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ENACTED with a background of knowledge gained from the termination of more than 25,000 army and navy contracts having an uncompleted value of approximately $17,000,000,000,[1] the Contract Settlement Act of 1944[2] was the first of the legislative enactments by which Congress seeks to control the possibility of a rising tide of economic difficulties which might otherwise drown the body politic in a flood of cancellation notices.[3] The passage of the act was preceded by extensive public hearings[4] and debates,[5] during which responsible Government officials and leaders of labor and industry expressed their

* Pub. L. 395, 78th Cong., 2d sess., c. 358, S. 1718, approved July 1, 1944, effective July 21, 1944, hereinafter referred to as Contract Settlement Act of 1944.

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The opinions expressed in this article are the writer's own and are not to be construed as the official views of the War Department.

[1] 90 CONG. REC., No. 78, pp. 3987–3988 (May 3, 1944).

[2] Contract Settlement Act of 1944.

[3] H. Rep. No. 1590, to acompany S. 1718, 78th Cong., 2d sess., entitled "Settlement of Claims Arising from Terminated War Contracts," June 1, 1944, p. 18:

"The report of the House Special Committee on Post-War Economic Policy and Planning (H.Rep. 1443) points out that approximately one-half of the total goods and services produced at the current rate of high production is for war purposes and of the persons now employed in manufacturing, about two-thirds are engaged in war work. The volume of our war production from July 1940 to the end of 1944 will total about $205,000,000,000, of which $130,000,000,000 represents the production completed by the end of 1943 and $75,000,000,000 is scheduled for completion in 1944. The number of prime contracts has been adversely estimated at from 100,000 to 250,000 depending on what is counted as a separate contract. A survey made in September 1943 showed that there were 105,000 contracts for $50,000 or more held by approximately 17,000 establishments and another 100,000 smaller contracts. The number of subcontracts might run well over a million involving 70 establishments large and small."

[4] See, for example, S. Hearings on S. 1268, S. 1280 and S. J. Res. 80, 78th Cong., 1st sess., 1943. (These hearings are headed "Problems of Contract Termination" and are divided into five parts. Part 1 is dated October 14 and 15; Part 2, October 21 and 22; Part 3, October 27 and 28; Part 4, November 4 and 5; Part 5, November 8, 9 and 10.)

[5] See, for example, 90 CONG. REC., Nos. 78, 79, 80, pp. 3987, 3988, 3994, 4079, 4125 (May 3, 4 and 5, 1944).

considered opinions. Congress likewise had the benefit of an extensive analysis of the termination and reconversion problem—the Baruch-Hancock report on War and Post-War Adjustment Policies[6]—written with a background of invaluable experience and knowledge gained in the First World War. Moreover, the whiplash of divergent views,[7] frankly expressed, of sincere and thoughtful men who felt the public good demanded that these complex problems be solved by means wholly different from those provided in the act, helped mold this legislation.

INTRODUCTION

In an earlier article,[8] the author traced the course of events which led the War Department, in November 1942, to abandon a termination article in its fixed-price supply contracts, which required extensive auditing and made payment of termination charges contingent upon the final review and approval of the General Accounting Office, and to adopt a termination article, under which " . . . the Government shall pay to the Contractor such sum as the Contracting Officer and the Contractor may agree by Supplemental Agreement is reasonably necessary to compensate the Contractor for his costs, expenditures, liabilities, commitments, and work in respect to the uncompleted portion of the contract so far as terminated by the notice referred to in paragraph (a). The Contracting Officer shall include in such sum such allowance for anticipated profit with respect to such uncompleted portion of the contract as is reasonable under all the circumstances."[9]

The tremendous number of contracts and the intricate workings of the "contractual chain" could not, as was readily apparent, be met by a termination article alone. The magnitude of the termination and reconversion task was emphasized when early in 1943, Senator James E. Murray of Montana, chairman of the Senate Small Business Com-

[6] Report on War and Post-War Adjustment Policies submitted to the Director, Office of War Mobilization, Honorable James F. Byrnes, on February 15, 1944, by Mr. Bernard M. Baruch and Mr. John Hancock for the Advisory Unit for War and Post-War Adjustment Policies, Office of War Mobilization. This analysis, commonly referred to as the Baruch-Hancock Report, and hereinafter so cited, has been generally accepted as sound, and constitutes the cornerstone of present-day thinking on the problems of termination of war contracts and reconversion to peace.

[7] See the testimony of the Comptroller General of the United States, Hon. Lindsay Warren, as recorded in the Senate Hearings cited in note 4, supra, and H. Hearings on H.R. 3022, 78th Cong., 1st sess., 1943, Part 2, p. 200 (Committee on Military Affairs). See also the statement of Senator Kilgore upon the inadequacies of S. 1718, 90 CONG. REC., No. 79, pp. 4072–4075 (May 4, 1944).

[8] 42 MICH. L. REV. 733 (1944).

[9] PR 15-901; C.C.H. WAR LAW SERVICE, 2 Govt. Contracts, ¶ 23,798.

mittee and of the War Contracts Subcommittee of the Senate Military Affairs Commitee, began to receive complaints from small businessmen whose contracts had been terminated and whose termination claims had remained unpaid. As an aftermath of these complaints, hearings were held which brought out the imperative need for protecting subcontractors in case of contract terminations by making available adequate interim financing and assisting in the final settlement of their claims.[10]

In June 1943, the War Department, seeking clear-cut legislative authority for the procedures it had already adopted, requested Congress to enact a very short bill as a rider to a $71,000,000,000 army appropriation measure, which would give blanket authority to the Secretary of War to use departmental appropriations "in connection

[10] "The bill really originated as a result of complaints which the Special Committee to Study and Survey Problems of Small Business Enterprises began to receive from small corporations engaged in war work, which were being affected by the termination of contracts. As early as June 24, 1943, I introduced a bill entitled 'A bill to facilitate the termination of war contracts.' That bill was introduced as a result of the many complaints which were coming to the Senate Committee on Small Business. It seems that a great many contracts which involved thousands of subcontractors had been terminated. One contract with the International Harvester Co. involved 2,500 subcontracts. A great many other prime contracts involving large numbers of subcontractors were being terminated. These terminations were vitally affecting the small contractors, because of the absolute need to get their money out of their war work when the contracts were terminated. So they became quite fearful of the prospect of having their money tied up for long periods of time. Many representatives of these small contractors came to our committee and complained that their contracts had been terminated for periods of many months, and that they saw no possibility of getting settlements. They were tied up as a result of the existing laws, which made it impossible for the war agencies to make speedy and equitable settlements of claims.

"As a result of that situation, in June 1943, I introduced the first bill on the subject. Later, I was invited by the chairman of the Special Committee on Post-War Economic Policy and Planning to sit with his committee for the purpose of cooperating in the study of the post-war program and problems which that committee was considering. I have since cooperated and consulted with that committee throughout the period while we were formulating this legislation, particularly the legislation pertaining to contract termination.

"The bill which is before us today has two main principles. The first is speedy and fair settlements for all holders of terminated contracts. The bill undertakes to provide a method whereby those contracts can be terminated and promptly settled by the war agencies, without the need of waiting for an audit by the General Accounting Office, which up to the present time has precluded the Government agencies from making prompt settlements.

"The bill undertakes to protect the Government against waste and fraud in making these settlements." Statement of Senator Murray, appearing in 90 CONG. REC., No. 78, p. 3992 (May 3, 1944).

See the analysis of the Contract Settlement Act of 1944 by Senator Murray, 10 L. AND CONTEMP. PROB. 683 (1944).

with the termination of War Department contracts, under such regulations as he may prescribe and without regard to any provision of law relating to the making, performance, amendment or modification of contracts . . . ."[11]

In September of the same year, the Comptroller General, Mr. Lindsay C. Warren, who up to that time had remained silent on the practices and procedures established by the War Department, expressed himself at length in response to an invitation of Senator Murray to comment on a proposed bill which the senator had introduced "to facilitate the termination of war-production contracts and subcontracts, establish uniform contract-termination policies, and for other purposes."[12] In stating his objections to the proposed bill, Mr. Warren vigorously attacked the then recently promulgated Procurement Regulation No. 15 which stated the War Department's policy of negotiating a final and conclusive settlement of any sums alleged by a contractor to be due under his contract and set forth the procedures to be followed in arriving at such settlements—procedures which precluded the General Accounting Office from questioning the amount agreed to be paid.

In quick rebuttal, the Under Secretary of War, Judge Robert P. Patterson, took the position that not only did the economic well being of the nation demand the speedy and final payment of claims under terminated war contracts but, that under the rules and regulations established by the War Department, the interests of the Government should be adequately protected. These conflicting views were discussed at length and, it is concluded from a reading of the hearings, apparently with some heat.[13]

[11] H. Hearings on H.R. 3022, 78th Cong., 1st sess., June 23, 24, 25 and 29, 1943, p. 1 (Committee on Military Affairs).

Said Congressman May: "Having had considerable experience with legislative riders on appropriation bills, and knowing the feeling of this committee that legislative authority should first be granted, I did not agree to allow the Senate to attach a rider of that kind to the Army appropriation bill, but felt that this committee should consider the legislation and exercise its own prerogative." Id. at p. 2.

[12] S. Hearings on S. 1268, S. 1280 and S.J. Res. 80, 78th Cong., 1st sess., 1943, Part 4, p. 234 (Committee on Military Affairs), cited note 4, supra.

[13] See S. Hearings, cited note 4, supra.

The following statement of the Comptroller General, appearing on pages 192–193 of H. Hearings on H.R. 4789 and S. 1718 (Contract Termination), 78th Cong., 2d sess., May 17, 1944 (Subcommittee No. 3 of the Committee on the Judiciary) constitutes a very clear statement of his position:

"At this point I wish to state for the information of your committee that under existing laws the contracting agencies of the Government have authority to terminate contracts and to enter into agreements with contractors setting forth the basis for determining the amount to be paid by the Government in the event of termination. I

Having obtained and studied these divergent opinions, Congress determined that the Comptroller General's position was untenable and, in the Contract Settlement Act, made the following provision on the question of finality of the settlement by a procuring agency: "Any contracting agency may settle all or any part of any termination claim under any war contract by agreement with the war contractor, or by determination of the amount due on the claim or part thereof without

have recognized that where the contractor and a contracting officer have agreed on the amount which is to be paid pursuant to such a contract provision and payment thereof is made by a disbursing officer, such agreement and payment are final and conclusive on the United States in the absence of fraud and misrepresentation or the like. Under such procedure, however, the audit function of the General Accounting Office would be merely to ascertain that the amount paid by the disbursing officer is in accordance with the agreement of the parties. Thus, it is apparent that under existing law the audit function of the General Accounting Office, insofar as respects payments made under terminated war contracts pursuant to an agreement of the parties, is practically negligible and is wholly insufficient to prevent or to recover any erroneous or improper payments to contractors. In other words, for all practical puposes the General Accounting Office is completely out of the picture—the interest of the United States being entrusted solely to contracting officers and other officials of the administrative agencies. And this would be the situation under the program which the bills before this committee would establish.

"In my various reports and statements on the proposed legislation I have attempted to point out as definitely and as emphatically as is possible that such a procedure was wholly inadequate and insufficient to protect the interests of the United States. This conclusion is based on the fact that the audit by this office of payments under cost-plus-a-fixed-fee contracts has disclosed that contracting officers and other officials of the contracting agencies who are charged with determining administratively what constitutes proper items of cost thereunder, have approved for payment items which in no way could be said to be reasonably incident to or necessary for the performance of the contract work. Hence, because of this demonstrated liberality and laxness of these same contracting officers and other administrative officials who may be charged with the duty of settling the Government's obligations, under terminated war contracts, I am convinced that they will allow improper payments which may total many millions of dollars, and under existing law and under the bills before this committee the Government will be precluded from the recovery thereof except in those cases where fraud can be detected and proved.

"Accordingly, I have urged consistently that specific provision be made in legislation which may be enacted to insure that, in connection with termination settlements, the General Accounting Office may be enabled to make an effective and independent examination and review prior to final settlement of the amount approved for payment by the administrative departments and agencies of the Government. I have urged further that, to insure that an effective and independent examination and review may be made by the General Accounting Office, there should be incorporated into any proposed legislation which may be enacted, the provision that claims records, adequately developed, shall be sent to the General Accounting Office for complete adjustment and final settlement after the contracting departments and agencies have made a tentative agreement or a finding as to amounts due and based thereon, have made payment of such advance or partial payments or loans as may otherwise be authorized."

such agreement, or by any combination of these methods. Where any such settlement is made by agreement, the settlement shall be final and conclusive, except (1) to the extent otherwise agreed in the settlement; (2) for fraud; (3) upon renegotiation to eliminate excessive profits under the Renegotiation Act, unless exempt or exempted under that Act; or (4) by mutual agreement before or after payment. Where any such settlement is made by determination without agreement, it shall likewise be final and conclusive, subject to the same exceptions as if made by agreement, unless the war contractor appeals or brings suit"[14] in accordance with the provisions of the act..

The theory of a final and conclusive settlement arrived at by negotiation constitutes the foundation stone upon which the entire act, and the procedures in effect under it, rest.[15] By its acceptance, Congress indorsed the principle of a plan of procedure which would make possible expeditious settlements with a minimum of time lost in auditing. It reveals an intention not to "quibble the nation into a panic."[16] The acceptance of the principle of the negotiated lump sum settlement which would be final and conclusive[17] meant that delegations of authority to prime contractors and subcontractors to settle the claims of their immediate suppliers within announced limitations, could be made; that interim financing would be supplied upon a basis commensurate with the need; that war contract settlements demanded quick and bold action rather than a hesitant policy of procrastination attendant upon a "battle of accountants." Such are the implications of the decisions made as reflected in the broad objectives of the act, which have been stated to be that businessmen shall be paid speedily the fair compensation which is due them for the termination of their war contracts

[14] Contract Settlement Act of 1944, § 5 (c).

[15] Until such time as the director of contract settlement issues policies, principles, methods, procedures and standards to the contrary, those policies and procedures in effect which have been prescribed by the director of war mobilization or any contracting agency not inconsistent with the act, are to remain in full force and effect. Contract Settlement Act of 1944, § 20 (d).

Moreover, any Government agency may issue such further regulations not inconsistent with the general orders or regulations of the director as it deems necessary or desirable to carry out the provisions of the act. Contract Settlement Act of 1944, § 4 (c).

[16] Baruch-Hancock Report, p. 8.

[17] "The term 'final and conclusive,' as applied to any settlement, finding, or decision, means that such settlement, finding, or decision shall not be reopened, annulled, modified, set aside, or disregarded by any officer, employee, or agent of the United States or in any suit, action, or proceeding except as provided in this Act." Contract Settlement Act of 1944, § 3 (m).

and that the Government, when paying out such fair compensation, should be carefully protected against waste and fraud.[18]

THE DIRECTOR OF CONTRACT SETTLEMENT

The act establishes an Office of Contract Settlement to be headed by a director,[19] who is to be appointed by the President by and with the consent of the Senate.[20] The director occupies the position of a policy-making and supervising coordinator and is empowered to prescribe principles, methods, procedures and standards[21] which the Government agencies must carry out to the end that uniformity and efficiency in accomplishing the provisions of the act will follow. (All policies and procedures in effect upon the effective date of this act, July 21,

[18] Report of Senator Murray in S. Rep. No. 836, to accompany S. 1718, 78th Cong., 2d sess., May 2, 1944, p. 2:

"The need for protecting the Government against the waste of funds and fraud is equally clear, and S. 1718 as amended fully protects the Government in the following manner:

"(1) The full responsibility for settling terminated war contracts has been placed squarely upon the shoulders of the contracting agencies and they cannot escape that responsibility. The contracting agencies who made the contracts, are familiar with the contracts, and any attempt to let them escape their responsibility of properly settling such contracts in case of termination must be avoided.

"(2) The Director of Contract Settlement is to be established as an independent civilian agency with policy-making and supervisory powers over the contracting agencies in connection with contract settlement and interim financing activities. It is the function of the Director to insist on efficient settlement methods and procedures which will achieve the dual purpose of this legislation.

"(3) The General Accounting Office as the investigatory arm of the Congress, is authorized to investigate settlements completed by the contracting agencies for the purpose of reporting to Congress whether the settlement methods and procedures employed by the contracting agencies are of a kind and type designed to assure expeditious and fair settlements, and whether such methods and procedures adequately protect the interests of the Government. The Comptroller General is directed to make suggestions and recommendations to the contracting agencies concerned and to the Congress if he shall find that the settlement methods and procedures fail to meet the standards of expeditiousness and fairness. Furthermore, the Comptroller General is to determine whether settlement payments are made in accordance with the settlement, and whether settlements are induced by fraud.

"(4) Finally the Congress, through the appropriate committees of the Senate and the House, will maintain continuous surveillance over the operations of the Government agencies under the proposed legislation. The Congress will appraise the reports submitted by the Director and the Comptroller General and, if necessary, will make suitable changes in the law, in order to make absolutely sure that the dual purpose of this legislation to settle termination claims speedily and to protect the Government's interest is achieved."

[19] Contract Settlement Act of 1944, § 4 (a).

[20] The Director of Contract Settlement is Mr. Robert H. Hinkley.

[21] Contract Settlement Act of 1944, § 4 (b) and (c).

1944, and not inconsistent with the act, are to remain in full force and effect unless and until superseded by the director in accordance with the act or by regulations of the contracting agency not inconsistent with the act or the policies prescribed by the director.)[22] The office is not an operating agency. It is the director's responsibility to provide war contractors having any termination claim or claims, pending their settlement, with adequate interim financing, within thirty days after proper application therefor.[23] He is to prescribe the practice and procedure to govern proceedings before an appeal board provided for by the act unless the director authorizes the appeal board to prescribe such rules.[24]

The director must establish, within the contracting agencies, policies for such supervision and review of termination settlements and interim financing as he deems necessary to prevent and detect fraud and to assure uniformity in administration and to provide for expeditious settlement.[25] Information and reports are to be prepared by the contracting agencies and furnished to the director, whose duty under the act embraces the making of such investigation as he deems necessary or desirable in connection with termination settlements and interim financing.[26] The duty has been placed on the director to establish policies and procedures for group settlements, by any contracting agency, of some or all of the termination claims of a war contractor, where he has contracts with one or more bureaus or divisions within a contracting agency or with different agencies or prime contractors and subcontractors, to the extent the director deems the action necessary or desirable for expeditious settlement.[27] He is further directed to promote the training of personnel for termination settlement and interim financing by contracting agencies, war contractors and financing institutions; to collaborate with the Smaller War Plants Corporation; to promote decentralization of the administration of termination settlements and interim financing by fostering delegations of authority within contracting agencies and to war contractors, and to consult with war contractors through advisory committees or such other methods as he deems appropriate.[28]

The director is authorized to delegate any authority and discretion conferred upon him by the act to the head of any Government agency to the extent necessary for the proper handling and solution of prob-

[22] Id. at § 20 (d).
[23] Id. at § 8 (a).
[24] Id. at § 13 (d) (3).
[25] Id. at § 18 (a).
[26] Id. at § 18 (d).
[27] Id. at § 7 (c).
[28] Id. at § 21.

lems peculiar to that agency, with full powers of redelegation.[29] Moreover, in January, April, July and October of each year, the director must submit to the Senate and House of Representatives a quarterly progress report on the exercise of his duties and authority under the act, the status of contract terminations, termination settlements and interim financing, and such other pertinent information on the administration of the act as to enable the Congress to evaluate its administration and the need for amendments and related legislation.[30] To assist the director in formulating policies and procedures, the act creates a Contract Settlement Advisory Board, composed of the director, as chairman, the Secretaries of War and of the Navy, the chairman of the Maritime Commission, the administrator of the Foreign Economic Administration, the chairman of the Board of Directors of the Reconstruction Finance Corporation, the chairman of the War Production Board, the chairman of the Board of Directors of the Smaller War Plants Corporation, or any alternate or representative delegated by any of them.

It is, of course, immediately seen that the Comptroller General is absent from this policy board. The Baruch-Hancock report, as well as the Colmer report,[31] recommended that he be placed on this board but he opposed the suggestion and, as a result, was not included.

[29] Id. at § 23. See 90 CONG. REC., No. 78, pp. 3994–3995 (May 3, 1944) under the heading "Statement by the Comptroller General."

[30] Id. at § 2.

[31] Baruch-Hancock Report, p. 5. H. Rep. No. 1443, pursuant to H. Res. 408, 78th Cong. 2d sess., entitled "Post-War Economic Policy and Planning," May 12, 1944, as reported in H. Hearings on H.R. 4789 and S. 1718, 78th Cong., 2d sess., May 17, 1944, p. 56 (Subcommittee No. 3 of the Committee on the Judiciary):

"In the second place, the committee recommends that the Comptroller General be made a member of the Contract Settlement Advisory Board. This will permit him to participate in advising the Director and to contribute to the formulation of policies for the protection of the Government interests and the prevention of fraud." Id. at 66.

Mr. Hancock testified before the Subcommittee on the Judiciary, House of Representatives, as follows:

"We thought in our report that the wise course of action was to put the Comptroller General there. He has wanted to have either sole responsibility—entire responsibility—or none. I thought on that issue he was entitled to a decision. On that issue I thought the only answer was to say that he shall have no power, I could not conceive of giving him full powers. So in our report—Mr. Baruch's and mine—we proposed that he come in on the policy level, where he would not be charged with actual operations, but would be a guiding, helpful hand in setting up policies. He declined the appointment. Now he has declined it again. I think his argument ran beyond the first proposition, which was to know whether he was fully in or fully out. He did consent in his letter, written to the Murray committee, which I think is in the record of their committee, that if he was to be out, he should be put out in no un-

PROTECTION OF THE INTEREST OF THE GOVERNMENT

The duties so imposed upon the director make possible the continuous surveillance by Congress of the operation of the contracting agencies under the act and are but one of several devices by which Congress proposes to avoid fraud and the waste of public funds. The full responsibility for settling terminated war contracts has been placed squarely upon the shoulders of the contracting agencies and they can neither shirk nor avoid that responsibility even if they desire to do so. In addition to the benefits derived from centralization of responsibility, Congress has defined the position which the General Accounting Office, as the investigatory arm of Congress, shall occupy. The office is confined to the duty of determining after final settlement: "(1) whether the settlement payments to the war contractor were made in acordance with the settlement, and (2) whether the records transmitted to it, or other information, warrant a reasonable belief that the settlement was induced by fraud."[32] In order to accomplish this purpose, authority was vested in the office to examine any records maintained by any contracting agency or by any war contractor relating to any termination settlement.[33] Furthermore, the act provides that, whenever the Comptroller General is convinced that any settlement was induced by fraud, he is to submit such facts to the Department of Justice, which is to make an investigation and, until the Department of Justice notifies the contracting agency that in its opinion the facts do not support the belief that the settlement was induced by fraud, the contracting agency, by setoff or otherwise, may withhold from amounts due the war contractor the sums which, in the opinion of the Comptroller General, were tainted by the fraud.[34] In addition, the Comptroller General may investigate completed settlements for the purpose of reporting to Congress whether the settlement procedures and methods of the contracting agency are of a kind designed to result in fair and expeditious settlements, whether such procedures and methods are followed, and whether they adequately protect the interests of the Government.[35]

The act further provides that it shall be unlawful for any person to destroy any records of a war contractor relating to the negotiation,

certain terms. That was the way the Murray bill was written. Our concern is that if he comes into settlement by way of preaudit, we will have an impossible situation." Id. at 35.

[32] Contract Settlement Act of 1944, § 16 (a).

[33] Ibid.

[34] Id. at § 16 (b).

[35] Id. at § 16 (c).

award, performance, payment, interim financing, cancellation or other termination or settlement of a war contract of $25,000 or more or; any records of a war contractor and any purchaser relating to any disposition of termination inventory in which the consideration received by any war contractor or any Government agency is $5,000 or more, until five years after the disposition of the termination inventory, the final settlement of such war contract, or the termination of hostilities, whichever applicable period is longer.[36] Congress took into consideration the fact that such records would be bulky, and made provisions for the making and retaining of photographs or micro-photographs of the documents involved in the foregoing transactions.

Severe penalties are provided for the presentation of a claim, bill, receipt, voucher, statement, account, certificate, affidavit or deposition, by anyone knowing the same to be false, fraudulent or fictitious, in connection with the termination, cancellation, settlement, payment, negotiation, renegotiation, performance, procurement or award of a contract with the United States.[37] Such are the provisions invoked to protect the Government's interests.[38]

THE UNIFORM TERMINATION ARTICLE AND THE CONTRACT SETTLEMENT ACT

A. The Prime Contractor. "It is the policy of the Government, and it shall be the responsibility of the contracting agencies and the Director, to provide war contractors with speedy and fair compensation for the termination of any war contract, in accordance with and subject to the provisions of this Act." So states section 6 (a) of the Contract Settlement Act. This constitutes a statement of policy with which no fair-minded individual can quarrel, but the problem with which the act seeks to deal goes far beyond any statement of policy, for its terms and conditions affect between 100,000 and 250,000 prime contracts, the number depending upon what is counted as a separate contract. A survey reveals that there were 105,000 contracts for $50,000 or more held by approximately 17,000 establishments and another 100,000 smaller contracts. "The number of subcontracts might run well over a million, involving 70,000 establishments, large and small."[39] The

[36] Id. at § 19 (a).

[37] Id. at § 19 (c) (1).

[38] See note 18, supra.

[39] H. Rep. No. 1443, pursuant to H. Res. 408, 78th Cong., 2d sess., entitled "Post-War Economic Policy and Planning, First Report of House Special Committee on Post-War Economic Policy and Planning," May 12, 1944, p. 3.

"first step" leading to and making feasible the statement of policy appearing as section 6 (a) of the act, was taken on January 8, 1944, when War Mobilization Director Byrnes accepted the uniform termination article for fixed-price contracts as recommended by the Joint Contract Termination Board and made such article effective. At the same time, he made effective a Statement of Principles for Determination of Costs as prepared by the board and incorporated in the termination article.[40]

By the adoption of this uniform article, it became possible to simplify procedures and to secure the benefits of regular and consistent practices—benefits which inured to both the Government and the contractor. What was even more important—with a uniform statement of rights, duties and obligations of the contracting parties established as a foundation—, legislation could be cut to a uniform pattern which would affect all contracting parties equally. The uniform termination article adopted for fixed-price supply contracts provides, among other things, that the Government may terminate its contract at any time, in whole or in part. Upon such termination, the contractor agrees he will cease working on that portion of the contract terminated; that he will place no further orders or subcontracts for materials, services or facilities; that he will terminate all orders and subcontracts to the extent that they relate to the performance of any work terminated by notice of termination; that he will assign to the Government, in the manner and to the extent directed by the contracting officer, all of the right, title and interest of the contractor under the orders or subcontracts so terminated; that he will settle all claims arising out of such termination of orders and subcontracts with the approval or ratification of the contracting officer to the extent that he may require, which approval or ratification is made final for all purposes of the termination article; that he will, in the manner, to the extent and at the times directed by the contracting officer, transfer and deliver to the Government property identified in the article; that he will, in the manner, to the extent, at the time and at the price or prices directed or authorized by the contracting officer, use his best efforts to sell any such property; that he will complete performance of such part of the work as is not terminated by the notice of termination; and that he will take such action as may be necessary or as the contracting officer may direct for the protection and preservation of such property, which is in the possession

[40] PR 324 (g); C.C.H. WAR LAW SERVICE, 2 Govt. Contracts ¶ 22,701; PR 15–481; id., C.C.H. ¶ 23,684, ¶ 23,685.

of the contractor and in which the Government has or may acquire an interest.[41]

To carry out these provisions, the contractor must be in a position to notify promptly his subcontractors of the termination of their purchase orders; to secure their termination charges and inventory schedules; to review such charges and schedules; to advise as to partial payments; and to arrange a program to dispose of property. The termination article thus places upon the prime contractor affirmative duties of a very real character—duties which the contractor will not be able to discharge expeditiously unless he recognizes their import today, for he will surely feel their impact tomorrow or the day after tomorrow or whenever V-Day comes. The contractor must be in a position to advise the Government promptly, fully and fairly of those facts necessary to secure payment upon the termination of his contract, or he will undoubtedly find that such payment, which is contingent upon information that must, in the first instance, be forthcoming from the contractor, will be delayed.

It seems quite apparent that Congress wrote the Contract Settlement Act of 1944 with the uniform termination article for fixed-price supply contracts in mind as a guide. Thus, the Statement of Principles for Determination of Costs, incorporated in the article by reference, though the subject of some disagreement[42] between the House and the Senate, was virtually written into the law as section 6 (d). With one exception, costs disallowed under the statement are disallowed under the act. That exception was the prohibition against the allowance of costs which, under the statute, were charged off during a period covered by renegotiation, if a refund was made for such period, or to the extent that such charging off is shown to have avoided such refund. On this point the act is silent. The act, as well as the Statement of Cost Principles, recognizes that accounting practices and procedures may vary in different companies, and the act calls upon the

[41] PR 324 (b); id., C.C.H. ¶ 22,701.

[42] "One of the major differences between the Senate and House versions of S. 1718 revolved around the question of cost principles. S. 1718 as passed by the Senate, did not contain detailed provisions regarding cost principles to be followed by the contracting agencies either in negotiating settlements or in determining the amount due on a termination claim where an agreement fails to be reached. S. 1718 as passed by the House, on the other hand, upon recommendation of the House Judiciary Committee, included a long list of cost principles derived largely from the Baruch-Hancock uniform termination article. In conference between the House and the Senate those cost principles were replaced by a broader and more general set of principles to be found in Section 6 (d)." Senator James E. Murray, "Contract Settlement Act of 1944," 10 L. AND CONTEMP. PROB. 681 at 686 (1944).

contracting agencies to establish methods and standards, suitable to the conditions of various war contractors, for determining fair compensation on the basis of actual, standard, average or estimated costs, or of a percentage of the contract price based on the estimated percentage of completion of work under the terminated contract, or on any other equitable basis that it deems appropriate.[43] Where the small size of the claim or the nature of production or other factors make it impracticable to apply the cost principles stated, other means of determining fair compensation are to be established.[44] Moreover, considerable latitude was vested in the director when Congress provided: "The failure specifically to mention in this subsection any item of cost is not intended to imply that it should be allowed or disallowed. The Director may interpret the provisions of this subsection (4) and may provide for the inclusion or exclusion of other costs in accordance with recognized commercial accounting practice."[45]

Of these cost provisions, Mr. Hancock said: "There is no problem in the world that is quite so controversial as the problem of accounting. We have tried to get obviously includible items in and obviously excluded items out. I think that if you start trying to draft a bill to take care of every detail, you are going to have a lot more wrangling, and the present procedure is pretty well accepted."[46]

These provisions are of real importance in the termination pattern for, notwithstanding the fact that the settlement is to be arrived at by negotiation, in every instance there must be an office review, by the accounting department, of each statement and settlement proposal submitted by a contractor in connection with a lump sum supply contract.[47] This review goes to the reasonableness of the amounts stated in relation to one another, and to the stage of completion of the work. Of particular interest is the rate of overhead which is stated. So, too, attention is paid to whether the statement was prepared in accordance with recognized accounting principles.[48] It is the contracting officer's responsibility to determine what further examination will be made, beyond the office review,[49] of the contractor's proposed settlement. These

[43] Contract Settlement Act of 1944, § 6 (b).
[44] Id. at § 6 (d) (7).
[45] Ibid.
[46] H. Hearings on H.R. 4789 and S. 1718, 78th Cong., 1st sess., May 17, 1944, p. 41 (Subcommittee No. 3 of the Committee on the Judiciary).
[47] PR 15–424.1; C.C.H. WAR LAW SERVICE, Govt. Contracts ¶ 23,645.05.
[48] PR 15–424.2; id., C.C.H. ¶ 23,645.10.
[49] PR 15–424.3; id., C.C.H. ¶ 23,645.15.

reports are not controlling or binding upon the contracting officer, but are simply guides to provide assistance to the contracting officer in connection with the determination of an appropriate amount to pay by way of settlement.[50]

B. The Subcontractor. Section 7 (a) of the act may be traced to the provisions of the uniform termination article placing upon the prime contractor the obligation to settle subcontractor's claims. The contracting agency is directed to "authorize war contractors to make such settlements with subcontractors without review by the contracting agency, whenever the reliability of the war contractor, the amount or nature of the claims, or other reasons appear to the contracting agency to justify such action." Any such settlement so made upon authority granted, is declared to be final and conclusive in the absence of fraud.

The contractual language and the statutory provisions constitute a recognition of the fact that the Government proposes to rely upon the prime contractor's knowledge of the transaction which was terminated, and his business judgment. Moreover, the size and complexity of the termination picture have been frankly appraised and the conclusion reached that, to carry out the broad purpose of the act, the Government must not only work with, but place reliance upon, the contractor; that industry must carry a fair share of the load in disposing of problems created by the war.

Under the uniform termination article for fixed-price contracts, the subcontractor has no direct rights against the Government. The rights of such subcontractors and suppliers are against the prime contractor or intermediate subcontractor who is directly obligated to them on the subcontract or purchase order which they hold. The extent of those rights will depend upon the terms of the subcontract or purchase order in question.[51] This conclusion is, of course, premised on the fact that there is no direct contractual relationship between the Government and the subcontractor. Moreover, there is no assurance that counterclaims and setoffs by the prime contractor or by intermediate subcontractors against a particular subcontractor will have been taken into account by the contracting officer in making partial payment; nor is there any assurance that the amount of such partial payments will be taken into account in determining the amount due the prime contractor. Furthermore, the very number of subcontractors involved will

[50] PR 15–532; id., C.C.H. ¶ 23,704.10.

[51] PR 15–325.2; id., C.C.H. ¶ 23,582.20.

result in delaying the settlement of terminated contracts should the Government seek, as a general policy, to deal directly with subcontractors.[52]

The act itself, however, makes provision for direct settlement of a subcontractor's claim, to the extent that any contracting agency "deems such action necessary or desirable for the expeditious and equitable settlement of such claims."[53] Note that it is not every claim of a subcontractor which will be settled directly—only those claims where direct action will mean an expeditious and equitable settlement. Moreover, the provisions of PR 15-570 categorically state that it is not the intention of the War Department to adopt the policy of direct settlements with subcontractors as a general program,[54] and, since the Director of Contract Settlements has not issued any principles to the contrary,[55] the War Department at least plans to use this method only where the prime contractor cannot accomplish a speedy and fair settlement with his subcontractor. The fact remains, however, that, with the approval of the officer or employee in charge of the procurement office which is administering the settlement of the prime contract, the contracting officer may settle directly the termination claim of any subcontractor if the prime contractor is in sound financial condition and a maximum is stated for the amount of such direct settlement.[56] Where these conditions do not exist, special authority must be obtained from Headquarters, Army Service Forces.[57] Hence, direct settlements may be regarded as an extraordinary procedure,[58] to be utilized on rare occasions.

[52] PR 15–507.1; id., C.C.H. ¶ 23,704.10.

[53] Contract Settlement Act of 1944, § 7 (d).

[54] PR 15–570 (5); C.C.H. WAR LAW SERVICE, 2 Govt. Contracts, ¶ 23,742.

[55] Contract Settlement Act of 1944, §§ 4 (c), 20 (d).

[56] PR 15–570; C.C.H. WAR LAW SERVICE, 2 Govt. Contracts, ¶ 23,742.

[57] Ibid.

[58] The difficulties of the direct settlement procedure were graphically described in the Baruch-Hancock Report when it was said:

"It has been proposed that the Government settle with all subcontractors directly. Apart from other problems discussed later, the Government has had no direct dealings with most of these subcontractors—their names and addresses are not even known—and it would be a tremendous administrative task to settle this multitude of claims. The contractual relationship of these many subcontractors, suppliers and primes, each with one another, are as intricate and complex as the commercial life of the nation.

"The personnel problem involved in having the Government check each of these claims would be gigantic.

"Another difficulty of having the Government step in and attempt to settle directly with the subcontractor is that the prime contractor may have an offsetting claim against the subcontractor. In such situations, the Government would have to

Of particular interest to a subcontractor are the provisions of section 7 (f) of the act, which call for a double payment in the event a subcontractor has been deprived of and cannot otherwise reasonably secure fair compensation in those cases where equity and good conscience require such payment, even though provision for payment has already been included in and made a part of a settlement with another war contractor. Hence, should the recipient of the funds from which a subcontractor is to be paid, abscond or go into bankruptcy, it is possible for the subcontractor to receive fair compensation on his terminated war contract.

The Government recognized, furthermore, that to settle the claim of the prime contractor expeditiously was but one feature of the entire termination task. Steps had to be taken in order to assist the prime contractor, in fulfilling his contractual obligations, to "settle *all* claims arising out of such termination of orders and subcontracts." The Government, predicating its action upon the contractual language contained in the uniform termination article, adopted a policy of authorizing prime and subcontractors to settle their immediate suppliers' claims within stated limitations, and devised and promulgated a uniform termination article for subcontractors, declaring that the policies applicable to the termination article contained in the prime contract would be recognized as applying to the subcontract article.[59]

C. Redelegation of Authority to Settle Claims of Subcontractors. The Congress recognized that delegations of authority to settle the claims of subcontractors would have to be made in order to accomplish the purposes of the act. Any such settlement of a subcontract, which is approved, ratified or authorized by the contracting agency, is made final and conclusive to the same extent as a settlement of a prime contract, and no war contractor may be held liable to the United States on account of any amounts which he pays on such settlements to his subcontractors except for the contractor's own fraud.[60]

The Procurement Regulations of the War Department specifically declare that such authorization to prime contractors, subcontractors

get a release from all such claims or would need the consent of the prime before making payment to a subcontractor.

"Again, it often is difficult to identify a subcontract with the particular contract of the Government which is being terminated" (pp. 48–49).

Nevertheless, the report did recommend that the termination legislation to be enacted by Congress contain appropriate authority to permit the procurement agencies to settle subcontracts directly at their discretion (id. at 51).

[59] PR 15–436; C.C.H. WAR LAW SERVICE, 2 Govt. Contracts, ¶ 23,658.

[60] Contract Settlement Act of 1944, § 7 (a).

and suppliers to settle termination claims asserted against them by their immediate subcontractors, is to be granted to the greatest possible extent consistent with good judgment.[61] The department acknowledges that ordinarily it will be impossible, in the time available, for contracting officers to review all settlements made by subcontractors with their suppliers, but that nonetheless any settlement with any subcontractor in any tier may be selected by the contracting officer for approval or ratification, and that the contracting officer should from time to time require, as a spot-check of the contractor's work, selective settlements with subcontractors in the second or more remote tiers to be submitted for his approval or ratification.[62]

Notwithstanding the fact that a prime or subcontractor has been given the authority to settle the claim of his immediate supplier, should he desire to secure the approval of the contracting officer prior to settling any one claim, he may submit the same for such approval or ratification. In this manner, doubtful cases may receive the approval of the contracting officer before the prime or subcontractor, exercising his authority to settle the claim, changes his position, thus averting the possibility that he might be subject to criticism at a later date.[63]

Authorizations given to a prime contractor or to a subcontractor to make settlements are subject to the following restrictions: first, the settlement agreement will not call for the payment of more than $10,000 without deducting disposal credits; second, the contracting officer must be satisfied that the prime contractor will give adequate reviews to subcontractors' statements of charges and to subcontractors' proposals for retention or sale of property allocable thereto; and, third, all the property allocable to the terminated portion of the subcontract or purchase order, the cost of which is included in the statement of charges, will be retained by the prime contractor or subcontractor at fair and reasonable values or sold by them at the best obtainable prices and the value or proceeds credited on the settlement. This last limitation is subject to the exception, however, that, if the prime contractor or subcontractor cannot sell part or all of the property at any price, or considers the best obtainable price too low to be acceptable, then the prime contractor may make special arrangements with the contracting officer for transfer of title and delivery to the Government of such unsold property.[64]

[61] PR 15–437 (2); C.C.H. WAR LAW SERVICE, 2 Govt. Contracts, ¶ 23,659.
[62] PR 15–437 (5); id., C.C.H. ¶ 23,659.
[63] PR 15–437 (6); id., C.C.H. ¶ 23,659.
[64] PR 15–437-A; id., C.C.H. ¶ 23,659.10.

When contractors act under the authorization granted to them, the settlement agreement must bear an approval signed by a representative of the contractor who is authorized to execute the same. Such approval must be in substantially the following form:

> "The undersigned certifies that it has examined, or caused to be examined, to an extent which it considers adequate in the circumstances, the statement of charges of its within named supplier, and that in its opinion the within settlement is properly allocable to the terminated portion of prime contract with the Government No. ————, is fair and reasonable, was negotiated in good faith, and is not more favorable to said supplier than one which the undersigned would make if reimbursement by the Government were not involved. The undersigned certifies that it has no knowledge to doubt the reasonableness of the settlements with more remote suppliers or to doubt that the charges for them are allocable to said contract." [65]

Authorizations given to the prime contractor or to subcontractors will exclude authority to settle claims of subcontractors which are affiliated with the authorized contractor.[66]

Obviously, it was not enough to permit contractors to settle the termination claims of subcontractors on a final and conclusive basis even within stated limitations if contractors and counsel for contractors were to allow their imaginations to run rampant in imposing terms to be met in the event of termination. To secure the benefits and uniformity of treatment and procedure and, in a measure, to control the terms and conditions upon which subcontracts will be let, the Joint Contract Settlement Board recommended [67] to the Director of War Mobilization, Mr. Byrnes, a termination provision for use in fixed-price orders or subcontracts for the manufacture of supplies under Government war contracts. The director made the article effective on May 29, 1944. In a statement of policy accompanying the article, the Government recommended its use in either first tier or more remote fixed-price subcontracts or purchase orders. The recommended article proposes that the contracting parties accept the same general principles as the uniform termination article for use in fixed-price Government supply contracts. The Office of War Mobilization's statement of policy further declared that the principles adopted for the determination of costs upon termination of the prime contracts would be acknowledged

[65] PR 15–537-A (6); id., C.C.H. ¶ 23,659.10.
[66] PR 15–437 (3); id., C.C.H. ¶ 23,659.
[67] PR 15–1006; id., C.C.H. ¶ 23,861.

by the Government as representing "recognized commercial accounting practices" as the term is used in the subcontract article.

Other Government policies applicable to prime contracts were stated to be generally applicable to the uniform subcontract article. Thus, the policy against reimbursing contractors at the contract rate on termination for completed undelivered articles which represent unreasonable anticipations of production schedules, and the policy against taking advantage of technical defaults when the real reason for termination of the subcontract is the termination of a prime contract by the Government, were deemed to be applicable to the subcontract article as well as to the prime contract article.[68]

As in the uniform article for Government fixed-price contracts, under the uniform subcontract article,[69] the buyer reserves the right to terminate work under the order given, in whole or in part, at any time when the Government may request termination, or, when a contract between the buyer and a third person is terminated or so amended that the articles or services to be furnished under it are eliminated or reduced in number. It should be noted that, by reason of this reservation, in the event of such termination, the buyer would not be breaching his contract and thus make himself liable to an action in damages. The specific reservation would mean, in effect, that, when acted upon, the buyer was exercising a right or option given to him by the seller.[70] On receipt of the notice, the seller, in accordance with the terms of this subcontract article, must stop work under the order and terminate work under outstanding orders and subcontracts. Further provision is made for the negotiation of an amount representing fair compensation to the seller upon such termination and, in the event the parties cannot agree upon such fair compensation, the buyer then agrees to pay, first, the contract price for all articles or services which have been completed in accordance with the order and for which payment has not been previously made; second, the actual costs incurred by the seller which are properly allocable under recognized commercial accounting practices to the terminated portion of this order, including the cost of dis-

[68] "To supplement the Uniform Termination Article for prime contractors, already in effect, a shorter, standard termination article for subcontractors is being drafted.

"The clarification of the rights and obligations of subcontractors provided for in this article will be a major contribution toward helping prime contractors settle promptly with their subs." Baruch-Hancock Report, p. 50.

[69] PR 15–1006.2; id., C.C.H. ¶ 23,861.20.

[70] Ford Motor Co. v. Alexander Motor Co., (Ky. Ct. App. 1928) 2 S.W. (2d) 1031; Sanborn v. Ballanfonte, (Cal. Ct. App. 1929) 277 P. 152.

charging liabilities which are so allocable or apportionable to the order and, in addition thereto, a sum equal to two per cent of that part of such costs representing the costs of articles or materials not processed by the seller, that is, raw materials, plus a sum equal to eight per cent of the remainder of such costs, but the aggregate of such sums not to exceed six per cent of the whole of such costs. Further provision is made that, notwithstanding the terms of the termination article, the right of the buyer to terminate the order for the default of the seller is unaffected.

It should, of course, be noted that, under this uniform subcontract article, as under the uniform prime contract article, though the parties are not restricted to any particular method of computing a profit allowance when they negotiate their settlement, an allowance for profit can be made only for work actually done by the contractor and materials actually obtained or furnished. It is not intended that the contractor shall be allowed any profit with respect to work which has not been done.[71] In recommending the uniform subcontract article, the Office of War Mobilization further declared that it was Government policy to encourage, as far as possible, the settlement of terminated subcontracts by negotiation. Procurement Regulation No. 15 provides that this approved subcontract termination article may be inserted at any time in any fixed-price subcontract to which it is appropriate. Moreover, the regulations provide that, where at the time of settlement a subcontract does not contain the approved article, a settlement based upon a reasonable estimate by the parties of the agreed amounts allowed by the uniform article will be considered fair and reasonable unless the profit allowed, if any, exceeds the rate of profit which the parties then estimate would have been realized had the subcontract been completed.[72]

In some instances, because of the terms of the particular subcontract being settled, the Government will be under obligation either to make reimbursement for, or to assure the defense against, a demand by a subcontractor which is greater in amount than would be recognized by the principles of the approved subcontract article. On the submission to the contracting officer for his approval of a settlement which provides for the payment of such an amount, the contracting officer will decide whether the settlement should be approved or ratified and

[71] PR 15–449; C.C.H. WAR LAW SERVICE, 2 Govt. Contracts, ¶ 23,671; PR 15–436 (1); id., C.C.H. ¶ 23,658.

[72] PR 15–436 (3); id., C.C.H. ¶ 23,658.

whether the Government should protect the prime contractor or intermediate subcontractor from the asserted liability.[73]

By this uniform termination article for subcontracts, the rights, duties and obligations of all parties became known. The article gives to the subcontractor substantially the same rights against the prime contractor as the prime contractor has against the Government. Both articles are in accord with the Contract Settlement Act. Accordingly, to secure the benefits of uniformity of approach, this article should be used wherever possible. It should be borne in mind that the act and the regulations and the uniform termination article for prime and subcontracts constitute one well-rounded whole, and that any contract containing unusual provisions will not be handled at the same rate of speed and dispatch which will prevail when the standard articles are used.

Now, in any case involving a subcontract which does not contain unusual termination provisions unreasonably increasing the common-law rights of the subcontractor, and in which the prime contractor, after making unsuccessful efforts to settle with his subcontractor, is sued in a court of competent jurisdiction and gives prompt notice of such suit to the contracting agency involved and offers to the Government control of the defense of the suit, the contracting officer is directed to accept the final judgment of a court of competent jurisdiction as determining the amount of the obligation between the parties to the suit, and as fixing the amount of the Government's obligation to reimburse the prime contractor to the extent that the subcontract is properly allocable to the prime contractor.[74]

Should the subcontractor fail to make any provisions for termination in the contractual undertaking, the common-law rule of damages for breach of contract will apply; such rule being the difference between the cost of performing the work by the party agreeing to do it and the price to be paid for it; in other words, the profits which would have been made, assuming always that the second party has used reasonable efforts to mitigate damages.[75]

As has been pointed out, the claims of subcontractors not in excess

[73] PR 15–436 (6); id., C.C.H. ¶ 23,658.

[74] PR 15–440; id., C.C.H. ¶ 23,662.

[75] Scheible v. Klein, 89 Mich. 376, 50 N. W. 857 (1891); Greenwood v. Davis, 106 Mich. 230, 64 N. W. 26 (1895); Fell v. Newberry, 106 Mich. 542, 64 N. W. 474 (1895); Barrett v. Grand Rapids Veneer Works, 110 Mich. 6, 67 N. W. 976 (1896); United States v. Purcell Envelope Co., 249 U. S. 313, 39 S. Ct. 300 (1919). See 3 SUTHERLAND, DAMAGES, 4th ed., § 713, p. 2687 (1916). See, generally, 5 WILLISTON, CONTRACTS, rev. ed., § 1338, p. 3762 et seq. (1937).

of $10,000 may be settled under a grant of authority from the Government. As to claims greater than $10,000, the Contract Settlement Act declares that a settlement agreement involving payment in excess of $50,000 (or such lesser amount as the director may determine) shall not become binding upon the Government until the agreement has been reviewed and approved by a settlement review board of three or more members established by the contracting agency to make such settlement, but the failure of the settlement review board to act upon any settlement within thirty days after its submission to the board shall operate as approval by the board.[76]

By administration regulation, the War Department has provided that settlements in excess of $25,000 must receive such approval prior to the execution of the final settlement agreement by the contracting officer, and that this requirement applies not only to the prime contractor but to each settlement with a subcontractor in any tier.[77] If the amount of the proposed settlement exceeds $500,000, the regulations provide that it must be submitted for such approval as the chief of the technical service concerned deems appropriate after having been approved by the review board. In reviewing the proposed settlement, the function of the review board is to determine the overall reasonableness of the proposal from the standpoint of protecting the Government's interests.[78]

It is not the function of the board to examine every element entering into the determination of the amount proposed to be paid, though selective cases will be examined in detail to the end that the board is assured that negotiations are conducted competently and with a full knowledge of all the facts.

INTERIM FINANCING

In examining the vast and complicated field of terminations and reconversion, the Baruch-Hancock report pointed out that "even with the best of good will by both Government and contractors, delays in settling are inevitable." Hence, "the importance to the whole economy of freeing the working capital of manufacturers so there will be jobs is such that interim financing which will provide quick cash pending final settlement is essential."[79]

[76] Contract Settlement Act of 1944, § 5 (c).

[77] PR 15–220 (2); id., C.C.H. ¶ 23,539.

[78] PR 15–220 (3); id., C.C.H. ¶ 23,539.

[79] The Baruch-Hancock Report at p. 10 itemizes the complete financial kit as follows:

"1. Immediate payment—*the full 100 percent*—for all completed articles

"2. On the uncompleted portion of the contract, immediate payment—*the full*

A so-called "financial kit" was devised to meet the varying needs of all war contractors while fully protecting the Government's interests. The Contract Settlement Act adheres closely to the recommendations made. The act declares that it is the policy of the Government to provide war contractors with adequate interim financing[80] pending the settlement of their termination claims, within thirty days after *proper* application therefor.[81] This is, of course, not mandatory. Where interim financing is made by way of advance or partial payment, the act provides that, as far as possible, it will consist of the following:

> "(1) An amount equal to 100 percentum of the amount payable at the contract price, on account of acceptable items completed prior to the termination date under the terms of the contract, or completed thereafter with the approval of the contracting agency; plus
>
> "(2) An amount equal to 90 percentum of the cost of raw materials, purchased parts, supplies, direct labor, and manufacturing overhead allocable to the terminated portion of the war contract; plus
>
> "(3) A reasonable percentage of other allowable costs, including administrative overhead, allocable to the terminated portion of the war contract not included in the foregoing; plus
>
> "(4) Such additional amounts, if any, as the contracting

100 percent—of the Government's estimate of single 'factual' items, wher proof ordinarily is simple, such as direct labor or materials, and of other items on which the Government is able to satisfy itself, *up to 90 percent of the contractor's total estimated costs.*

"3. Immediate payment—*the full 100 percent*—of settlements with subcontractors as soon as approved.

"4. Payment by the Government of *interest on termination claims*, until settled.

"5. As insurance against delays in validating claims, *a new, simplified system of T (Termination) loans by local banks*, with Government guarantees, to be available to all war contractors, primes and subs.

"6. For those unable to obtain such loans from their local banks in 30 days, *the Government to make the loans directly.*

"7. Until the new T loans are authorized by Congress *extension of V and VT loans* to all eligible borrowers.

"8. Finally, for hardship cases, unable to use any of the tools outlined above, *expedited settlements.*"

[80] The term "interim financing" is defined by Contract Settlment Act of 1944, § 3 (i) as follows: "The term 'interim financing' includes advance payments, partial payments, loans, discounts, advances, and commitments in connection therewith, and guaranties of loans, discounts, advances and commitments in connection therewith and any other type of financing made in contemplation of or related to termination of war contracts."

[81] Contract Settlement Act of 1944, § 8 (a).

agency deems necessary to provide the war contractor with adequate interim financing."[82]

In the event that the contractor overstates the amount due on his termination claim in connection with interim financing, a penalty of six per cent of the amount of the overstatement is to be paid by the contractor.[83] These provisions of the act and others, to which reference will be made hereinafter, serve to emphasize the contractual obligation of subsection (9) of the termination article[84] providing "the Government shall make partial payments and payments on account, from time to time, of the amount to which the contractor shall be entitled under this article, whether determined by agreement or otherwise, whenever in the opinion of the contracting officer the aggregate of such payments shall be within the amount to which the contractor will be entitled hereunder."

The act[85] draws a distinction between a partial payment and a final payment on a partial settlement. A partial payment which is in excess of the amount finally determined to be due on the termination claim, is considered a loan repayable to the Government upon demand together with a six per cent penalty computed from the date the excess payment was made to the date on which the excess is repaid or extinguished. However, in the absence of fraud, payments made pursuant to partial or final settlements cannot be recovered. The latter condition is meant to protect a contractor who acts under authority delegated to him to settle the claims of his subcontractors or a situation where the contractor has secured the approval of the contracting officer prior to making payment and then seeks reimbursement from the Government for the payment so made. The duty is placed upon the contracting officer to ascertain whether the prime contractor, either for his own account or for his subcontractor's, needs or desires a partial payment.[86]

Partial payments may take the following forms:

(a) *Immediate partial payment:* Where the contractor is in need of funds for his own benefit shortly after receipt of a notice of termination, he may request a partial payment and include in his request a certificate that the amount of his own costs allocable to the contract and due as of the date of the certificate is not less than a specified amount, after excluding charges with respect to inventory which he

[82] Contract Settlement Act of 1944, § 8 (b).
[83] Id. at § 8 (d).
[84] PR 15–901; C.C.H. WAR LAW SERVICE, 2 Govt. Contracts, ¶ 23,797.
[85] Contract Settlement Act of 1944, § 9 (b).
[86] PR 15–505.3; C.C.H. WAR LAW SERVICE, 2 Govt. Contracts, ¶ 23,700.30.

intends to retain at no cost to the Government. Thereupon, the regulations declare "the contracting officer should promptly grant the request for partial payment in the largest amount he believes reasonable under all the circumstances, . . . but such amount together with all previous unliquidated advance or partial payments allocable to the contractor's own costs, shall not exceed ninety per cent of the amount stated in the contractor's certificate."[87]

(b) *Cost supported partial payments:* If the contractor submits a partial or complete settlement proposal supported by the necessary data prescribed for the submission of termination claims, the contracting officer, after a preliminary examination, will authorize payment of all or part of the following amounts:

(1) The full contract price of completed supplies for which payment has not theretofore been made;

(2) Ninety per cent of the cost of raw materials, purchased parts, supplies, direct labor and manufacturing overhead allocable to the terminated part of the war contract; and

(3) A reasonable percentage of other allowable costs.[88]

(c) *Controlled partial payments:* Where the contractor is of doubtful financial responsibility or where his books and records are known to be inadequate, partial payments may be made through a special controlled account. The controlled partial payment is to be made by means of a supplemental agreement[89] to the terminated contract. The sums so advanced are to be deposited in an account separate from the contractor's general funds. Withdrawals from such account can be made only with the prior written approval of the contracting officer and the money is made subject to a prior Government lien.

The three types of partial payment indicated above are for the benefit of the prime contractor. As in the case of prime contractors, partial payments for the benefit of subcontractors are likewise to be provided for within thirty days after date of receipt by the contracting officer of a proper application. Such payments may be made as follows:

(a) A partial payment may be made in advance of an actual re-

[87] PR 15–506.2; id., C.C.H. ¶ 23,701.20.

[88] PR 15–506.3; id., C.C.H. ¶ 23,701.30.

[89] PR 15–922; id., C.C.H. ¶ 23,815. Section 7 (b) of the Contract Settlement Act of 1944 provides:

"Whenever any contracting agency is satisfied of the inability of a war contractor to meet his obligations it shall exercise supervision or control over payments to the war contractor on account of termination claims of subcontractors of such war contractor to such extent and in such manner as it deems necessary or desirable for the purpose of assuring the receipt of the benefit of such payments by the subcontractors."

quest by a subcontractor in order to place a prime contractor in funds from which the latter may make prompt partial or final payments to his subcontractors as the case arises. To secure such funds from the Government for this purpose, the prime contractor should include with his application for partial payments, either for his own account or solely for the benefit of his subcontractors, a certificate that the amount of all subcontractors' charges allocable to the contract is not less than the specified sum. After giving due consideration to all relevant information available upon the reasonableness of the sum requested and the relationship between the partial payment desired and the amount certified by the contractor as undoubtedly due and, further, upon the general reputation of the contractor for honesty and fair dealing, the contracting officer is directed to grant promptly the request for partial payment in the largest amount he believes reasonable under all the circumstances then known to him, but not exceeding ninety per cent of the amount certified by the contractor as the minimum amount of all subcontractors' charges. The prime contractor must agree to keep all such funds in an account separate from his other funds.

(b) An immediate partial payment may be made to a subcontractor in any tier before he has had an opportunity to prepare an adequate inventory or statement of costs, such payment being predicated upon a certificate that the amount of the subcontractor's own costs allocable to the contract and due as of the date of the certificate is not less than a specified figure, after excluding charges with respect to inventory which he intends to retain at no cost to the Government. This application for an immediate partial payment should be made by the subcontractor to his immediate prime contractor, who will then forward the application through the contractual chain to the contracting officer, with such pertinent information as will assist the contracting officer in passing on the request made.

(c) As in the case of prime contractors, partial payments may be made to provide a subcontractor in any tier with a cost-supported partial payment as soon as possible after a partial or complete settlement proposal has been submitted.[90]

The prime contractor or subcontractor who makes a partial payment should state that the payment is made expressly subject to section 9 (b) of the Contract Settlement Act, which provides that any excess payment over the final amount determined to be due shall be treated as a loan from the Government to the war contractor receiv-

[90] PR 15–507.2; C.C.H. WAR LAW SERVICE, 2 Govt. Contracts, ¶ 23,704.20.

ing it. Under such circumstances, the war contractor authorizing or making the payment, in the absence of fraud on his part, is entitled to receive payment or credit from the Government to the extent of any such excess payment.[91] Partial payments to prime contractors or subcontractors may be made on the basis of a voucher, the form of which is set forth in the Procurement Regulations.[92] However, a partial settlement can be made only on the basis of a supplemental agreement to the contract.[93]

[91] PR 15–507.4; id., C.C.H. ¶ 23,704.40.

[92] When immediate or cost-supported partial payments are to be made to a *prime* contractor, the voucher is to include substantially the following statement:

"The payment covered by this voucher is a partial payment of the amount due on the contractor's termination claim under Contract W————, made pursuant to Section 9 of the Contract Settlement Act of 1944 and expressly subject to subsection (b) of such Section. This payment shall be applied against the amount finally payable by the Government to the contractor on such claim." PR 15–506.4; id., C.C.H. ¶ 23,701.40.

Partial payments made to a prime contractor to be in turn made to a subcontractor may be authorized on the basis of a voucher signed by the prime contractor and approved by the contracting officer. Where such payments are made in advance of actual requests by subcontractors for the purpose of placing a prime contractor *in funds*, the voucher is to include substantially the following statement:

"The payment covered by this voucher is a partial payment of the amount due on the contractor's termination claim under Contract W————, made pursuant to Section 9 of the Contract Settlement Act of 1944 and expressly subject to subsection (b) of such Section. This payment shall be applied against the amount finally payable by the Government to the contractor on such claim. The contractor agrees to keep this payment and all other payments received for the same purpose in an account separate from his other funds and to use this payment only for the purpose of making payments to subcontractors. Any amount not so used shall be repaid to the Government upon demand, with interest at 6% per annum from the date of demand to the date of repayment." PR 15–507.5 (1); id., C.C.H. ¶ 23,704.50.

Where payment is made by a prime contractor to a subcontractor to provide the latter with an *immediate partial payment* before he has had an opportunity to prepare an adequate inventory or statement of costs, or when made upon the basis of a cost-supported partial or complete settlement proposal, the voucher is to include substantially the following statement:

"The payment covered by this voucher is a partial payment of the amount due on the contractor's termination claim under Contract W————, made pursuant to Section 9 of the Contract Settlement Act of 1944 and expressly subject to subsection (b) of such Section. This payment shall be applied against the amount finally payable by the Government to the contractor on such claim. The contractor agrees to keep this payment and all other payments received for the same purpose in an account or accounts separate from his other funds and to pay over to the subcontractors listed below the amounts set opposite their names. Any amount not so paid over by the contractor shall be repaid to the Government upon demand with interest at 6% per annum from the date of demand to the date of repayment." PR 15–507.5 (2); id., C.C.H. ¶ 23,704.50.

[93] PR 15–559; id., C.C.H. ¶ 23,737.

In addition to the procedures described above, other means of interim financing are available. Thus, advance payments previously authorized in connection with the performance of a terminated contract or increased advances authorized thereafter, may be utilized to finance terminations, either total or partial, provided that the contracting officer determines that such advances, in addition to those previously made, will be less in amount than the estimated termination charges.[94]

Still another method of interim financing is available in the form of V, VT or T loans. Though it is the general policy of the War Department that contractors be given partial payments of amounts owed them where that is administratively practicable, yet, in the case of contractors who have numerous contracts with several procurement agencies or technical services or who are primarily subcontractors, loans will probably be the most practicable method for initially financing the borrower's total termination claim on an overall basis.

Guaranteed or regulation V loans were provided for in March 1942.[95] The loans were intended to finance subcontractors, mixed prime and subcontractors, and prime contractors, where the latter held numerous contracts with several procurement agencies. Financing was predicated upon an overall basis rather than upon the basis of an advance payment on a particular contract. V loans give the borrower termination protection because maturity is suspended until final settlement is made on a portion of the loan which bears the same ratio to the whole loan as the cancelled portion of the war producer's contracts bears to his total back-log of war contracts unperformed at the date of termination.[96] Moreover, interest is waived on this suspended portion of the loan and the Government pays the bank interest on that amount of the loan at its previous rate less guarantee fee, or at the rate of two and one-half per cent per annum, whichever is less.[97]

In 1943, as a means of freeing the contractor's own working capital upon termination of war contracts, Government guaranteed loans were liberalized by the development of VT type loans. Such loans differ from V loans in these respects: (1) There need not be a showing that the money is required for present war production, although a portion

[94] PR 15–508; id., C.C.H. ¶ 23,705.

[95] Executive Order No. 9112, March 26, 1942, 7 FED. REG., Part 2, p. 2367 (Jan.-March 1942); C.C.H. WAR LAW SERVICE, Govt. Contracts, ¶ 4078.

[96] PR 15–502 (3); id., C.C.H. ¶ 23,697. See § 6 (f), Contract Settlement Act of 1944, for the effect of waiver of interest under an advance payment or loan upon the allowance of interest on the termination claim.

[97] PR 15–502 (3); C.C.H. WAR LAW SERVICE, 2 Govt. Contracts, ¶ 23,697.

of it may be used for that purpose; (2) The amount to be borrowed is predicated upon a formula which takes into consideration receivables and inventories attributable to terminated as well as continuing war contracts and amounts which the contractor has paid or currently is to pay to his subcontractors; (3) The percentage of guarantee cannot exceed ninety per cent; (4) Banks are permitted to charge a commitment fee up to one-half of one per cent (instead of one-fourth of one per cent which is the maximum that can be charged on V loans), in which the guarantor shares on the same basis as it shares in interest.[98]

Since neither a V nor a VT loan may be obtained after all of a contractor's war production is terminated and he is no longer a necessary war facility, these two types of financing have serious limitations from the standpoint of the contractor who is in need of additional funds pending final settlement of his terminated contracts.

Congress took the limitations of V and VT loans into consideration in passing the Contract Settlement Act, for it authorizes[99] any contracting agency to enter into contracts with any Federal Reserve Bank, or other public or private financing institution, guaranteeing such financing institution against loss of principal or interest on loans or advances, which such institutions may make to a war contractor who is or has been engaged in any operation connected with or related to war production, for the purpose of financing such war contractor in connection with or in contemplation of the termination of one or more of such war contracts. The act further authorizes the agency to contract with any Federal Reserve Bank or public or private financing institution in making loans, discounts, or advances for the purpose of financing a war contractor in connection with or in contemplation of the termination of such war contracts.

On August 18, 1944,[100] pursuant to the authority vested in him under the act, the director established the procedure for the guaranteeing of termination loans by the War Department, the Navy Department, and the Maritime Commission through the Federal Reserve Bank, acting as fiscal agent of the United States. In the execution of the procedures established by the director, the following policies were to be observed in the execution of termination loans (identified as T-loans):

[98] PR 15–503; id., C.C.H. ¶ 23,698.

[99] Contract Settlement Act of 1944, § 10 (a).

[100] Office of Contract Settlement, General Regulation No. 1, 9 FED. REG., No. 170, pp. 10358–10364 (Aug. 25, 1944); C.C.H. WAR LAW SERVICE, Govt. Contracts, ¶ 8401.

(1) If the borrower is or has been engaged in war production, T-loan guarantees should not be refused except in such classes of cases as may be prescribed by the director. Unless there is reason to believe that the borrower has substantially overstated the value of his termination inventories and receivables, his certification of his investment and of the amount payable to subcontractors should not be questioned.

(2) Contracting agencies are encouraged to delegate to the Federal Reserve Bank, acting as their fiscal agent, authority to approve, after consultation with the agencies' bank liaison representative, applications for guarantees of loans totalling (a) $500,000 or less to any one borrower when the requested percentage of guarantee is not in excess of ninety per cent and (b) $100,000 or less to any borrower when the requested percentage of guarantee is not in excess of ninety-five per cent.

(3) Changes in the standard loan agreement, which was promulgated at the same time, should be made only in exceptional cases and when necessary to protect the Government's interest.

(4) A request to guarantee not in excess of ninety per cent should not be challenged except in cases justifying this action.

(5) After consultation with the Board of Governors of the Federal Reserve System, the contracting agencies are to specify general rules to be applied in typical cases.[101]

The form of T-Loan Guarantee Agreement between the guarantor and the financing institution; the Termination Loan Agreement between the financing institution and the borrower, as well as explanatory notes, are set forth.[102] It is to be observed that, under the former agreement,[103] the guarantor undertakes, at any time prior to the date of settlement, to purchase such portion of the obligation as may be demanded in writing by the financing institution by paying the unpaid principal amount of the portion of the obligation to be purchased, provided that in no event is the total amount of the portion of the obligation owned by the guarantor to exceed the stated guaranteed percentage of the loan made by the financing institution.

The latter form of agreement provides[104] that the loan is to mature thirty days after final payment of the amounts due upon final and conclusive settlements on the war contracts of the borrower, which are

[101] Id., FED. REG., p. 10359; id., C.C.H. ¶ 8401.

[102] Ibid.

[103] Id., FED. REG., p. 10359, T. Loan Guarantee Agreement, paragraph 3; id., C.C.H. ¶ 8408.

[104] Id., FED. REG., p. 10360, Termination Loan Agreement, paragraph 2; id., C.C.H. ¶ 8403.

listed in an appendix to be attached to the contract, or upon a day certain, whichever is earlier, and thereupon all notes issued in connection with the loan agreement become due and payable.[105] As security for the loan, the borrower is to assign all moneys due or to become due on the terminated contracts listed in an appendix which is made a part of the agreement. The proceeds of assignments made are to be applied to the indebtedness under the loan.[106]

REMOVAL AND STORAGE OF MATERIALS

In discussing the most significant provisions of S. 1718 in Congress, Senator Murray pointed out that the then proposed legislation provided for the removal and storage of materials, machinery and equipment left on hand which were acquired for performance of the terminated contract. "The bill also provides that if not removed within 60 days, the contractor may remove and store such property at Government risk and expense."[107]

In submitting their report, Messrs. Baruch and Hancock very properly emphasized the necessity of prompt clearance of termination inventories[108] from private plants. The Advisory Unit for War and Post-War Adjustment Policies, Office of War Mobilization, recommended a "deadline of not later than 60 days after the filing of inventory lists, with manufacturers having the right to remove and store the property earlier at their own risk." It further recommended:

"Considerable quantities of raw materials, equipment, semi-

[105] Ibid. Section 3 (i) of the Contract Settlement Act of 1944 defines the phrase "interim financing" as follows:

"The term 'interim financing' includes advance payments, partial payments, loans, discounts, advances, and commitments in connection therewith, and guaranties of loans, discounts, advances, and commitments in connection therewith and any other type of financing made in contemplation of or related to termination of war contracts."

Section 8 (f) of the act reads:

"No interim financing shall be made by any contracting agency under this Act unless the terms of such financing provide for the liquidation by the war contractor of all loans, discounts, advance payments, or partial payments thereunder not later than the time of final payment of the amount due on the settlement of the termination claim or claims of the war contractor involved in such time thereafter as the contracting agency deems necessary for the liquidation of such interim financing in an orderly manner."

[106] 9 FED. REG., No. 170, p. 10360 (Aug. 25, 1944), Termination Loan Agreement, paragraph 5; C.C.H. WAR LAW SERVICE, Govt. Contracts, ¶ 8403.

[107] 90 CONG. REC., No. 78, p. 3993 (May 3, 1944).

[108] "The term 'termination inventory' means any materials (including a proper part of any common materials), properly allocable to the terminated portion of a war contract except any machinery and equipment subject to a separate contract specifically governing the use or disposition therof." Contract Settlement Act of 1944, § 3 (1).

finished parts and inventories will come into the possession of the Government as a result of the termination of contracts. Prompt, effective, orderly handling of these and other Government surpluses in excess of war needs will have a most important effect on *quickening war production, combating inflation, speeding the resumption of civilian employment* as that becomes possible, and *reducing the national debt,* with a consequent *lowering of post-war taxes.* The months to come, while the war is still on, are the *most precious months for disposal.* Market conditions will never be better. Effective action now could reduce enormously the likely surpluses that will be left for after the war."[109]

These factors were undoubtedly borne in mind by the Joint Contract Termination Board in recommending the present uniform termination article for fixed-price contracts. That article provides that, upon notice of termination, except as otherwise directed by the Contracting Officer, the duty is placed upon the contractor to "(6) transfer title and deliver to the Government in the manner, to the extent and at the times directed by the contracting officer (i) the fabricated or unfabricated parts, work in process, completed work, supplies and other material produced as a part of, or acquired in respect of the performance of, the work terminated in the Notice of Termination, and (ii) the plans, drawings, information and other property which, if the contract had been completed, would be required to be furnished to the Government; (7) use his best efforts to sell in the manner, to the extent, at the time, and at the price or prices directed or authorized by the contracting officer, any property of the types referred to in subdivision (6) of this paragraph provided, however, that the contractor (i) shall not be required to extend credit to any purchaser and (ii) may retain any such property at a price or prices approved by the contracting officer."[110]

The basic policy of the War Department with reference to the disposition of contractor-owned property acquired for performance of a war contract was stated by the Under Secretary of War as long ago as June 30, 1943.[111] Judge Patterson stated that the standard form of contract article for termination of fixed-price contracts at the option of the Government provides broad and ample authority for any contract-

[109] Baruch-Hancock Report, p. 13.

[110] PR 324 (b); C.C.H. WAR LAW SERVICE, 2 Govt. Contracts, ¶ 22,701.

[111] PR 15–350.2; id., C.C.H. ¶ 23,588.10. This statement was made in a memorandum for the Commanding General, Army Air Forces and the Commanding General, Army Service Forces.

ing officer to authorize or direct the contractor to sell or retain at a price approved by the contracting officer, any supplies, partially completed supplies, work in process or material acquired or manufactured by the contractor in the performance of the particular contract. He further stated that "the prompt and courageous exercise to the fullest extent possible of this authority given to Contracting Officers to dispose of this contractor-owned property in accordance with the principles of sound business judgment will achieve the objective of returning the property to use in war production. Such action is essential also to the expeditious settlement of termination claims. It will in a very real sense facilitate the prosecution of the war."[112]

These recommendations and policies were apparently taken into consideration by Congress in passing the Contract Settlement Act, for that act declares that it is the policy of the Government, upon the termination of any war contract, to assure the expeditious removal from the plant of a war contractor of such termination inventory which is not to be retained or sold by the contractor.[113] Within sixty days[114] after the contractor submits a statement[115] listing the materials which are claimed to be termination inventory, and which the contractor desires to have removed by the Government, accompanied by a tender of title,[116] the contracting agency concerned is directed to either arrange for the storage by the contractor on his own premises or elsewhere of such inventory or to remove from the plant of the contractor all such claimed termination inventory not retained, disposed of or stored by the war contractor.[117] Upon the failure of the Government to act within the period specified, the contractor is authorized to remove some or all of the termination inventory from his plant and store it on his own premises or elsewhere for the account and at the risk and expense of the Government, using reasonable care for its transportation and preservation. However, before removing the inventory, the contractor must advise the Government, by written notice, of the removal, and submit a statement showing the quantities and conditions of the materials to be removed, which must be certified by the contractor as having been prepared in accordance with a concurrent physical inven-

[112] PR 15–350.2; id., C.C.H. ¶ 23,588.10.

[113] Contract Settlement Act of 1944, § 12 (a).

[114] " . . . or such shorter period as may be prescribed under this Act, or within such longer period as the war contractor may agree." Id. at § 12 (c).

[115] PR 15–856; C.C.H. WAR LAW SERVICE, 2 Govt. Contracts, ¶ 23,791.50.

[116] PR 15–863; id. C.C.H. ¶ 23,792.40.

[117] See PR 15–951; id., C.C.H. ¶ 23,852 for form of contract with war contractor for storage.

tory of such materials. The notice and statement must be delivered twenty days in advance of the time fixed for removal, although it may be served either before or after the sixty days commencing with the submission of the contractor's original statement. [118] The act further declares: "No contracting agency shall postpone or delay any termination settlement beyond the period specified in subsection (c) [60 days] of this section for the purpose of awaiting disposal by the war contractor or the Government of any termination inventory reported in accordance with subsection (b) of this section." [119]

The policy of the War Department, as stated in the Procurement Regulations, goes beyond a strict adherence to the time limits stated in the act. So far as permitted by the terminated contract, property acquired for the performance of the contract is to be disposed of with reasonable dispatch, as advantageously as is reasonably possible and in a manner which makes such property available for other productive use at the earliest possible moment.[120] *Such disposition is to be made by the contracting officers upon termination and without waiting for formal requests for removal or the expiration of the sixty-day or longer period in the event formal request is made.*[121] In further recognition of the necessity for speedy action to clear plants of termination inventory, contracting officers are instructed to waive one hundred per cent verification of the quantities of property at the time of removal from the plant except where reasons exist for such verification. In ascertaining the extent of the check to be made, the contracting officer is directed to take into consideration the size of the inventory, nature of property involved and past experience with the contractor. The regulations declare that the quantities and weights stated in the inventory lists will ordinarily be accepted for all purposes if they are determined by such checks to be within reasonable "plus or minus tolerances in accordance with good commercial practice." [122] A receipt is to be given for the property removed, without prejudice, however, to any determination of allocability of contractor-owned property to the terminated portion of the contract.[123]

[118] Contract Settlement Act of 1944, §§ 12 (c) and 12 (d).

[119] Id. at § 12 (f).

[120] PR 15–106 (2); C.C.H. WAR LAW SERVICE, 2 Govt. Contracts, ¶ 23,507.

[121] PR 15–852; id., C.C.H. ¶ 23,791.10.

[122] PR 15–860.1; id., C.C.H. ¶ 23,792.11. Just what constitutes a plus or minus tolerance as defined by good commercial practice is not stated. Presumably a rule of reason is to be applied by the contracting officer.

[123] PR 15–860.2; id., C.C.H. ¶ 23,792.12. The form of receipt is set forth at PR 15–950; id., C.C.H. ¶ 23,851.

It should be noted that the removal or storage of such property does not entitle the contractor to direct payment for the property by the Government. Payment for such property is effected through settlement of the termination claim. In the case of fixed-price subcontracts, the subcontractor is paid through settlement of his termination charge for the allocable property removed or stored. Thereupon, this payment by the immediate prime contractor to the subcontractor is made a part of the claim of such prime contractor and is eventually passed on to the Government.[124] Of course, unless contractually bound to do otherwise, a contractor may, at any time after receipt of notice of termination, remove the property and store it at his own risk and expense.[125] The contract form for storage of termination inventory is stated in the Procurement Regulations.[126]

To be distinguished from termination inventory, and falling within the exception to the definition of that term, is "machinery or equipment subject to a separate contract specifically governing the use or disposition thereof."[127] The act declares that "whenever any war contractor no longer requires, for the performance of any war contract, any Government-owned machinery, tools, or equipment installed in his plant for the performance of one or more war contracts, the Government agency concerned, upon written demand by the war contractor, and within sixty days after such demand or such other period as may be prescribed under this Act, and upon such conditions as may be so prescribed, shall remove or provide for the removal of such machinery, tools, or equipment from such plant, unless the Government agency concerned and the war contractor, by facilities contracts or otherwise, have made or make other provisions for the retention, storage, main-

[124] PR 15–853; id., C.C.H. ¶ 23,791.20.

The rights pertaining to removal and storage of materials are given to a "war contractor." Section 3(c) of the act defines that phrase as follows: "The term 'war contract' means a prime contract or a subcontract; and the term 'war contractor' means any holder of one or more war contracts." Hence, subcontractors may insist on removal or storage of termination inventory "within sixty days after the submission of any such statement by a war contractor." See PR 15–864; id., C.C.H. ¶ 23,793. The act, however, fails to state when that period begins to run as far as a subcontractor is concerned, that is, does it start to run from the time the inventory list is served upon the prime contractor, or when the prime contractor passes the same to the Government. The latter would seem to be the rule, but regulations to clarify the point, as well as the manner in which the subcontractor is to be notified of the beginning of the period would appear to be in order.

[125] PR15–853; id., C.C.H. ¶ 23,791.20; Contract Settlement Act of 1944, § 12 (i).

[126] PR 15–951; C.C.H. WAR LAW SERVICE, 2 Govt. Contracts, ¶ 23,852.

[127] See note 108 supra.

tenance, or disposition of such machinery, tools or equipment."[128] This section of the act was undoubtedly aimed at standby and storage provisions of the "Government-owned Facilities" article[129] which is prescribed for inclusion in fixed-price contracts under which the contractor is to acquire or manufacture facilities for the account of the Government, or the Government is to furnish facilities to the contractor, for use in connection with the contractor's work under the contract which at present calls for a ninety-day stand-by period and a nine months storage period which may be eliminated, shortened or lengthened by mutual agreement.[130] Similar provisions are found in the equipment lease form of contract and the master facilities lease.[131]

Nothing is to stand in the way of prompt clearance of manufacturing plants to the end that business go forward with its peacetime activities at the earliest possible moment.

DEFECTIVE, INFORMAL AND QUASI CONTRACTS

The urgent demands of war do not lend themselves to the niceties of legal perfection, and men whose lives depend upon an unlimited supply of ammunition, guns and airplanes cannot be told that shortages exist because contracts have not been executed. The Congress has passed laws designed to protect the body politic against wilful refusal to cooperate.[132] The handful of instances in which recourse had to be

[128] Contract Settlement Act of 1944, § 12 (g). That section further provides: "The Government agency concerned may waive or release on behalf of the United States any obligation of the war contractor with respect to such machinery, tools, or equipment upon such terms and conditions as the agency deems appropriate." Such regulations had not been written as of the date of this writing.

[129] PR 332; C.C.H. WAR LAW SERVICE, 2 Govt. Contracts ¶ 22,709.

[130] Ibid. Subparagraphs K, L, and M of the "Government-Owned Facilities" article which is prescribed for inclusion in fixed price contracts under which the contractor is to acquire or manufacture facilities for the account of the Government or the Government is to furnish such facilities to the contractor to be used in connection with the contractor's work contain the clauses in question.

[131] Equipment Lease Form, Ordnance Procurement Instructions 13004; id., C.C.H. ¶ 25,127.40, paragraphs IV-F and IV-H; Master Facilities Lease Form.

[132] See, for example, 54 Stat. L. 892 (1940) as amended by 57 Stat. L. 164 (1943); 50 U.S.C.A. (1943 Supp.) App. § 309, p. 142, the placing of mandatory orders with any individual, firm, association, company, corporation, or organized manufacturing industry for such product or material as may be required and which is of the nature and kind usually produced or capable of being produced by such individual or entity; Second War Powers Act, 1942, 56 Stat. L. 176; 50 U.S.C.A. (1943 Supp.) App. § 632, p. 270, the acquisition by purchase, donation, or other means of transfer, or the institution of proceedings to acquire by condemnation, any real property, temporary use thereof, or other interest therein, together with any personal property located thereon or used therewith, that is deemed necessary for military, naval or other

made to these extraordinary war powers bears dramatic testimony to the spirit of cooperation and the wholehearted support of the fight for an enlightened mode of living. However, the speed with which this country has been geared to produce, the number of transactions involved, and the ever-changing conditions of manufacturing during a period of extreme stress, have, as in the last war, inevitably led to a situation where action preceded contractual coverage. Dire necessity has at times meant that contractors proceeded upon oral assurances of payment, or promises of adjustments, at a later date. At times, in the absence of enabling statutes of broad scope, it was found that such adjustments are most difficult in dealing with the sovereign state. To remove these difficulties, Congress, as in the last war,[133] made specific provision to enable procuring agencies to pay contractors for undertakings performed in good faith. The Contract Settlement Act accomplishes this purpose by virtue of the following language:

"(a) Where any person has arranged to furnish or furnished to a contracting agency or to a war contractor any materials, services, or facilities related to the prosecution of the war, without a formal contract, relying in good faith upon the apparent authority of an officer or agent of a contracting agency, written or oral instructions, or any other request to proceed from a contracting agency, the contracting agency shall pay such person fair compensation therefor.

"(b) Whenever any formal or technical defect or omission in any prime contract, or in any grant of authority to an officer or agent of a contracting agency who ordered any materials, services, and facilities might invalidate the contract or commitment, the contracting agency (1) shall not take advantage of such defect or omission; (2) shall amend, confirm, or ratify such contract or commitment without consideration in order to cure such defect or omission; and (3) shall make a fair settlement of any obligation thereby created or incurred by such agency, whether expressed or implied, in fact or in law, or in the nature of an implied or quasi contract.

"(c) Where a contracting agency fails to settle by agreement any claim asserted under this section, the dispute shall be subject to the provisions of section 13 of this Act.

"(d) The Director shall require each contracting agency to

war purposes; 56 Stat. L. 23 (1942); 50 U.S.C.A. (1943 Supp.) App. § 901, p. 310, the fixing of prices; 56 Stat. L. 245 (1942); 50 U.S.C.A. (1943 Supp.) App. § 1191, p. 383, the renegotiation of war contracts and recapture of excessive profits.

[133] Act of March 2, 1919, c. 94, 40 Stat. L. 1272, as amended, November 23, 1921, 42 Stat. L. 322; 50 U.S.C.A. (1926) § 80, p. 91.

formalize all such obligations and commitments within such period as the Director deems appropriate."[134]

In accordance with these statutory provisions, the War Department issued regulations which will govern the procedures to be followed when this section of the act is invoked. Authority is vested in the chiefs of the technical services[135] to take or approve any action authorized by subsections (a) and (b), supra, if there was in force at the time of furnishing or making provision to furnish the material, services and equipment for which payment is sought, a valid formal contract between the Government and the person claiming the benefit of the act, and also:

"(a) such person acted upon instructions from an officer or employee of such technical service;

"(b) such instructions were of a type which, when given could properly be embodied in a change order or supplemental agreement under such existing contract;

"(c) such person actually furnished or arranged to furnish materials, services or facilities which the Government in fact desired such person to furnish or to arrange to furnish in connection with such contract at the time such instructions were given; and

"(d) such person (i) has not been paid for such materials, services or facilities or for arranging to furnish the same, (ii) has no pending contractual agreement for such payment by the Government, and (iii) is willing to accept in complete discharge of all liability of the Government for furnishing or arranging to furnish such materials, services or facilities an amount which the chief of the technical service considers to be not in excess of fair compensation for what such person has in fact done or furnished and which is not in excess of $500,000.

"(e) No claim relating to the furnishing of such materials, services or facilities has been referred to the General Accounting Office (see par. 308-G).

"(f) Final payment has not been made under the contract as theretofore formally amended in writing."[136]

[134] Contract Settlement Act of 1944, § 17.

[135] The technical services under Army Service Forces are as follows: Quartermaster General, Chief of Ordnance, Chief of Engineers, Chief of Chemical Warfare Service, Chief Signal Officer, Surgeon General, Chief of Transportation. In addition to the foregoing, the Procurement Regulations also apply to the Army Air Forces unless otherwise specifically indicated.

[136] PR 308-H.4; C.C.H. WAR LAW SERVICE, 2 Government Contracts, ¶ 22,667.44

The action taken under the regulation is to be evidenced by a supplemental agreement[137] to the existing contract.[138] In cases which are not covered by the foregoing, either because there is no contract in existence or for any other reason (as e.g., the amount involved is in excess of $500,000), the prior written approval of the Director, Purchases Division, Headquarters, Army Service Forces, must be obtained before any action under section 17 of the Contract Settlement Act can be taken. Prior to the passage of the act, cases which did not involve the receipt by the Government of adequate legal consideration or which modified or released accrued obligations owing directly or indirectly to the Government, including accrued liquidated damages or liability under any surety or other bonds, had to be dealt with by the procuring agencies under the First War Powers Act[139] and Executive Order No. 9001[140] where relief was justified. Under this statute and executive order, action could be taken only upon a finding that it "would facilitate the prosecution of the war." Assuming, for the moment, that such an administrative finding could be made in the individual case while the war was in progress, the inadequacies of the procedure become obvious when the state of war now existing ceases. Hence, the real need for section 17 of the Contract Settlement Act.

APPEALS

Under the Contract Settlement Act, full rights of appeal have been preserved in the event the contractor considers himself aggrieved.[141] In the event the parties are unable to arrive at an agreement, or can agree on only a portion of the termination claim, the contracting agency, at any time, can determine the amount due on such claim or the unsettled part thereof, and prepare written findings indicating the basis of the determination and deliver a copy of such finding to the war contractor. If the termination claim has been submitted in substantially the form required by the act, the contractor may demand that such a finding be made, whereupon the determination must be made within ninety days after the receipt of the demand. Within

[137] PR 308-H.6; id., C.C.H. ¶ 22,667.46.

[138] Ibid. In the event the supplemental agreement calls for the payment of more than $50,000, it must first receive the written approval of the chief of the service involved.

[139] Act of December 18, 1941, c. 593, 55 Stat. L. 838; 50 U.S.C.A. (1943 Supp.) App. § 601, p. 238.

[140] December 27, 1941, 6 FED. REG. 6787 (Oct.-Dec. 1941); 50 U.S.C.A. (1943 Supp.) App. § 611, p. 261.

[141] Contract Settlement Act of 1944, § 13.

thirty days thereafter, the contracting agency is directed to pay to the contractor at least ninety per cent of the amount determined to be due after deducting the amount of any outstanding interim financing.[142] Thereupon, the contractor may, at his election, appeal to an appeal board created by the act or bring suit against the United States in the Court of Claims or in a United States district court for the amount in dispute.[143] Such an appeal is subject to the following conditions:

Before availing himself of the right of appeal as provided by this act, the contractor may resort to any appeal procedure set forth in his contract.[144] In the War Department, this will mean that the "Disputes" article, which has been made mandatory in every contract for an amount in excess of $20,000, may be invoked. Under this article, all disputes concerning questions of fact are to be decided by the contracting officer with a right of appeal to the Secretary of War or his duly authorized representative, whose decision shall be final and conclusive. Should the contractor fail to take an appeal from the determination of the contracting officer within the time stated in the "Disputes" article, or within thirty days, such finding becomes the determination of the department.

This procedure must be followed if required by regulations to be issued by the director. To date, no such regulations have been issued. Any revision of the findings by the contracting agency upon protest or appeal becomes the finding of the department for the purpose of any subsequent appeal or suit under the act. However, the act declares that the findings of the department are to be treated only as *prima facie* correct, and places the burden upon the war contractor

[142] Id. at § 13 (a).

[143] Id. at § 13 (b).

"S. 1718 as passed by the Senate gave war contractors the right to elect whether to appeal to the Court of Claims (or if the the amount was below $10,000, to a United States District Court) or to an Appeal Board to be established in accordance with the legislation, but when a war contractor had initiated proceedings by one method he was precluded from initiating proceedings on the same claim by any other method. The House changed this provision by allowing war contractors who feel themselves aggrieved by a decision of the Appeal Board to bring suit as if no appeal had been taken under the Act to the Appeal Board. The Senate conferees agreed to the House amendment, so that under the Act a war contractor who is aggrieved by a decision of the Appeal Board may bring suit in the Court of Claims or in a United States District Court as if he had not appealed to the Appeal Board." Senator James E. Murray, "Contract Settlement Act of 1944," 10 L. AND CONTEMP. PROB. 681 at 688 (1944).

[144] Contract Settlement Act of 1944, § 13 (c) (1). See also PR 318-D; C.C.H. WAR LAW SERVICE, 2 Government Contracts, ¶ 22,688 et seq.

to establish that the amount due on his claim exceeds the amount allowed under the findings of the contracting agency.[145]

Thereafter, a contractor may initiate proceedings under the act within ninety days after delivery to him of the finding of the contracting agency; or ninety days after determination of his appeal within the agency, or, in case of the failure to deliver such findings, within one year after the contractor's demand for the same. Failure to institute proceedings within these periods precludes the contractor from further appeals under the act.[146] The pendency of any appeal within the War Department or before the statutory appeal board does not affect the authority of the agency to make a settlement of the termination claim by agreement with the war contractor at any time before the appeal is concluded.[147]

The appeal board is to be appointed by the Director of Contract Settlement.[148] Panels of one or more members may act for the board, and are to sit in reasonably convenient localities throughout the country. If the contractor feels that he is aggrieved by the decision of the appeal board or panel, then, within ninety days after the decision, he may bring an action in court, in which event the suit is to proceed as if no appeal had been taken to the appeal board. Unless the court awards an amount in excess of that allowed by the appeal board or panel, all costs of suit are to be borne by the war contractor.[149] Moreover, the contracting agency and the contractor may, by agreement, submit the termination claim to arbitration, the proceedings in which are to be governed by the United States Arbitration Act.[150]

If a dispute exists between a war contractor and a subcontractor regarding any termination claim, it may, by agreement, be submitted to the appeal board or to a contracting agency for mediation or arbitration whenever authorized by the agency or required by the director. In the absence of fraud or collusion, any award or decision made in the proceedings is final and conclusive.[151]

To expedite the adjudication of termination claims, the Court of Claims is authorized to appoint not more than ten auditors and not more than twenty commissioners[152] in addition to those now provided by law.[153] The act further provides that the Court of Claims, on motion

[145] Contract Settlement Act of 1944, § 13 (c) (3).
[146] Id. at § 13 (c) (2).
[147] Id. at § 13 (c) (4).
[148] Id. at § 13 (d) (1).
[149] Id. at § 13 (d) (2).
[150] Id. at § 13 (e).
[151] Id. at § 13 (f).
[152] Id. at § 14 (a).
[153] Act of February 24, 1925, 43 Stat. L. 964 as amended by the Act of June 23, 1930, 46 Stat. L. 799.

of either of the parties or on its own motion, may summon all persons having an interest in any suit or proceedings before the court for the purpose of asserting and defending their respective interests. If such person resides within the jurisdiction of the United States, he is to be summoned by personal service; if he resides outside the jurisdiction of the United States or if his address is unknown or, for other good and sufficient reason, personal service cannot be had, service by publication in accordance with the rules of the court, together with a copy of the summons mailed to the last known address of such person, constitutes valid service. Upon failure to appear, such person is declared forever barred, and the court is given jurisdiction to enter judgment *pro confesso*.[154]

MISCELLANEOUS PROVISIONS

A. Company-Wide Settlements. The Baruch-Hancock report recommended that the contracting agencies launch immediately a vigorous experiment to fully explore the possibilities of so-called company-wide or merged claim settlements.[155] Under this procedure, all the claims of a company would be merged together in one, regardless of the number of contracts involved or the agencies of the Government holding these contracts, and regardless of whether the company is a prime or subcontractor. It was also recommended that Congress be asked to pass appropriate legislation to permit the use of such a plan if it were found feasible.[156] Congress deemed the proposal had merit for the act provides for the settlement, as a group or otherwise, by any contracting agency, of some or all of the termination claims of a war contractor under policies and methods to be prescribed by the director. Moreover, the director, after consultation with the department concerned, may provide for assigning any war contractor to a contracting agency for such settlement, whereupon that particular agency has authority to settle on behalf of any other agency some or all of the termination claims of the contractor.[157] From an examination of the Procurement Regulations,[158] it is observed that experiments are presently being conducted with the theory of company-wide settlements. Apparently, if such experiments are successful, there will undoubtedly be an expansion of the program.

[154] Contract Settlement Act of 1944, § 14 (b).

[155] Baruch-Hancock Report, p. 51.

[156] Id. at p. 52.

[157] Contract Settlement Act of 1944, § 7 (c).

[158] PR 15–492; C.C.H. WAR LAW SERVICE, 2 Govt. Contracts, ¶ 23,694.

B. Interest. The act places upon the contracting agencies the mandatory duty of allowing and paying interest on termination claims under a prime contract at the rate of two and one-half per cent per annum for the period beginning thirty days after the date fixed for termination and ending with the date of final settlement,[159] although there are exceptions to this allowance of interest. Subcontractors are to receive the same interest allowance as prime contractors.[160]

C. Advance Notice. The act provides that each of the contracting agencies is to advise its prime contractors of the termination of their contracts as far in advance of the cessation of work thereunder as is feasible, and further declares that they are to establish the procedures whereby prime contractors are to provide immediate notice of termination to affected subcontractors.[161] The same section of the Contract Settlement Act further declares that whenever a contracting agency directs a prime contractor to cease or suspend work under his contract, as distinguished from terminating that contract, unless the contract itself provides otherwise, the agency involved is to compensate the contractor for his reasonable costs and expenses resulting from the suspension notice and, if the suspension extends for thirty days or more, the contractor is given the right to elect to treat the notice of suspension as a termination by serving proper notice of such election to the contracting agency at any time prior to directions from that agency to resume work upon the contract.[162]

D. Advice to Contractors. Congress has provided that any contracting agency may authorize or direct its officers and employees, as a part of their official duties, to advise and assist war contractors in preparing and presenting termination claims and related matter to the extent that it deems desirable.[163] Moreover, the Smaller War Plants Corporation is specifically directed to disseminate information among small business concerns with respect to problems arising from the termination of war contracts and to assist small business concerns in the proper presentation of matters related to such terminations.[164]

[159] Contract Settlement Act of 1944, § 6 (f).

[160] Ibid. See PR 15–490; C.C.H. WAR LAW SERVICE, 2 Govt. Contracts, ¶ 23,693.

[161] Contract Settlement Act of 1944, § 11.

[162] Ibid. "The Act does not alter established War Department policy against suspension of contracts." PR 15–315; C.C.H. WAR LAW SERVICE, 2 Govt. Contracts, ¶ 23,569.

[163] Contract Settlement Act of 1944, § 20 (f).

[164] Id. at § 20 (g).

CONCLUSION

As has been indicated hereinbefore, the present form of the Contract Settlement Act was not adopted by Congress without dissent. The Comptroller General was not alone in his objection to the bill.[165]

[165] The Comptroller General addressed the following letter to Senator Murray on May 4, 1944: "During debate in the Senate yesterday on the bill S. 1718, certain statements were made by you, in response to questions of Senators Davis and Kilgore, which did not clearly and completely express to the Senate the position I have consistently taken with respect to legislation for a settlement program for war contract termination claims. I know you did not intend and could not have intended to misstate my position or in any way to mislead the Senators as to that position and as to the effectiveness of the role of the General Accounting Office under the provisions of the bill S. 1718. However, I am afraid misunderstanding may have resulted and I feel I would be lacking in frankness and candor if I should fail to invite your attention to this possibility.

"In appearances before and reports to your subcommittee of the Senate Committee on Military Affairs and various committees of the House of Representatives I have consistently expressed the belief, with reasons which I tried to make clear, that the General Accounting Office cannot make any truly effective contribution—worth the cost and effort—to the war contract termination settlement program unless it is given authority to review settlements arranged with contractors by the war contracting agencies before such settlements become final, by agreement or otherwise, and before final payment is made. During almost a year I have given this problem frequent and careful consideration. I have discussed it at length with committees of the Congress, with many representatives of the war contracting agencies, and with many representatives of war contractors. Nothing has occurred to shake my confidence in the soundness of this position.

"In my report to you, February 22, 1944, on an earlier draft of the bill, S. 1718, I suggested no specific major amendments to the plan of the bill with respect to including provisions for a review of settlements prior to their finality because I was given to understand that your committee had already determined to approve a bill without provision therefor. In the report I made clear my views in that regard but proposed only a few specific amendments to other parts of the bill.

"Section 16(a) and (b) of the pending bill, although it may have the appearance of giving the General Accounting Office a limited role for the detection of fraud actually does not even do that for the reason that there is no assurance that the records made and made available to the General Accounting Office will be adequate to make possible the detection of fraud.

"Section 16(c) of the pending bill, a new subsection, may give the appearance of imposing upon the General Accounting Office a new and effective duty to perform. Actually it would not do so. It would rather serve to limit the general duties and authority of the General Accounting Office which it now has under sections 312 and 313 of the Budget and Accounting Act, 1921 (42 Stat. 25, 26). I would like, therefore, to urge you to endeavor to have this subsection eliminated from the bill.

"I shall appreciate it if you should see fit to ask that this letter be inserted in the Record." 90 CONG. REC., No. 80, p. 4125 (May 5, 1944).

Senator Murray made the following reply to the foregoing letter:

"I have your letter of May 4, 1944, inviting my attention to the possibility that the statements made by me on the floor of the Senate during the debate on the bill

Senator Murray reported the bill back from the Committee on Mili-

S. 1718, in respect to the questions of Senators Davis and Kilgore, may result in some misunderstanding.

"In order to make certain that your position on the bill S. 1718 be stated correctly, I asked that part VI, Statement by the Comptroller General, of the Report of the War Contracts Subcommittees, dated March 20, 1944, be inserted in the CONGRESSIONAL RECORD, and this passage may be found on pages 3994 and 3995. This passage quotes extensively from your letter addressed to me as chairman of the War Contracts Subcommittee, dated February 22, 1944. In your letter you stated that, while you are still of the view that there should be an independent audit and review of proposed settlements prior to the making of final payment thereunder, nevertheless, 'if the Congress, as a matter of public policy, should decide otherwise, I have no objections to offer to the bill S. 1718, except as hereinbefore noted, as it is believed that the provisions of the bill, if properly administered, are adequate to accomplish the announced objective thereof.'

"A draft of part VI of the report, referred to above, was submitted to you on February 29 with a request for your suggestions for improvements, if it did not 'properly reflect the views of your Office.' You replied on the same date by letter that 'The draft of section submitted fairly and adequately reflects the view of this Office on the matter.'

"I take it that your position as expressed in your letter of February 22 has remained unchanged.

"You further observe that section 16 (a) and (b) of S. 1718 does not give any assurance that the records prepared in connection with contract settlements and made available to the General Accounting Office, will be adequate to make possible the detection of fraud. The bill places the primary responsibility for the prevention and discovery of fraud on the shoulders of the Director of Contract Settlement and the contracting agencies. Section 18 (a) provides specifically that 'The Director shall establish policies for such supervision and review within the contracting agencies of termination settlements and interim financing as he deems necessary and appropriate to prevent and detect fraud. . . .'

"In this connection I would like to refer you also to subsection (c) of section 16, which provides that the 'Comptroller General may investigate the settlements completed by each contracting agency for the purpose of reporting to the Congress from time to time on . . . .

" '(3) Whether such methods and procedures (or the contracting agencies) adequately protect the interest of the Government.'

"The adequacy of the records to be prepared by the contracting agencies is an important consideration in connection with the question whether the interest of the Government is adequately protected. Should you find that such records are inadequate for the purpose of allowing the General Accounting Office to determine, (1) whether the settlement payments were made in accordance with the settlement, and (2) whether the records transmitted to the General Accounting Office, or other information, warrant a reasonable belief that the settlement was induced by fraud, then this fact should be reported to the Congress in accordance with subsection (c) of section 16.

"In connection with your observation that section 16 would serve to limit the general duties and authority of the General Accounting Office, which it now has under sections 312 and 313 of the Budget and Accounting Act, 1921, 42 Stat. 25, 26, I would like to state that there was no intention of so limiting the provisions of the Budget and Accounting Act.

"Section 16 (d) specifically provides that 'the jurisdiction of the Comptroller General of the United States shall not be affected by this act except to the extent necessary to give effect to the specific provisions thereof.'

tary Affairs on May 1, 1944.[166] The following day Senator Kilgore moved that consideration of the bill be postponed so as to afford opportunity to study the bill and amendments thereto.[167] The motion to postpone was vigorously opposed by the proponents of the bill. Senator George declared:

> "Unfortunately, the real controversy which has arisen about the bill is that it does not include a great many other things which, of course, should be dealt with by the Congress at the earliest possible moment, to wit, disposal of war plants, disposal of surplus property of all kinds, and the matter of demobilization. It has been insisted that those matters should be dealt with promptly . . . .
>
> "However, two bills which are pending deal with the other related questions which it is insisted should be included in the

"I believe strongly that the bill as passed by the Senate is not only in keeping with the Budget and Accounting Act but definitely stresses the fact that the General Accounting Office is indispensable as an effective arm of the Congress in connection with investigations of the care and efficiency of the executive branch of the Government in the administration of this legislation.

"In answer to your request, I am asking that your letter be inserted into the CONGRESSIONAL RECORD, together with my reply." 90 CONG. REC., No. 80, pp. 4125–4126 (May 5, 1944).

[166] 90 CONG. REC., No. 76, p. 3895 (May 1, 1944).

[167] Id., No. 78, p. 3980. At the same time Senator Kilgore called attention to a letter issued jointly by the American Federation of Labor, the Congress of Industrial Organizations, and the Railway Labor Executives Association, and asked that the same be printed in the CONGRESSIONAL RECORD. The letter was ordered printed and in part reads as follows: "We are united in urging the following programs:

"1. There must be no piecemeal legislation such as contract-termination legislation alone. An integrated program of reconversion offers the only means of preventing the chaos that may overwhelm us on the production front in a short time.

"2. We stand fully behind the principles of the Kilgore bill, Senate bill 1823, which provides an integrated attack on the problems of reconversion. We urge that the Murray-George bill, S. 1718, be amended to include the Kilgore bill, S. 1823, thus providing a well-rounded program.

"3. Such a program must include, in line with War Mobilization Director Byrnes' proposal, special unemployment compensation benefits in the transition period to take care of unemployed workers as well as discharged servicemen.

"4. An orderly program for reconversion to civilian production is necessary to achieve maximum production and employment during the reconversion period. Establish an office of war mobilization and adjustment to coordinate all Federal activities during the reconversion period.

"5. We favor creation of a national production-employment board, consisting of representatives of industry, labor, agriculture, and the general public, to form an integral part of the office of war mobilization and adjustment.

"6. Establish a bureau of programs to review and develop Government programs dealing with reconversion and production, and to encourage the development of private and local programs for increased production and unemployment.

"7. Provide adequate protection for, and incentives to, small business in reconverting to peace." 90 CONG. REC., No. 78, p. 3972 (May 3, 1944).

pending bill. These other bills, as I recall, are Senate Bill 1730, which is pending before the Committee on Military Affairs, and Senate Bill 1823, introduced by the Senator from West Virginia (Mr. Kilgore)."[168]

Said Senator Vandenberg:

"Mr. President, the problem of demobilization and reconversion does fall into three and probably four general subdivisions. The Senator from West Virginia is quite correct; the pending bill, S. 1718, refers only to the first two of them, the two which are first faced by industry when it has to reconvert, namely, contract termination and plant clearance.

"There still remains the question of the disposition of surplus property, There still remains the question of unemployment compensation and of severance pay. I will agree that the latter two in their time are just as important to those who are interested in them as are the first two. I will agree that we have not covered the subject adequately or conclusively until we have covered all four. I will join with the Senator from West Virginia and the Senator from Georgia and the Senator from Montana in seeking to proceed through the total program before Congress shall take a recess but I certainly cannot agree that these first two essential things, contract termination and plant clearance, shall be set aside until there can also be an agreement upon unemployment compensation and surplus-property disposition."[169]

During the course of the debate, Senator Kilgore proposed an amendment to S. 1718, which would create an Office of War Mobilization and Adjustment and establish in that office a Bureau of Programs, headed by a chief. Within the Office of War Mobilization, the following administrations were to have been created: (1) a Surplus War Property Administration, (2) a Contract Settlement Administration, (3) a Retaining and Reemployment Administration. Each administration was to be headed by an administrator appointed by the President with the advice and consent of the Senate. It is needless to say that the amendment was most comprehensive in scope and contained many controversial issues.[170] After considerable discussion, Senator Kilgore withdrew his motion, and consideration of the bill as drafted went forward.[171]

Thus, it is quite apparent that the Contract Settlement Act, though comprehensive in character, is not the last of the legislative enactments

[168] 90 CONG. REC., No. 78, p. 3980 (May 3, 1944).
[169] Id. at 3983.
[170] 90 CONG. REC., No. 78, pp. 3988–3992 (May 3, 1944).
[171] Id. at 3984.

necessary to cover the entire termination and reconversion problem.[172] Within the four corners of the act, however, it can be said that con-

[172] See, for example, S. 2051, 78th Cong., 2d sess.: An act to amend the Social Security Act, as amended, to provide a national program for war mobilization and reconversion, and for other purposes. Passed by the Senate on August 11, 1944 and referred to the Ways and Means Committee, House of Representatives, on August 14, 1944. Passed the House of Representatives with amendments on August 31, 1944.

The favorable report of the Committee on Finance on S. 2051, S. Rep. No. 1035, 78th Cong., 2d sess., reads, in part, as follows:

"The Committee on Finance, to whom was referred the bill (S. 2051) to amend the Social Security Act, as amended, having considered the same, report favorably thereon with amendments and recommend that the bill as amended do pass.

"The amendments made by your committee embody no material changes in substance but are designed to clarify the bill and simplify its administration.

"This bill was introduced to effectuate the recommendations of the Special Committee on Post-war Economic Policy and Planning as contained in the report of that committee dated June 23, 1944 (Rept. No. 539, pt. 5, 78th Cong., 2d sess.). A copy of that report is printed herewith as an appendix.

"There has been much controversy as to whether the unemployment-compensation system should be Federalized or whether the prevailing system of State administration should continue. The Special Committee on Post-war Economic Policy and Planning held extensive hearings and had before it numerous proponents of both plans. Those hearings culminated in the report above mentioned. The testimony adduced was made available to this committee.

"The committee concurs in the conclusions of the Post-war Committee that the administration of unemployment compensation laws should remain with the States and that the Congress should not interfere with State standards and State procedures.

"This bill creates a Federal unemployment account, from which advances can be made to any State whose account in the unemployment trust fund becomes impaired. It provides for advances without interest, repayable whenever the unemployment account of the State becomes adequate for this purpose. This method of repayment makes the advance merely an obligation of the State unemployment account and avoids constitutional prohibitions against borrowing prevailing in many of the States.

"The committee feels that it is very unlikely that the unemployment compensation funds of the various States will be inadequate but believes that every possible question as to their adequacy should be removed and feels that this bill accomplishes that purpose.

"The bill also makes the same provision for unemployment compensation for Federal employees as they would have had if they had been in covered employment. The committee feels that this is a fair and proper extension of the unemployment compensation benefits. This provision makes applicable to Federal employees the benefits provided by the laws of the State in which they file their claim, to the same extent as if they had been in covered employment in that State. The entire cost of paying these benefits is to be borne by the Federal Government, but they may be administered by the States. Procedure for cooperative agreements with the States for carrying out these provisions is set up in the bill.

"The Special Committee on Post-war Economic Policy and Planning also recommended that the Unemployment Tax Act be amended to provide for the imposition of unemployment taxes on employers of maritime workers and employers of one or more employees. As this legislation must originate in the House of Representatives, it is not included in S. 2051, but this committee concurs in the recommendation of the Special Committee on Post-war Economic Policy and Planning.

tractors need have no apprehensions that their termination claims will be handled in any other than a fair, just and equitable manner. The legislative means for accomplishing these high purposes are at hand. Contractors and their counsel would be wise to study such means and to prepare for what is hoped will be the early end of their war business.[173]

"Public, 346 (the so-called G. I. bill) provides the necessary unemployment benefits for some 11,000,000 soldiers. More than 30,000,000 people are now covered under the State unemployment compensation laws.

"The passage of this bill will make eligible for unemployment compensation approximately 3,500,000 additional workers. The carrying out of the tax recommendations of the Special Committee on Post-war Economic Policy and Planning would make unemployment compensation available for approximately 2,500,000 more workers.

"Substantially all of the remaining workers would be agricultural workers, domestic servants, the self-employed, the employees of State and local governments. Up to this time it has not been deemed administratively practicable to cover the first three of these groups, although there is no inhibition on the States bringing them within their systems. The States also have authority to cover the State and local employees and the committee feels that it would be inappropriate for the Congress to force them to do so.

"The committee, therefore, feels that the recommendations of the Special Committee on Post-war Economic Policy and Planning would make the unemployment compensation system thoroughly comprehensive and that those recommendations are sufficient to meet any unemployment situation likely to arise as a result of difficulties growing out of reconversion."

[173] Following the submission of this paper, the War Mobilization and Reconversion Act of 1944, Act of October 3, 1944, Pub. L. 458, 78th Cong., 2d sess., was passed. Section 101 of that act provides in part as follows:

"(a) There is hereby established the Office of War Mobilization and Reconversion, which shall be headed by the Director of War Mobilization and Reconversion (hereinafter called the 'Director'). The Director shall be appointed by the President, by and with the advice and consent of the Senate, shall receive compensation at the rate of $15,000 per year, and shall serve for a term of two years.

"(b) The following agencies shall be placed within the Office of War Mobilization and Reconversion and shall exercise their functions subject to the general supervision of the Director:

"(1) Office of Contract Settlement, created by the Contract Settlement Act of 1944.

"(2) Surplus War Property Administration created by Executive Order Numbered 9425 (if such Administration is in existence after the Office of War Mobilization ceases to exist), and the Surplus Property Board created by the Surplus Property Act of 1944.

"(3) Retraining and Reemployment Administration, created by Executive Order Numbered 9427 (if such Administration is in existence after the Office of War Mobilization ceases to exist), and the Retraining and Reemployment Administration created by title III of this Act.

"Nothing in this subsection shall imply any derogation of the powers of the Director under subsection (c) with respect to the agencies placed within his office or with respect to other agencies not specifically placed within his office."

See C.C.H. WAR LAW SERVICE, Statutes, Proclamations, Interpretations, ¶ 2641.