdictional customers we will permit such release and payment.

[1] Pursuant to a Commission order issued on Dec. 30, 1964, Transmission acquired the pipeline facilities of Fuel as of Oct. 1, 1964. Accordingly, refunds attributable to gas purchases made prior to that closing date are payable to Fuel, and those made subsequently are payable to Transmission.

[2] See settlement orders imposing refund retention requirements in Hunt Oil Co., Docket Nos. G-9065, et al., July 16, 1963; Humble Oil & Refining Co., Docket Nos. G-9287, et al., July 8, 1964; United Gas Pipe Line Co., Docket No. RP63-1, Sept. 2, 1964.

In order to implement this policy, it is necessary and appropriate that each of the jurisdictional pipeline purchasers listed in the caption of this order which may receive refunds from United shall submit the report hereinafter required; indicating whether it is expressly obligated to flow-through the amounts received, whether it proposes voluntarily to pass on such refunds or whether it intends to retain the whole or any portion thereof. No such reports are necessary, however, with respect to refundable amounts now in the hands of Humble Oil & Refining Co. (Humble), in Docket No. G-9287, et al.

Inasmuch as Texas Eastern has advised the Commission that it proposes to retain all amounts refundable to it applicable to gas purchases during the period herein involved, the issues raised by Texas Eastern's position will be the subject of a separate proceeding.

We are herein expressly reiterating our prior requirement [2] that United shall retain certain refundable amounts now or later frozen in its hands or received from a producer supplier (other than Humble) which have not been expressly released herein for payment to Fuel or Transmission and to its own immediate distributor customers.

The Commission orders:

(A) United and its duly authorized escrow agent are hereby authorized to distribute and pay, within 10 days from the date of this order, to Fuel and Transmission and to those of its customers listed in the designation of distributor customers which United filed on January 6, 1964, all amounts (shown in Appendix A to the settlement agreement approved by our order issued December 23, 1964), being retained by either of them (including supplier refunds), which are attributable to gas purchased from United by any of such jurisdictional customers during the period covered by United's rate increase filings in Docket No. RP61-18 and Docket No. RP63-1.

(B) Within 10 days of the date of payment of the refunds identified in ordering paragraph (A) above, United shall submit to this Commission a copy of the releases received from each of its pipeline and distributor jurisdictional customers with respect to the refunds authorized herein.

(C) United shall retain refunds frozen by prior order of the Commission which have not been specifically released by this order, under the terms and conditions specified in ordering paragraphs (H) and (I) of Opinion No. 428-A entered in Docket No. RP63-1 on September 2, 1964, until the issuance of a further order directing or authorizing the disposition of such refunds: *Provided, however,* That any amounts received by United from Humble in Docket Nos. G-9287, et al., shall be retained and disposed of in accordance with the provisions of the order being issued this day in said docket.

(D) Natural Gas Pipeline Co. of America, Southern Natural Gas Co., Tennessee Gas Transmission Co., and Texas Gas Transmission Corp., in their respective dockets captioned above, shall submit, in triplicate within 20 days of the date of issuance of this order, a detailed report showing:

(i) The amount received from each of its suppliers, the portion if any, of each such amount which the reporting pipeline claims it has a right to retain, together with a full explanation of the basis for such claim, including any pertinent factual circumstances.

(ii) The portion of the amounts refundable under Appendix A to the settlement agreement approved by our order issued December 23, 1964, in Docket Nos. RP61-18, et al., which each proposes to flow-through to its jurisdictional customers, together with a detailed explanation of the methods and allocation factors used in determining the jurisdictional portion of such refunds.

(iii) The proposed plan of distribution of the respective total amounts received from each producer-supplier, setting forth by months, by rate schedules, and by purchasers, the amount to be refunded to each jurisdictional customer, the billing determinants used to compute the refunds to each customer and the aggregate amount attributable to nonjurisdictional sales in each such reporting period:

Provided, however, That such reports need not include refunds attributable to amounts now being retained by Humble in Docket No. G-9827, et al.

The reporting pipeline shall serve a copy of each such report on every one of its jurisdictional customers.

By the Commission.

[SEAL] JOSEPH H. GUTRIDE, *Secretary.*

[F.R. Doc. 65-4476; Filed, Apr. 28, 1965; 8:46 a.m.]

[2] Pursuant to ordering paragraphs (C) and (D) of our order of Dec. 23, 1964, captioned "Order Approving Rate Settlement and Requiring Retention of Certain Refunds."

SECURITIES AND EXCHANGE COMMISSION

[812-1773]

BOSTON FUND, INC.

Notice of Filing of Application for Order Exempting Sale by Open-End Company of Shares at Other Than Public Offering Price in Exchange for Assets of Closely Held Company

APRIL 23, 1965.

Notice is hereby given that Boston Fund, Inc. ("Boston Fund"), 111 Devonshire Street, Boston, Mass., a Massachusetts corporation which is registered under the Investment Company Act of 1940 ("Act") as an open-end diversified investment company, has filed an application pursuant to section 6(c) of the Act. Boston Fund requests an order of the Commission exempting from the provisions of section 22(d) of the Act the proposed issuance of its shares at net asset value for substantially all of the cash and securities of Ridgecroft Real Estate Trust ("Ridgecroft"). Since the sale of Boston Fund stock will be other than at the public offering price, which normally includes sales charges, an exemption is deemed necessary. All interested persons are referred to the application as filed with the Commission for a complete statement of the representations therein which are summarized below.

Shares of Boston Fund are offered to the public on a continuous basis at net asset value plus varying sales charges dependent on the amount purchased. As of February 1, 1965, the net assets of Boston Fund amounted to approximately $361,000,000.

Ridgecroft, a common law trust organized under the laws of Illinois whose shares are held by 17 shareholders, is engaged in investing and reinvesting its funds. Pursuant to an agreement between Boston Fund and Ridgecroft, substantially all of the assets of Ridgecroft, with a value of approximately $6,352,000 on February 1, 1965, will be transferred to Boston Fund in exchange for stock of Boston Fund which will be distributed to shareholders of Ridgecroft upon liquidation. Neither Ridgecroft nor any of the principal shareholders thereof has any present intention of redeeming the shares of Boston Fund which they acquire.

The amount of stock of Boston Fund to be delivered to Ridgecroft will be determined on the basis of the values on the business day preceeding the closing by dividing the net asset value per share of Boston Fund into the value of the assets of Ridgecroft. The value of the assets of Ridgecroft will be adjusted according to a formula set forth in the application which reflects the higher ratio of unrealized appreciation in the assets of Ridgecroft than in the assets of Boston Fund and the Federal income taxes payable upon the future realization of the excess appreciation. As of February 1, 1965, unrealized appreciation represented 41.0 percent and 35.4 percent of the net asset value of the shares of Ridgecroft and Boston Fund respectively. Boston Fund represents that it has no present intention of selling or otherwise disposing of any of the assets of Ridgecroft to be acquired.

The agreement and plan of reorganization states that (1) the trustees of Ridgecroft have approved of this agreement, (2) as a condition precedent, the holders of at least three quarters of the outstanding shares of Ridgecroft shall have approved of the agreement and (3) the performance of the transactions contemplated herein have been duly and validly authorized by the Board of Directors of Boston Fund.

Notice is further given that any interested person may, not later than May 12, 1965, at 5:30 p.m., submit to the Commission in writing a request for a hearing on the matter accompanied by a statement as to the nature of his interest, the reason for such request and the issues of fact or law proposed to be controverted, or he may request that he be notified if the Commission shall order a hearing thereon. Any such communication should be addressed: Secretary, Securities and Exchange Commission, Washington, D.C., 20549. A copy of such request shall be served personally or by

mail (air mail if the person being served is located more than 500 miles from the point of mailing) upon applicant at the address stated above. Proof of such service (by affidavit or in case of an attorney-at-law by certificate) shall be filed contemporaneously with the request. At any time after said date, as provided by Rule 0-5 of the rules and regulations promulgated under the Act, an order disposing of the application herein may be issued by the Commission upon the basis of the information stated in said application, unless an order for hearing upon said application shall be issued upon request or upon the Commission's own motion.

For the Commission (pursuant to delegated authority.

[SEAL] ORVAL L. DUBOIS, *Secretary.*

[F.R. Doc. 65-4473; Filed, Apr. 28, 1965; 8:46 a.m.]

INTERSTATE COMMERCE COMMISSION

FOURTH SECTION APPLICATIONS FOR RELIEF

APRIL 26, 1965.

Protests to the granting of an application must be prepared in accordance with Rule 1.40 of the general rules of practice (49 CFR 1.40) and filed within 15 days from the date of publication of this notice in the FEDERAL REGISTER.

LONG-AND-SHORT HAUL

FSA No. 39723—*Methanol to Calvert, Ky.* Filed by O. W. South, Jr., agent (No. A4670), for interested rail carriers. Rates on methanol, in tank carloads, from South Point, Ohio, to Calvert, Ky.

Grounds for relief—Market competition.

Tariff—Supplement 13 to Southern Freight Association, agent, tariff I.C.C. S-470.

FSA No. 39724—*Liquid caustic soda to Chicago, Ill.* Filed by O. W. South, Jr., agent (No. A4669), for interested rail carriers. Rates on liquid caustic soda, in tank carloads, subject to minimum shipment of 5 cars, from Evans City, Ala., to Chicago, Ill.

Grounds for relief—Market competition.

Tariff—Supplement 73 to Southern Freight Association, agent, tariff I.C.C. S-272.

FSA No. 39725—*Cement and related articles from Selma, Mo.* Filed by Western Trunk Line Committee, agent (No. A-2401), for interested rail carriers. Rates on cement and related articles, in carloads, from Selma, Mo., to specified points in Illinois, Indiana, Iowa and Missouri.

Grounds for relief—Market competition.

Tariff—Supplement 170 to Western Trunk Line Committee, agent, tariff I.C.C. A-4308.

FSA No. 39726—*Liquid caustic soda to Cedartown, Ga.* Filed by O. W. South, Jr., agent (No. A4668), for interested rail carriers. Rates on liquid caustic soda, in tank carloads, from Charleston, Dock, Elk, Owens, South Charleston, and South Ruffner, W. Va., to Cedartown, Ga.

Grounds for relief—Market competition.

Tariff—Supplement 161 to Traffic Executive Association-Eastern Railroads, agent, tariff I.C.C. C-102.

FSA No. 39727—*Joint motor-rail rates—Southern Motor Carriers.* Filed by Southern Motor Carriers Rate Conference, agent (No. 111), for interested carriers. Rates on commodities moving on class and commodity rates over joint routes of applicant rail and motor carriers, between points in southern territory, on the one hand, and points in southwestern territory, on the other.

Grounds for relief—Motor-truck competition.

Tariff—Supplement 7 to Southern Motor Carriers Rate Conference, agent, tariff MF-I.C.C. 1338.

By the Commission.

[SEAL] BERTHA F. ARMES, *Acting Secretary.*

[F.R. Doc. 65-4488; Filed, Apr. 28, 1965; 8:47 a.m.]

[Rev. S.O. 562, 2d Amended Taylor's I.C.C. Order 185; Amdt. 1]

RAILROADS SERVING IOWA AND MINNESOTA

Diversion or Rerouting of Traffic

Upon further consideration of Second Amended Taylor's I.C.C. Order No. 185 and good cause appearing therefor:

It is ordered, That:

Second Amended Taylor's I.C.C. Order No. 185 be, and it is hereby, amended by substituting the following paragraph (g) for paragraph (g) thereof:

(g) Expiration date: This order shall expire at 11:59 p.m., May 7, 1965, unless otherwise modified, changed, suspended or annulled.

It is further ordered, That this amendment shall become effective at 11:59 p.m., April 23, 1965, and that this order shall be served upon the Association of American Railroads, Car Service Division, as agent of all railroads subscribing to the car service and per diem agreement under the terms of that agreement, and by filing it with the Director, Office of the Federal Register.

Issued at Washington, D.C., April 23, 1965.

INTERSTATE COMMERCE COMMISSION,
[SEAL] CHARLES W. TAYLOR, *Agent.*

[F.R. Doc. 65-4489; Filed, Apr. 28, 1965; 8:48 a.m.]

CUMULATIVE LIST OF CFR PARTS AFFECTED—APRIL

The following numerical guide is a list of the parts of each title of the Code of Federal Regulations affected by documents published to date during April.

3 CFR

Page

PROCLAMATIONS:
- 3423 (corrected by PLO 3576) 4476
- 3649 4307
- 3650 4309
- 3651 4525
- 3652 5415
- 3653 5417

EXECUTIVE ORDERS:
- Mar. 3, 1854 (revoked in part by PLO 3630) 5481
- May 4, 1907 (revoked in part by PLO 3594) 4502
- July 2, 1910 (revoked in part by PLO 3616) 5378
- Dec. 19, 1910 (modified by PLO 3596) 4542
- Jan. 24, 1914 (revoked in part by PLO 3569) 4253
- May 4, 1914 (revoked in part by PLO 3599) 4678
- May 17, 1917 (modified by PLO 3596) 4542
- Apr. 17, 1926:
  - Revoked in part by PLO 3591 4541
  - Revoked in part by PLO 3599 4678
  - Revoked in part by PLO 3604 4717
- June 17, 1935 (revoked by PLO 3623) 5480
- 2347 (revoked by PLO 3572) 4254
- 3406 (revoked in part by PLO 3590) 4541
- 4719 (revoked by PLO 3602) 4679
- 5182 (revoked in part by PLO 3601) 4679
- 5289 (revoked by PLO 3571) 4253
- 5327 (see PLO 3573) 4254
- 5352 (revoked by PLO 3602) 4679
- 6039 (revoked in part by PLO 3592) 4541
- 6143 (revoked in part by PLO 3589) 4541
- 8977 (revoked by EO 11215) 4661
- 11017 (amended by EO 11218) 5821
- 11052 (amended by EO 11214) 4527
- 11176 (superseded by EO 11213) 4389
- 11211 4385
- 11212 4387
- 11213 4389
- 11214 4527
- 11215 4661
- 11216 5817
- 11217 5819
- 11218 5821

5 CFR

- 213 4311, 4410, 4663, 4711, 4745, 5471, 5503, 5619, 5701, 5787, 5825, 5897.
- 316 4349
- 410 5503
- 511 4410, 5619
- 534 4410, 5619
- 550 4609, 4663, 4745

7 CFR

- 7 5759, 5787
- 11 4240

7 CFR—Continued

Page

- 26 4605, 5760
- 51 6063
- 53 4453
- 81 6064
- 301 4311, 5760, 5761
- 318 5619
- 319 4745
- 354 4745
- 401 4240
- 719 5701
- 722 4606
- 723 4313
- 724 4313
- 728 5467
- 730 5503, 5619
- 775 5334
- 777 5358
- 811 4314
- 814 4746
- 849 5825
- 905 4663, 5358, 6065
- 907 4349, 4664, 4749, 5503, 5620, 5787
- 908 4349, 4665, 4750, 5504, 5620, 5787, 5788
- 909 5788
- 910 4350, 4665, 5504, 5573, 5789, 5826
- 911 5620
- 915 4666
- 917 4711
- 944 5359, 5621, 6065
- 965 4350
- 980 5505
- 1030 4241
- 1031 4314
- 1032 4314
- 1038 4314
- 1039 4314
- 1048 5789
- 1051 4314
- 1062 4314
- 1063 4314
- 1070 4314
- 1078 4314
- 1079 4314
- 1131 4250
- 1201 5826
- 1421 4529, 4606, 4068, 4666, 4667, 4750, 5702, 5762.
- 1427 4410
- 1430 4351
- 1438 5573
- 1483 4531
- 1485 4314
- 1486 4532
- 1600 4315
- 1601 4315

PROPOSED RULES:
- 29 4361
- 51 5382, 5850
- 52 4486
- 718 5708
- 724 5641
- 908 4635
- 930 5514
- 965 4761
- 980 4416
- 989 4361
- 1005 4761, 5904
- 1048 4764
- 1063 5603, 5907

7 CFR—Continued

Page

PROPOSED RULES—Continued
- 1070 5603, 5907
- 1078 5603, 5907
- 1079 5603, 5907
- 1138 5851
- 1201 4321

8 CFR

- 103 5471
- 212 4411
- 214 4351, 4532
- 237 4411
- 341 5471, 5621

9 CFR

- 74 4750
- 75 5790
- 97 4609
- 114 4751
- 317 5702
- 318 5702

PROPOSED RULES:
- 101 5514
- 103 5514
- 201 4486, 4847
- 316 5708
- 317 5708
- 318 5708

10 CFR

- 30 4352
- 150 4352

PROPOSED RULES:
- 30 4764

12 CFR

- 8 4462, 5742
- 217 5574
- 220 5826
- 545 5472–5474
- 563 4251

PROPOSED RULES:
- 17 6074
- 545 5861

13 CFR

- 121 4252, 5703

14 CFR

- 25 6066
- 39 4240, 4318, 4533, 4609, 5506, 5621, 5622, 5827, 5897, 6067.
- 61 4668
- 71 4319, 4391, 4462, 4463, 4533, 4534, 4610, 4669, 4670, 4751, 4752, 5359, 5506, 5575, 5622–5624, 5703, 5731, 5790, 5827, 5829–5831, 5898, 5899, 6068, 6069.
- 73 4391, 4464, 4534, 4752, 5624, 5831, 6069
- 75 4464, 5790, 5831
- 91 5507, 6070
- 93 5575
- 95 5576
- 97 4392, 5360, 5455, 5732, 5831
- 121 6066
- 135 4352
- 302 5899
- 399 5625

PROPOSED RULES:
- 1 6074

14 CFR—Continued

PROPOSED RULES—Continued

23 ... 6074
25 ... 5798, 6074
27 ... 6074
29 ... 6074
37 ... 6074
39 ... 5532, 5643, 5907
61 ... 6074
71 ... 4321, 4489–4491, 4553, 4554, 4638, 4680, 4681, 4723, 4766–4768, 5383, 5384, 5604–5606, 5643, 5854–5857, 5908, 6074, 6077.
75 ... 6074
91 ... 6074
95 ... 6074
97 ... 6074
135 ... 6074
207 ... 5483
298 ... 4636

15 CFR

202 ... 5686
206 ... 4237
230 ... 5552
368 ... 4465
370 ... 4465
371 ... 4466
372 ... 4466, 5627
373 ... 4466, 5627
374 ... 4466
377 ... 4466
379 ... 4466
380 ... 4467
384 ... 4467
385 ... 4467
399 ... 5102

PROPOSED RULES:

9 ... 5795

16 CFR

13 ... 4252, 4711–4714
74 ... 5331
300 ... 5742

PROPOSED RULES:

214 ... 5532

17 CFR

240 ... 4319, 4752, 5629

PROPOSED RULES:

240 ... 5908
249 ... 4688, 4690

18 CFR

2 ... 4670
141 ... 5703

PROPOSED RULES:

10 ... 4769
11 ... 4259
154 ... 5861
157 ... 5861

19 CFR

1 ... 4411
2 ... 5419
11 ... 5580
19 ... 5580
24 ... 4671, 5580, 5900

21 CFR

1 ... 5507
3 ... 5790, 6071
8 ... 4534
19 ... 5508
25 ... 5831
27 ... 4535
120 ... 4411, 5508
121 ... 4535, 4536, 4672, 4714, 5474, 5475, 5508–5510, 5629, 5631, 5791.
144 ... 4536, 5792, 6071

21 CFR—Continued

146a ... 6071
146b ... 5629
147 ... 5792
191 ... 5507

PROPOSED RULES:

8 ... 5797
15 ... 5643
27 ... 5798

22 CFR

72 ... 4412
501 ... 5832

PROPOSED RULES:

Ch. II ... 4321

24 CFR

3 ... 4715
203 ... 5371, 5900
234 ... 5900

25 CFR

88 ... 5742

PROPOSED RULES:

163 ... 5849
221 ... 5708, 6074

26 CFR

1 ... 4412, 4472, 4537, 5372, 5580
2 ... 6030
147 ... 4413
301 ... 4414

PROPOSED RULES:

1 ... 4256, 4482, 4548, 4619, 4635, 4718, 5584, 5595, 5841.

28 CFR

0 ... 5703, 5832
3 ... 5510
50 ... 5510

29 CFR

545 ... 5468

31 CFR

306 ... 4716
316 ... 4716
332 ... 4716

32 CFR

1 ... 5959
2 ... 5959
3 ... 5971
4 ... 5985
5 ... 5985
6 ... 5986
7 ... 5986
8 ... 5998
9 ... 6003
12 ... 6003
13 ... 6013
15 ... 6013
16 ... 6013
17 ... 6019
18 ... 6019
110 ... 5792
220 ... 4753
564 ... 5704
725 ... 5704
823 ... 4353
889 ... 4353
900 ... 4353
902 ... 4353
1016 ... 4353
1456 ... 4672
1458 ... 5475
1470 ... 5476, 5631
1811 ... 5372

32A CFR

OIA (Ch. X):

Reg. 1 ... 4415

33 CFR

8 ... 4415
202 ... 4756
203 ... 4253, 4756, 5762
207 ... 4756, 5631
211 ... 4475

PROPOSED RULES:

401 ... 4557

36 CFR

1 ... 4757
212 ... 5476, 5762
251 ... 5631, 5707
311 ... 4475
313 ... 4610

39 CFR

92 ... 4353
168 ... 4537

41 CFR

8–1 ... 4672
8–2 ... 4674
8–3 ... 4674
8–6 ... 4675
8–7 ... 5376
8–10 ... 4676
8–11 ... 4676
8–16 ... 4677
8–18 ... 4677
8–30 ... 4677
8–52 ... 4677
9–16 ... 4357
39–1 ... 5793
101–5 ... 4358
101–10 ... 4359
101–11 ... 4757
101–25 ... 4757, 5479
101–26 ... 4758, 5480
101–43 ... 5823
101–44 ... 4716

PROPOSED RULES:

50–204 ... 5483

42 CFR

61 ... 6072
63 ... 6072

43 CFR

18 ... 5632
416 ... 4538
2030 ... 4759
2230 ... 5707
2240 ... 5707
3160 ... 4759

PUBLIC LAND ORDERS:

802 (revoked in part by PLO 3577) ... 4476
891 (revoked by PLO 3578) ... 4476
1009 (revoked in part by PLO 3582) ... 4478
1233 (revoked in part by PLO 3623) ... 5480
1254 (revoked by PLO 3628) ... 5380
1301 (revoked by PLO 3572) ... 4254
1457 (revoked in part by PLO 3617) ... 5379
1546 (revoked in part by PLO 3642) ... 5636
1632 (revoked by PLO 3593) ... 4542
1695 (modified by PLO 3570) ... 4253
1726 (modified by PLO 3596) ... 4542
1843 (revoked in part by PLO 3587) ... 4540
1993 (revoked by PLO 3613) ... 5378
2932 (revoked by PLO 3593) ... 4542
3152 (amended by PLO 3584) ... 4478
3349 (vacated in part by PLO 3583) ... 4478
3406 (revoked in part by PLO 3587) ... 4540
3407 (revoked by PLO 3625) ... 5481

43 CFR—Continued

PUBLIC LAND ORDERS—Continued

	Page
3480 (amended by PLO 3631)	5482
3500 (amended and revoked in part by PLO 3581)	4477
3501 (revoked in part by PLO 3574)	4254
3569	4253
3570	4253
3571	4253
3572	4254
3573	4254
3574	4254
3575	4475
3576	4476
3577	4476
3578	4476
3579	4477
3580	4477
3581	4477
3582	4478
3583	4478
3584	4478
3585	4539
3586	4540
3587	4540
3588	4540
3589	4541
3590	4541
3591	4541
3592	4541
3593	4542
3594	4542
3595	4542
3596	4542
3597	4678
3598	4678
3599	4678
3600	4678
3601	4679
3602	4679
3603	4716
3604	4717
3605	5376
3606	5376
3607	5376
3608	5377
3609	5377
3610	5377
3611	5377
3612	5377
3613	5378
3614	5378
3615	5378

43 CFR—Continued

PUBLIC LAND ORDERS—Continued

	Page
3616	5378
3617	5379
3618	5379
3619	5480
3620	5379
3621	5380
3622	5480
3623	5480
3624	5481
3625	5481
3626	5481
3627	5380
3628	5380
3629	5481
3630	5481
3631	5482
3632	5482
3633	5380
3634	5632
3635	5635
3636	5635
3637	5635
3638	5635
3639	5635
3640	5636
3641	5636
3642	5636
3643	5636
3644	5637
3645	5637
3646	5637
3647	5637
3648	5638
3649	5638
3650	5638
3651	5639
3652	6072
3653	6072
3654	6072

44 CFR

702	5511

45 CFR

13	5833
180	4359
301	5794

46 CFR

244	5794
355	5901
402	5512
510	4360

46 CFR—Continued

PROPOSED RULES:

53	5607
221	4416
525	5908
537	4557, 5908

47 CFR

0	4543, 4612
1	4478, 4479, 4543
2	4479, 5513
21	6038
73	4479, 4480, 4543, 5513, 5833, 5901, 6063
89	4612
91	4612, 6038
93	4612
97	4618

PROPOSED RULES:

2	4322, 4492
21	4322, 6078
31	5858
42	5858
73	4493, 4495, 4554, 5798, 5860
74	4322, 6078
87	4492
91	4322, 6078
97	4496

49 CFR

72	5743
73	5743
74	5747
77	5748
78	5748
95	4254, 5419
182	5420
193	4481
240	5836

PROPOSED RULES:

72	4682
73	4682
74	4685
77	4685
78	4685
79	4687
188	5709
211	5384

50 CFR

33	5380, 5381, 5707, 6073

PROPOSED RULES:

10	5640
13	4721
253	5382
256	4761

Latest Edition in the series of . . .

PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES

John F. Kennedy, 1963

Contains verbatim transcripts of the President's news conferences and speeches and full texts of messages to Congress and other materials released by the White House during the period January 1–November 22, 1963.

Among the 478 items in the book are: special messages to the Congress on education, youth conservation, needs of the Nation's senior citizens, and on improving the Nation's health; radio and television addresses to the American people on civil rights and on the nuclear test ban treaty and the tax reduction bill; joint statements with leaders of foreign governments; and the President's final remarks at the breakfast of the Fort Worth Chamber of Commerce. Also included is the text of two addresses which the President had planned to deliver on the day of his assassination; President Johnson's proclamation designating November 25 a national day of mourning; and remarks at the White House ceremony in which President Kennedy was posthumously awarded the Presidential Medal of Freedom.

A valuable reference source for scholars, reporters of current affairs and the events of history, historians, librarians, and Government officials.

1007 Pages *Price: $9.00*

VOLUMES *of* PUBLIC PAPERS *of the* PRESIDENTS
currently available:

HARRY S. TRUMAN

1945	$5.50	1947	$5.25
1946	$6.00	1948	$9.75
1949	$6.75		

DWIGHT D. EISENHOWER:

1953	$6.75	1957	$6.75
1954	$7.25	1958	$8.25
1955	$6.75	1959	$7.00
1956	$7.25	1960–61	$7.75

JOHN F. KENNEDY:

1961	$9.00	1962	$9.00
1963	$9.00		

Volumes are published annually, soon after the close of each year. Earlier volumes are being issued periodically, beginning with 1945.

Contents:

- Messages to the Congress
- Public speeches
- The President's news conferences
- Radio and television reports to the American people
- Remarks to informal groups
- Public letters

Order *from the*: Superintendent of Documents
Government Printing Office
Washington, D.C. 20402