STAFF REVIEW OF RECOMMENDATIONS MADE ON THE RENEGOTIATION PROCESS: A PRELIMINARY REPORT

PREPARED FOR THE USE OF THE

COMMITTEE ON WAYS AND MEANS

U.S. HOUSE OF REPRESENTATIVES

AND

COMMITTEE ON FINANCE

UNITED STATES SENATE

BY THE STAFF OF

THE JOINT COMMITTEE ON INTERNAL REVENUE TAXATION

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PART I. INTRODUCTION

At the time the Renegotiation Act was last extended in 1973, both the House Committee on Ways and Means (House Report No. 93–165, accompanying H.R. 7445, dated May 3, 1973) and the Senate Committee on Finance (Senate Report No. 93–240, accompanying H.R. 7445, dated June 22, 1973) requested that the staffs of the Renegotiation Board and the Joint Committee on Internal Revenue Taxation analyze three congressionally-sponsored reports on the renegotiation process. These reports were made by the Subcommittee on Government Activities of the House Government Operations Committee,[1] the Commission on Government Procurement,[2] and the General Accounting Office.[3] The staff of the Joint Committee has prepared this preliminary report in response to that request.

As the House and Senate Reports clearly indicate, it was contemplated that a comprehensive study by the staffs of the Renegotiation Board and the Joint Committee on Internal Revenue Taxation would be conducted over a period of two years. Further, it was expected that the study would be completed in sufficient time prior to the expiration of the Renegotiation Act in 1975 to allow Congress to review fully the renegotiation process at that time. However, H.R. 7445 was amended on the floor of the Senate (which amendment was accepted in conference and approved by both Houses) to extend the Renegotiation Act for one year instead of two. This significantly reduced the time available for an indepth study and review of the far-reaching recommendations contained in the three reports referred to above, including time for hearings to give all interested parties and the general public the opportunity to make their views known regarding any conclusions reached by the Board and the Joint Committee staff with respect to the recommendations of the three reports.

Unfortunately, at the time the Joint Committee staff prepared this report the staff of the Renegotiation Board was unable to go on record in any meaningful discussion of the specific recommendations contained in the aforementioned reports because of delays in receiving approval by the Office of Management and Budget for the Board's position on the various recommendations for substantive legislative changes contained in these reports. Faced with the prospect of no combined report by the Joint Committee staff and the Board in time for the public hearing scheduled by the Committee on Ways and Means, the staff of the Joint Committee has decided to publish this prelimi-

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[1] *The Efficiency and Effectiveness of Renegotiation Board Operations,* 6th Report by the House Committee on Government Operations, 92nd Congress, 1st Session (House Report No. 92–758, December 16, 1971).

[2] *Report of the Commission on Government Procurement* (Vol. 4, Part J, Ch. 4, December 1972).

[3] *The Operations and Activities of the Renegotiation Board,* A Report to the Congress by the Comptroller General of the United States (General Accounting Office Report No. B–163520, May 9, 1973).

nary report independently of the staff of the Renegotiation Board in order that the members of the Committee on Ways and Means and Committee on Finance and the public may have the benefit of a summary of the main issues raised and recommendations contained in the reports.

The staff's primary source materials for this report were the original reports of three aforementioned groups on the renegotiation process and materials supplied by the staff of the Renegotiation Board. In presenting this preliminary report, the staff wishes to note the cooperation it has received from the staff and members of the Renegotiation Board.

In addition to discussions which took place over the past several months with the staff of the Renegotiation Board, the staff of the Joint Committee met with members of the staff of the Cost Accounting Standards Board to review the present and proposed accounting standards relating to procurement and renegotiation within the context of attempts to standardize accounting standards.

This preliminary report is intended as a discussion of the more important aspects of the renegotiation process, and the more important recommendations which have been made to improve this process, rather than as a discussion in detail of either the process itself or the numerous recommendations for change.

As a result of its study and discussions of the past months, and in view of the delay in developing the Board's official position on some very far-reaching changes in the renegotiation process, as it is presently conducted, the staff of the Joint Committee believes it would be desirable to extend the Renegotiation Act at this time for one additional year, or until June 30, 1975. During this time the comprehensive study by the staffs of the Renegotiation Board and the Joint Committee on Internal Revenue Taxation of the three congressional-sponsored reports on the renegotiation process could be completed.

If this procedure is followed, the Renegotiation Board could report to Congress by the end of 1974 its response to the recommendations made in the three congressionally-sponsored studies of the renegotiation process and its legislative recommendations on the future of renegotiation. In addition, it would be desirable for the Board to prepare written guidelines on the application of the existing statutory factors in the determination of excessive profits, as well as standards to be applied for any suggested changes in these factors. If this were done public hearings could be held at some point early in the first session of the next Congress on the various legislative proposals associated with the renegotiation process.

Finally, it would appear desirable to authorize additional planning and research staff for the Renegotiation Board expressly for the task of preparing guidelines for the application of existing statutory factors and accounting standards in the determination of excessive profits, as well as for other needed research on the renegotiation process. This is one of the major recommendations made by all three study groups. In essence, this would codify the 23 years of experience of the Board in interpreting and applying current statutory factors to the individual cases reviewed in the renegotiation process. The ab-

sense of anything in the form of written guidelines makes it extremely difficult not only to recommend substantive changes, but even to consider changes in the law in two key areas: (1) the statutory factors which must be considered in determining what constitutes excessive profits in any individual case, and (2) the accounting standards which govern the analysis of a corporation's costs and profits made by the Board and ultimately the amount of excessive profits involved, if any. This effort will be useful in considering legislative changes in the coming months, and will help to meet the recurring criticisms made since the Board's inception that, in the absence of written guidelines, contractors subject to the Board's jurisdiction do not enjoy the minimum standards of administrative practice and procedure applicable to practically every other agency of the Government with quasi-judicial power.

PART II. THE RENEGOTIATION PROCESS

A. OUTLINE OF THE RENEGOTIATION PROCESS

Renegotiation is a process whereby the Government, acting through an independent establishment in the executive branch known as the Renegotiation Board, may require a contractor to refund that portion of profits on Government contracts or related subcontracts which are determined to be "excessive." In making this determination, the Board reviews and analyzes amounts received or accrued by a contractor during his fiscal year (or such other related period as may be fixed by mutual agreement) on contracts or on related subcontracts with the Government departments named in the Renegotiation Act of 1951, as amended. Amounts received under such renegotiable contracts and subcontracts are sometimes referred to as "renegotiable sales," "renegotiable business," and "renegotiable receipts or accruals." The departments named in the Act are the Department of Defense, the Departments of the Army, Navy, and Air Force, the Maritime Administration, the Federal Maritime Board, the General Services Administration, the National Aeronautics and Space Administration, the Federal Aviation Administration, and the Atomic Energy Commission.

Under the Renegotiation Act of 1951, as amended, the Renegotiation Board is composed of five members appointed by the President, by and with the advice and consent of the Senate. The Secretaries of the Army, the Navy, and the Air Force, respectively, subject to the approval of the Secretary of Defense, and the Administrator of the General Services Administration, each recommend to the President, for his consideration, one person from civilian life to serve as a member of the Board. The President, at the time of appointment, designates one member to serve as Chairman. (There is no specific term of appointment for the Board members.) No member is permitted to actively engage in any business, vocation, or employment other than as a member of the Board. The principal office of the Board (frequently referred to as the headquarters office) is in Washington, D.C. Under authority granted to it by the Act, the Board has established two regional boards, located in Washington, D.C. and Los Angeles, California.

The Act does not apply to amounts attributable to contracts exempt under section 106 (providing for "mandatory" and "permissive" exemptions), or to those amounts which are below the minimum amount subject to renegotiation specified in section 105(f). This minimum amount presently is $1,000,000, and it is commonly referred to as the "floor." Under the Act, renegotiation is conducted with respect to all amounts received or accrued by a contractor during his fiscal year (or such other period as may have been agreed upon) under contracts or related subcontracts with all Government Departments specified in the Act. Under this procedure, it is said that renegotiations are made on an "aggregate" or "fiscal-year" basis, rather than on a contract-by-contract basis.

In order for the Renegotiation Board to determine "excessive profits," it is first necessary that the contractor or group of contractors to be renegotiated be identified, that the accounting period and method of accounting to be used for renegotiation be fixed, and that sales, costs and profits be determined and segregated as between renegotiable and nonrenegotiable business. Then, a determination may be made of the amount, if any, of renegotiable profits which constitute excessive profits, which requires the application of the so-called statutory factors which are set forth in section 103(e) of the Act.

The renegotiation procedures provided for by the Act require that there be an administrative proceeding before the Board in which a determination of excessive profits is made either by agreement between the contractor and the Board, or by the unilateral order of the Board. Section 111 of the Act excludes the functions of the Board from the operation of the Administrative Procedure Act except as to the requirement of section 3 thereof, dealing with the publications of rules, orders, and so forth. The Administrative Procedure Act was amended by Public Law 90–23 in 1967, and the Board has revised its regulations (part 1480) to provide rules relating to the availability of information in conformity with that amendment.

After the Board has delivered an order determining excessive profits, contractor or subcontractor may, within 90 days from the date of mailing of the notice of the order of the Board, file a petition with the U.S. Court of Claims for a redetermination of the amount of such excessive profits. Section 108 of the Act provides that within 10 days after a petition is filed with the court, the petitioner must file a bond in such amount as may be fixed by the court. The Court of Claims is to have exclusive jurisdiction to determine the amount of excessive profits received or accrued by a contractor or subcontractor in these cases. The Court of Claims may determine that the amount of excessive profits is less than, equal to, or greater than the amount determined by the Board.

The Renegotiation Amendments of 1971, in transferring jurisdiction over petitions for redeterminations of Renegotiation Board determinations from the Tax Court to the Court of Claims, makes it clear that the proceeding in the Court of Claims is not to be treated as a proceeding to review the determination of the Renegotiation Board, but is to be a *de novo* proceeding. In other words, in excessive profits redetermination cases, there is to be a full *de novo* court trial in the Court of Claims. The decision of the Court of Claims is to be subject to review

only by the Supreme Court upon certiorari in the manner provided in the U.S. Code for the review of other cases in the Court of Claims. However, unlike the rules of procedure applicable to cases before the Tax Court, the decision of the Court of Claims in *Lykes Bros. Steamship Co. v. U.S.* (Ct. Cl. No. 594–71, 198 Ct. Cl. 312, 459 F. 2d 1393 (1972) held that the burden of proof in renegotiation cases has been transferred from the contractor to the Government.

B. BRIEF HISTORY OF RENEGOTIATION

Renegotiation procedures under the Renegotiation Act of 1951 are similar to those which prevailed (after amendment) under an earlier statute generally known as the Renegotiation Act of 1942.

Although a few earlier attempts had been made to limit contractors' profits on contracts with the Government,[4] the 1942 Act was the first renegotiation statute. As originally enacted, it provided for renegotiation on a contract-by-contract basis by the procurement officials of the departments involved. However, 6 months after enactment it was amended to place renegotiation on what is now known as a fiscal-year basis. Subsequent amendments extended it to the end of 1945, prescribed certain factors which were to be taken into consideration in determining excessive profits, and also provided for *de novo* redetermination proceedings before the Tax Court.

In 1948, a new Renegotiation Act was passed; it was applicable principally to certain Air Force contracts for aircraft procurement. Later in the same year, however, it was amended to authorize the Secretary of Defense to extend it to other contracts, and subsequent amendments made it applicable to all negotiated Department of Defense contracts entered into during the Government's fiscal years of 1950 and 1951. The administration of this Act was placed under the Secretary of Defense who established departmental renegotiation boards which were subject to review by the Military Renegotiation and Review Board.

The Renegotiation Act of 1951 granted renegotiation authority effective with respect to amounts received or accrued on or after January 1, 1951. This Act expired on December 31, 1953, but 8 months thereafter it was amended and extended for one year until December 31, 1954. At that time, the minimum amount renegotiable under the Act, the "floor," was raised from $250,000 to $500,000. In addition, the amendments enlarged the exemption for contracts not connected with the national defense, modified the partial exemption for sales of durable productive equipment, provided an exemption for standard commercial articles, and modified the exemption for contracts with common carriers for transportation.

In August of 1955, 7 months after the Act had expired, it was amended and extended for a period of 2 years from its expiration date, or until December 31, 1956. These amendments broadened the renegotiation provisions which suspend the profit limitations of the Vinson-

[4] For example, the Vinson-Trammell Act of 1934 and the Merchant Marine Act of 1936, and subsequent modifications of those acts. These acts limited profits on contracts in excess of $10,000 for the construction of vessels and aircraft, with contractors agreeing to refund to the Treasury all profits in excess of 10 percent of the total contract price with respect to the major contracts, and 12 percent of such total on aircraft contracts. These profit-limiting provisions are suspended while the Renegotiation Act is in effect.

Trammell and Merchant Marine Acts (footnote 4, *supra*) to suspend those limitations where the sales were exempt under the standard commercial articles exemption, broadened the standard commercial articles exemption to include standard commercial services, added an exemption for certain construction contracts let by competitive bidding, and further modified the exemption for sales of durable productive equipment.

In 1956, the 1951 Act was extensively amended and further extended for a period of 2 years, to December 31, 1958. These amendments reduced the number of departments whose contracts were subject to the Act, provided for a 2-year carryforward of losses on renegotiable business, raised the "floor" from $500,000 to $1 million, and modified the provisions relating to the computation of the aggregate amounts received from persons under common control for purposes of applying the "floor." The 1956 amendments also made technical amendments to the mandatory exemption for certain subcontracts related to contracts exempt from the Act, substantially modified the exemption for standard commercial articles and services, and instituted a requirement that the Board file annual reports of its activities with Congress.

In September of 1958, the Act was amended to bring the National Aeronautics and Space Administration under its coverage, and it was extended for a period of 6 months, or until June 30, 1959. Amendments made in July of 1959 extended the Act for 3 years, or until June 30, 1962, and extended the period for carryforward of losses from 2 to 5 years.

Amendments enacted in 1962, 1964, 1966, 1968, 1971, and 1973, extended the Act for periods ranging from one year to 3 years, with 2 years the most frequent; the present extension enacted in 1973 expires on June 30, 1974.

The 1962 amendments also provided for review by the U.S. Court of Appeals, with respect to material questions of law, of determinations of excessive profits by the Tax Court. The 1964 amendments also provided that contracts and subcontracts of the Federal Aviation Administration would be included in the Act's coverage with respect to amounts received or accrued after June 30, 1964.

In the 1968 legislation, certain changes were made with respect to the exemption for standard commercial articles and services. The amendment increased the percentage of sales of an item which must be nonrenegotiable (i.e., commercial or to noncovered Government agencies) in order for the exemption to apply, from 35 percent to 55 percent. Further, the exemption was not to apply if the article or service was sold to the Government at a higher price than charged to a civilian commercial purchaser. In addition, two other modifications in the exemption for articles were made: (1) the alternate period (the current year or preceding year) with respect to which the percentage test may be applied was removed (so that the test applied only to the year under review); and (2) the exemption of "like" articles was removed as being unnecessary in view of the exemption for a "class" of articles. Finally, a reporting requirement was added whereby contractors who self-apply the exemption for standard commercial articles are to furnish information on the exemption to the Board, if the effect of the

self-application is to reduce the total renegotiable sales below the $1,000,000 statutory "floor."

The 1971 amendments also provided for a transfer of jurisdiction from the U.S. Tax Court to the U.S. Court of Claims (effective July 1, 1971), and also increased the rate of interest charged by the Board where cases are appealed by the contractor to the court from 4 percent to a prevailing rate as set by the Secretary of the Treasury at 6-month intervals based upon current rates of interest on new private commercial loans with maturity of approximately 5 years.

C. DATA ON RENEGOTIATION, 1968 THROUGH 1973 [5]

1. Filings with the Renegotiation Board

All contractors having renegotiable business in excess of the statutory minimum (the "floor") must file a report with the headquarters office of the Renegotiation Board. Contractors whose renegotiable sales are below that minimum amount are not required to file reports with the Board, but they may do so if they desire and a number of contractors in this category do elect to file a report. For fiscal years 1968 through 1973 (and 9 months of fiscal 1974), the number of reports filed with the Board were as follows:

RENEGOTIATION REPORTS FILED

Fiscal year	Total	Above the floor	Below the floor
1968	6,880	4,552	2,328
1969	7,236	5,030	2,206
1970	7,639	5,085	2,554
1971	7,414	5,267	2,147
1972	6,948	4,874	2,074
1973	5,492	3,910	1,582
1974 (9 months)	3,563	2,624	939

The contractors' reports are screened at headquarters, and each filing showing renegotiable business above the statutory minimum is reviewed to determine the acceptability of the segregation which the contractor has made of sales and his allocation of costs. This information is then evaluated to determine whether the filing should be assigned to a regional board for renegotiation, or whether it may be cleared at headquarters without assignment. If the latter determination is made (for example, because a report shows a loss or obviously nonexcessive profit), then headquarters will complete action on the filing by issuing to the contractor a notice of clearance without assignment. The following tabulation, for the Board's 1968 through 1973 fiscal years (plus 9 months of fiscal 1974), shows the number of above-the-floor filings made by contractors (including brokers and manufacturers' agents) for those years which were screened at headquarters, the number cleared without assignment and the number assigned to a regional board for renegotiation, as well as the average time required for the screening of a filing:

[5] Data for fiscal years 1968–1973 are from the respective Annual Reports of the Renegotiation Board. In addition, some data for the first 9 months of fiscal 1974 is presented, which was supplied by the Board's Office of Planning and Analysis.

ABOVE-THE-FLOOR FILINGS

Fiscal year	Total screened at headquarters	Cleared without assignment		Assigned to a regional board		Average number of days required for screening
		Number	Percent	Number	Percent	
1968	4,354	3,527	81.0	827	19.0	39
1969	4,828	3,858	79.9	970	20.1	54
1970	4,853	4,163	85.8	690	14.2	82
1971	5,442	4,827	88.7	615	11.3	87
1972	4,630	4,197	90.6	433	9.4	86
1973	3,108	2,785	89.6	323	10.4	121
1974 (9 months)	2,819	2,272	80.6	547	19.4	

The fiscal year 1974 data show a reversal of both the declining trend in number of cases assigned to the regional boards and percentage of cases assigned over the years 1969–1973. The Board reports that this is a result of increased scrutiny of cases in the screening process, as well as the reversal of the previous declining trend in DOD procurement. The changes in the screening process have also resulted in an increase in days required for completing screening.

2. *Renegotiable sales and profits*

The amounts of renegotiable sales for nonagent contractors, in total and by contract type, reviewed by the Board for the fiscal years 1968 through 1973, were as follows:

RENEGOTIABLE SALES REVIEWED, BY CONTRACT TYPES

[In millions of dollars]

Fiscal year	Total sales	Types of contracts				
		Cost-plus-fixed-fee	Cost-plus-incentive	Fixed price	Fixed-plus incentive	Other [1]
1968	38,773	5,556	4,664	22,449	3,962	2,142
1969	48,495	5,970	5,073	27,669	6,382	3,401
1970	48,008	6,310	5,551	27,468	6,799	1,880
1971	51,639	6,514	4,488	28,750	7,956	3,931
1972	31,264	4,027	2,633	17,252	5,300	2,052
1973	28,335	5,368	3,438	13,010	5,010	1,509

[1] "Other" contracts include price redetermination, and time and material contracts.

The amounts of renegotiable sales and profits and losses on contracts involved in the above-the-floor filings (other than filings by brokers or manufacturers' agents) screened for the fiscal years 1968 through 1973, were as follows:

RENEGOTIABLE SALES, PROFITS, AND LOSSES IN ABOVE-THE-FLOOR FILINGS SCREENED

[Dollar amounts in millions]

Fiscal year	Number of nonagent filings screened	Renegotiable sales and profits			
		Net profit reports		Net loss reports	
		Sales	Profits	Sales	Losses
1968	4,027	$35,260	$1,909	$3,513	$215
1969	4,452	43,226	2,445	5,269	256
1970	4,400	38,752	1,981	9,256	461
1971	5,009	40,911	2,018	10,728	700
1972	4,227	22,303	993	8,960	575
1973	2,891	22,831	1,105	5,504	427

The profit and loss figures in the preceding table are net figures, reflecting the fact that both profitable and nonprofitable contracts may be involved in individual cases. Also, the figures are based on cost allowances required for renegotiation purposes, which differ in significant respects from costs allowable for procurement purposes.

The amounts of renegotiable sales and profits and losses reported in filings which the Board receives in a given fiscal year generally relate to contractors' receipts or accruals during the preceding 2 calendar years. Thus, filings during fiscal year 1973 would relate to receipts and accruals during the calendar years 1971 and 1972. This time lag occurs because contractors are not required to file a report with the Board until 4 months after their business year ends, and also because many of them request and are granted extensions of time (usually for 90 days) for filing their reports.

3. *Cases assigned to regional boards*

Cases assigned to regional boards generally involve substantial questions, and thus require more extensive examination and analysis than those which are screened at the headquarters office. (The average time for processing such cases from filing to determination was 29 months as of fiscal year 1973, although the time required for a given case might vary considerably from that average. This was an increase from the average time of 19 months as of fiscal year 1970 and 15 months as of fiscal year 1967.) The regional board formally commences renegotiation in each case it is assigned; it obtains such additional information as it may need; and it then determines the amount of the contractor's excessive profits, if any.

Until fiscal year 1973, the regional boards had been delegated final authority to issue clearances or make refund agreements in cases involving aggregate renegotiable profits of $800,000 or less. During fiscal year 1973, the Board reserved the authority to itself to issue such orders. If a determination of excessive profits is made and the contractor will not enter into an agreement to refund such profits, the Board issues an order directing a payment of the refund. If a recommendation of the regional board is not acceptable either to the Board or to the contractor, the case is reassigned from the regional board to the Board for further processing and completion.

For fiscal years 1968 through 1973, the following tabulation shows the number of cases worked on by the regional boards, their disposition of those cases, and the number of cases completed at headquarters after reassignment to it:

RENEGOTIATION CASES CONSIDERED BY THE REGIONAL BOARDS

Fiscal year	Assignment	Completed	Backlog	Disposition of completed cases		
				Refund agreement, clearance, or decision not to proceed	Transferred to headquarters for further processing	Cases completed at headquarters after further processing
1968	827	567	938	329	238	252
1969	970	617	1,291	333	284	208
1970	690	687	1,294	349	338	342
1971	615	740	1,169	338	402	362
1972	433	677	925	289	388	363
1973	323	583	665	184	399	192

4. *Excessive profit determinations*

The following table shows the number and amounts (before adjustmade by the Board for fiscal years 1968–1973 (and 9 months for fiscal 1974):

DETERMINATIONS OF EXCESSIVE PROFITS

[Dollar amounts in thousands]

Fiscal year	Number of determinations			Amounts of determinations [1]		
	Total	By agreement	By unilateral order	By agreement	By unilateral order	Total excessive profits
1968	46	27	19	$6,200	$16,870	$23,070
1969	82	54	28	9,880	11,470	21,350
1970	123	68	55	13,120	20,330	33,450
1971	149	87	62	42,780	22,450	[2] 65,240
1972	178	110	68	21,120	19,060	40,190
1973	86	77	9	25,430	2,570	28,000
1974 (9 mos)	107	41	66	18,100	41,720	59,820

[1] Rounded to the nearest ten thousands.
[2] $26.5 million was from one case.

It should be noted that the excessive profits determinations in a given fiscal year generally relate to amounts received by contractors during the second and third preceding calendar years. In other words, excessive profit determinations in fiscal year 1973 generally relate to amounts received by contractors during the calendar years 1971 and 1970 under contracts awarded in those or prior years. This substantial time lag between the awarding of a contract and an excessive profits determination with respect to amounts received under the contract is a result of the combined effect of the time lag between the receipt of amounts under contracts subject to renegotiation and the reporting of those amounts by contractors to the Renegotiation Board, and also the time required to process a case from filing to determination.

5. *Appeals to the courts*

In those cases where a contractor does not agree with the Board's determination of excessive profits (that is, where the Board has issued a unilateral order directing the contractor to refund such amounts to the Government), he may appeal to the U.S. Court of Claims [6] for a redetermination. In such a proceeding, the Court of Claims may determine an amount of excessive profits which is less than, equal to, or greater than that determined by the Board. The following tabulation, for fiscal years 1968 through 1973 (and number of cases for 9 months of fiscal 1974), shows the number and amount of the Board's determinations appealed to the Tax Court (1968–1971) and Court of Claims (1971–1974), and the number and amount involved in cases pending before the court at fiscal yearend:

[6] Appeal was to the Tax Court prior to July 1, 1971. The Renegotiation Amendments of 1971 transferred jurisdiction to the Court of Claims.

APPEALS OF RENEGOTIATION DETERMINATIONS TO THE COURTS

Fiscal year	Unilateral orders appealed to tax court and court of claims		Cases pending in tax court and court of claims at fiscal yearend	
	Number	Amounts involved (thousands)	Number	Amount of determinations (thousands)
Tax Court:				
1968	15	$16,517	32	$28,934
1969	25	11,000	41	51,525
1970	43	17,698	66	40,759
1971	44	19,091	104	47,591
Court of Claims:				
1972	54	16,211	129	62,596
1973	3	1,377	104	41,963
1974 (9 mos)	50		142	

6. *Board expenses and personnel*

The number of personnel employed by the Board at its headquarters office and at its regional boards on June 30 of each of the years 1968–1973 (and end of March 1974), and the Board's expenses for fiscal years 1968–1973, were as follows:

BOARD PERSONNEL AND EXPENSES

Fiscal year	Personnel			Expenses (thousands)		
	Total	Headquarters	Regional boards	Total	Salaries	Other
1968	184	96	88	$2,626	$2,344	$282
1969	199	96	103	3,069	2,673	396
1970	232	112	120	3,967	3,481	486
1971	239	114	125	4,530	3,990	540
1972	223	109	114	4,754	4,148	606
1973	201	106	95	4,859	4,147	712
1974 (end of March)	189	107	82			

7. *Board's estimated workload, fiscal years 1974 and 1975*

The Renegotiation Board estimates that in the fiscal years 1974 and 1975 it will receive about 4,000 and 4,100 filings, respectively, or slightly higher than the 3,900 filings received in fiscal year 1973. Also, it is estimated that there will be a larger amount of renegotiable sales reported than in fiscal year 1973. In addition, the Board estimates that the number of cases assigned to the regional boards for renegotiation will increase significantly in fiscal years 1974 and 1975 as compared to fiscal years 1972 and 1973. The Board's estimates for fiscal years 1974 and 1975, and the actual figures in fiscal years 1972 and 1973, of the number of above-the-floor filings received, the amounts of renegotiable sales represented in those filings, and the number of cases assigned to regional boards are as follows:

BOARD'S WORKLOAD

[Dollar amounts in millions]

	Filings received	Renegotiable sales	Cases assigned to a regional board
Fiscal year:			
1972	4,874	$31,264	433
1973	3,910	28,335	323
1974 (estimated)	4,000	36,500	[1] 750
1975 (estimated)	4,100	38,500	[1] 800

[1] Original estimate for 1974 and 1975 was 400, but 637 have already been assigned for 1st 10 months in fiscal year 1974.

PART III. SUMMARY OF RECOMMENDATIONS ON THE RENEGOTIATION PROCESS MADE BY OUTSIDE STUDY GROUPS

A. DURATION OF THE ENABLING LEGISLATION

Study recommendations

The Subcommittee on Government Activities of the House Government Operations Committee recommended that the Renegotiation Act be made permanent.[1] The Commission on Government Procurement subsequently recommended that the Act be extended for periods of five years.[2] Most recently, the GAO, instead of recommending a specific time period, indicated simply that future extensions should be for more than two years at a time, if the Act is extended.[3]

Present law

The current Renegotiation Act, enacted in 1951, has been extended a total of 11 times since then for periods ranging anywhere from six months to three years at a time. The latest extension was enacted in 1973 (H.R. 7445; Public Law 93–66). As passed by the House, the Act would have been extended for an additional two years. However, the Senate adopted an amendment to the bill as reported by the Committee on Finance (which also would have extended the Act for two years) offered by Senator Proxmire to limit the extension to one year. This amendment was accepted by the House conferees. Thus, the Renegotiation Board is currently operating under an extension of the Act that is due to expire June 30, 1974. At that time, in the absence of a further extension (or any indication that such an extension is imminent), the Board would be unable to require or process new filings. However, because of a backlog of cases from previous years, the Board would continue in existence until it had disposed of this backlog.

Discussion of issues

All three outside groups concluded that the present congressional policy of frequent, short extensions for the Board has created an

[1] *Efficiency and Effectiveness of Renegotiation Board Operations,* 6th Report by the House Committee on Government Operations, Subcommittee on Government Activities (House Report 92–758, December 16, 1971), pp. 10, 14–15. (Hereinafter referred to as Government Operations Report.)

[2] *Report of the Commission on Government Procurement,* Vol. 4 Part J. ch. 4 (December 1972), pp. 188–9. (Hereinafter referred to as Commission Report.)

[3] *The Operations and Activities of the Renegotiation Board,* Report to the Congress by the Comptroller General of the United States (General Accounting Office Report No. B–163520, May 9, 1973), p. 47. (Hereinafter referred to as GAO Report (1973).)

atmosphere of uncertainty and encouraged a philosophy throughout the Board's 23-year history of simply getting through the current workload. In the absence of a relatively long or permanent lease on life, the Board has put a very low priority on long-term planning or development of guidelines on the application of the statutory factors in the determination of excessive profits. In its year-to-year existence, the apparent emphasis has been on reviewing the largest number of filings possible within the shortest period of time in order to show Congress that it was doing its job.

To a large extent, reluctance of Congress to cloak the Board with permanency appears to have stemmed from a genuine conviction that periodic review was necessary in view of the large delegation of judgment vested in the Board by Congress.[4] However, it is the opinion of each of the outside groups reviewing the Board that in discouraging long-term planning and codification of past opinions, the element of judgment in determining excess profits has probably been expanded over the years rather than curbed by this policy. The consensus of opinion of these studies is that Congress could retain oversight authority over the Board even while extending the Board for longer periods than two years, particularly if this were accompanied by a clear congressional directive to the Board to begin the long overdue task of codifying its experience and publishing guidelines with respect to the application of the statutory factors in determining whether excessive profits exist.

B. EXTENSION OF RENEGOTIATION COVERAGE TO ALL GOVERNMENT AGENCIES

Study recommendations

The chief source and support for the proposal to extend renegotiation coverage to all Government agencies appeared to be the Commission on Government Procurement,[5] with the GAO in effect simply endorsing the Commission's recommendation.[6]

Present law

At present, only contracts entered into by the Department of Defense, Departments of the Army, Navy and Air Force, National Aeronautics and Space Administration, General Services Administration, the Federal Aviation Administration, the Atomic Energy Commission, the Federal Maritime Board, and the Maritime Administration are subject to the Renegotiation Acts.[7] (With respect to GSA, under RBR 1453.5(b)(8), the Board has exempted all GSA contracts except those entered into by that agency on behalf of the other departments and agencies listed above.)

Discussion of issues

The fact is that although it was during the 1930's that Congress passed the nation's first profit-limiting legislation in connection with

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[4] *Report on the Renegotiation Act of 1951*, a Report to the Congress by the Staff of the Joint Committee on Internal Revenue Taxation (House Document No. 322, 87th Cong., 2d Sess.; January 31, 1962), p. 11.

[5] Commission Report, pp. 188–189.

[6] GAO Report (1973), p. 47.

[7] Contracts with the Defense Department, the General Services Administration, and the Atomic Energy Commission were specifically subjected to renegotiation by the original Renegotiation Act of 1951. The Maritime Administration was added by P.L. 84–870, Aug. 1, 1956; NASA by P.L. 85–930, Sept. 6, 1958; and the FAA by P.L. 88–339, June 30, 1964.

the military naval and aircraft construction of that decade, the widest application and development of the renegotiation concept occurred in wartime conditions. In other words, renegotiation as a concept has been associated from its inception principally with military production. The theory has always been that defense production such as that required for modern armed forces of necessity involves large amounts of money and a degree of specialization which makes true free-market competitive bidding oftentimes impossible.

In fact, the present Act, dating back to 1951 and the Korean conflict as it does, declares in its preamble that it is a matter of national policy to eliminate excessive profits in the general area of defense-type procurement as distinguished from the government-at-large.[8]

It should also be pointed out, however, that almost from the beginning, renegotiation has from time to time been extended both by Act of Congress and Presidential designations to cover agencies not normally considered defense-oriented. For example, the line between defense and nondefense may be very thin in the case of the Canal Zone Government or the Coast Guard. On the other hand, the Department of Commerce, Geological Survey, the Reconstruction Finance Corporation, the Housing and Home Finance Agency, the Tennessee Valley Authority, and the Bureau of Mines would normally be considered civilian agencies. Yet each of these departments and agencies has at one time or another, whether by Executive Order or Act of Congress, been subject to the jurisdiction of the Renegotiation Act.[9]

At present, the two main nondefense-related agencies subject to the jurisdiction of the Renegotiation Act are NASA and the FAA. It was felt that their high volume or relative concentration of spending on complex facilities and equipment involving highly complicated technology and procurement conditions under less than competitive conditions argued for the inclusion of these two agencies in the renegotiation process.

The chief argument made by the Commission on Government Procurement for extending renegotiation to all Government agencies is that, in terms of good financial management, a dollar spent for defense is indistinguishable from a dollar spent by the Government in any other area. It is argued that there should be as much concern that the taxpayers' dollar be spent as prudently as possible in one area of Government spending as any other. In effect, by singling out defense-related spending for special review and treatment, different standards of Government spending are being created. If excessive

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[8] Section 101 of the Act (50 U.S.C. App. § 1211).

[9] The Department of Commerce, Reconstruction Finance Corporation, Canal Zone Government, and the Housing and Home Finance Agency previously included under renegotiation coverage by Act of Congress were eliminated from such coverage by P.L. 84–870, Aug. 1, 1956. In addition, the following were also eliminated from renegotiation coverage by P.L. 84–870:

The Tennessee Valley Authority, the Coast Guard, Federal Civil Defense Administration and the National Advisory Committee on Aeronautics, designated by Executive Order 10260, dated June 27, 1951; the Defense Materials Procurement Agency, the Bureau of Mines, and the U.S. Geological Survey designated by Executive Order 10294, dated September 28, 1951: the Bonneville Power Administration designated by Executive Order 10299, dated Oct. 31, 1951; the Bureau of Reclamation, designated by Executive Order 10369, dated June 30, 1952; and the Federal Facilities Corporation designated by Executive Order 10567, dated Sept. 29, 1954. At the same time, Congress amended section 103(a) of the Act to limit the discretion of the President to designate for renegotiation coverage "during [and for the life of] any national emergency: . . . any other agency of the Government exercising functions having a direct and immediate connection with the national defense. . . ."

profits are something to be discouraged and recovered when they occur in connection with the procurement by one Government Department, then both consistency and equity, it is asserted, would require that a similar policy prevail for procurement in every other department.

The underlying economic assumption under this approach is that the Government today is such a large customer that, in effect, true market-tested competitive pricing does not exist in many cases when it enters the market, particularly with a sizable demand for a new product or product line. It is argued that the potential for such Government-caused dislocation (whether permanent or temporary), resulting in unfavorable prices being charged the Government and paid for with the taxpayers' dollars, is not limited to defense production.

There is little in the way of hard figures to indicate just how much might be recovered in the way of excessive profits were renegotiation to be extended to include all Government agencies. Nor is there any accurate estimate available of how much extra work would be required of the Renegotiation Board were it to be responsible for reviewing all Government contractors, with or without the same minimum floors and exemptions as are in effect today for defense-related contractors. In other words, the argument as presented is primarily one of equity or equal treatment for all Government Departments and all contractors doing business with the Government.

Constitutionally, the main test of the renegotiation process occurred in *Lichter, et al, d.b.a. Southern Fireproofing Company v. U.S.*, 334 U.S. 742, decided June 14, 1948. While *Lichter* has been cited in numerous cases since then, in holding that war powers under the Constitution gave Congress the power to support the Armed Forces with supplies and equipment in wartime,[10] the question is raised as to what the court might do when presented with a significantly broader renegotiation act in peacetime conditions covering all Government agencies. To date the Supreme Court has not heard a challenge to the inclusion of NASA and the FAA under the purview of the Renegotiation Act.

C. "FLOOR" LEVEL

Study recommendation

The recommendations of the three groups were: (1) House Government Operations—eliminate the floor (or lower it to $100,000);[11] (2) Commission on Government Procurement—raise the floor to $2,000,000 ($50,000 for brokers and agents' fees);[12] and (3) General Accounting Office—keep the floor at the present $1,000,000 level (and $25,000 for brokers and agents' fees).[13]

Present law

Section 105(f)(1) of the 1951 Act provides that renegotiation does not apply if the aggregate of the amounts received or accrued during a fiscal year by a contractor or subcontractor from covered Government Departments is not more than $1,000,000, in the case of fiscal years ending after June 30, 1956 ($500,000 for fiscal years ending on or after June 30, 1953 and $250,000 for fiscal years ending before June 30,

[10] *Lichter*, at pp. 455 and 756.
[11] Government Operations Report, p. 15.
[12] Commission Report, p. 189.
[13] GAO Report (1973), p. 1.

1953). The provision further provides that no determination of excessive profits to be eliminated for such year shall be greater than the amount by which the aggregate renegotiable receipts or accruals exceeds the floor. For example, if total renegotiable receipts or accruals were $1,028,000, and excessive profits were $100,000, only $28,000 would thus be eliminated or required to be refunded. (In such a case, the Board's minimum refund rule, discussed below under topic D, would not apply since the original determination was $100,000, although the actual amount to be refunded was only $28,000.)

The minimum amount ("floor") for brokers' and agents' fees has been $25,000 since the inception of the 1951 Act (sec. 105(f)(2)). As is the case with the nonagent "floor," no determination of excessive profits to be eliminated for a year shall be in an amount greater than the amount by which such aggregate exceeds $25,000.

Discussion of issues

The House Government Operations Committee Report indicated that the removal of the minimum floor would appear to be feasible and economical in light of the administrative improvements that could be made through modern electronic data processing techniques. The Report stated "there is no logical basis for excluding contractors with renegotiable sales of less than $1 million, on either legal or moral grounds." [14] However, the Report suggested, as an alternative to complete elimination of the floor, a level of, say, $100,000.[15]

The Commission on Government Procurement, on the other hand, recommended raising the minimum "floor" to $2,000,000. They contended that as a result the Board could then focus its attention on the most significant areas of potential recoupment. Moreover, they indicated that this would also tend to relieve some of the reporting burden for small businesses. The Commission concluded that lowering the floor to $100,000 would call for a costly increase in the Board's staff.

Data tabulated by the Board indicate that if the floor for nonagents had been $2,000,000 during the fiscal years 1969–1973, about 26 percent (5,357) of the total filings would not have been covered. There would have been 172 fewer excessive profit determinations, representing $15.5 million in refunds, which was about 30 percent of the number of determinations and about 8 percent of the amount determined. Estimates of filings before the $1,000,000 floor are very difficult and uncertain due to changing procurement and economic conditions from time to time, as well as the lack of accurate data available on contractors and subcontractors below the floor.

Of 1,830 agent filings screened during fiscal 1969–1973, only 11 (or less than one percent) were redetermined. Only 2 of these had renegotiable commissions of less than $100,000 (and both were above $50,000). The total amount refunded during this period for the 11 filings was $770,000, or about 0.4 percent of the total refunds for the 5 years.

D. MINIMUM REFUND LEVEL

Study recommendation

The GAO recommended that the Board consider whether the practice (by regulation) of setting a minimum level of excessive profits

[14] Government Operations Report, p. 15.
[15] *Ibid.*

below which the Board does not attempt to proceed is appropriate under the statute and, if so, whether the Board has clearly stated its objectives for establishing minimums and whether these objectives are being attained.[16]

Present law

The Renegotiation Act of 1951 has no specific provision to exempt any amount of profits determined by the Board to be excessive. Administrative practice by regulation [17] has set a "minimum refund" level under which the Board does not proceed against a contractor if the level of "excessive profits" is less than $80,000 (or $20,000 for brokers and agents). This level was raised administratively in 1972 from the previous minimum refund level of $40,000 ($10,000 for brokers and agents) which had been in the regulations since 1954.[18] The 1972 change was effective for fiscal years ending after December 31, 1970.

Discussion of issues

Apparently there has been a minimum refund level by regulation since the inception of the Act whereby the Board does not proceed to collect if the amount of profit determined to be "excessive" is below the minimum level set by regulation. The Board has felt that some *de minimis* rule on excessive profit determinations has been necessary because of the inexact nature of their determination process where the amount of "excessive" profit is not a precise figure, particularly when nominal amounts are being reviewed. Further, a minimum refund level is considered beneficial to "small businesses," as well as avoiding the cost to both contractor and the Government of proceeding to recover relatively small amounts. In addition, the factor of inflation has been mentioned as a rationale for increasing the level in 1972 from $40,000 to $80,000. It is noted that the net gain to the Government is still smaller due to the credit given for income taxes paid on these amounts.

The GAO pointed out that the statute does not mention any level of "excessive profits" which are not to be recovered, if such amounts are determined to be excessive after being reviewed in the renegotiation process. Some would argue that if, say, $81,000 of excessive profits should be recovered, there is no apparent reason why $79,000 or some smaller amount should not be recovered as well. Since a case has to be processed to the point of determining whether any excessive profits exist or not, the only extra cost to the Government would be if the contractor appealed the determination. On the other hand, suggestions have been made to provide a *de minimis* rule to assist small businesses, which would speed up the entire renegotiation process for them and thereby reduce their burden of compliance and the time involved for the Government in proceeding against cases involving relatively small amounts.

The GAO report indicated that 29 excessive profit determinations for $1.6 million would not have been made in fiscal 1972 had the increased minimum refund level of $80,000 been in effect that year.[19]

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[17] Reg. § 1460.5.
[18] GAO Report (1973), p. 4.
[18] Prior to the 1954 increase to $40,000, the minimum refund level (set by regulation) was: $20,000 in 1953, $10,000 from 1951 to 1953, $5,000 during the existence of the 1948 Act and $10,000 during the life of the 1943 Act.
[19] GAO Report (1973), p. 48.

E. EXEMPTIONS

Study recommendations

The House Government Operations Committee recommended complete repeal of the exemption for standard commercial articles and services.[20] The General Accounting Office indicated that the Board should (1) analyze data on the commercial exemption to see if excessive profits may be present; and (2) determine the validity of the exemption for new durable productive equipment.[21]

Present law

Section 106 of the Act provides 10 "mandatory" exemptions, five "permissive" exemptions, and a "cost allowance" which has the effect of an exemption for integrated producers of certain agricultural products and raw materials.

1. *Mandatory exemptions*

The mandatory exemptions are as follows:

1. Any contract by a department with any territory, possession, or State, or any agency or political subdivision thereof, or with any foreign government or any agency thereof.

2. Any contract or subcontract for an agricultural commodity in its raw or natural state or, if the commodity is not customarily sold or has not an established market in its raw or natural state, the state in which it is customarily sold or in which it has an established market.

3. Any contract or subcontract for the product of a mine, oil or gas well, or other mineral or natural deposit, or timber, which has not been processed, refined, or treated beyond the first form or state suitable for industrial use.

4. Any contract or subcontract with a common carrier for transportation or with a public utility for gas, electric energy, water, communications, or transportation, when made in either case at rates not in excess of unregulated rates of such a public utility which are substantially as favorable to users and consumers as are regulated rates.

5. Contracts or subcontracts with organizations, which are tax exempt charitable, religious, or educational institutions, where the income is not "unrelated business income."

6. Any contract which the Board determines does not have a direct and immediate connection with the national defense.[22]

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[20] Government Operations Report, p. 15.

[21] GAO Report (1973), p. 4.

[22] Under the Regulations, the contracts exempted are listed as: contracts for building maintenance and repair, for other departments, for other persons or agencies, which obligate foreign aid funds, materials for authorized resale, removal of waste materials, laundry and cleaning services, certain contracts of the Commerce Department (however, except for the Maritime Administration for years after 1956, the Act does not apply to the Commerce Department), certain GSA contracts (Public Buildings Service, National Archives and Records Service, and Federal Supply Service for store stock and direct delivery contracts of the FSS to the extent delivered to noncovered Departments), Canal Zone Government and Panama Canal Company housing contracts prior to July 1, 1950, Housing and Home Finance Agency, certain Corps of Engineers construction contracts (civil functions other than for named projects deemed to be related to national defense as having part of their purposes the increase of power facilities for defense, Bonneville Power Administration prior to July 1, 1950, certain Tennessee Valley Administration contracts, U.S. Geological Survey contracts for gauge-reading services, certain Bureau of Reclamation projects (except projects similar to those for Corps of Engineers), Military exchanges and similar organizations using nonappropriated funds, and contracts for maintenance dredging. (The Board may also consider requests for specific contract exemptions under this provision as well as contracts let for natural disasters or other emergency repairs, etc.) (Reg. § 1453.5).

7. Subcontracts directly or indirectly under contracts or subcontracts which are exempt.

8. Any contract, awarded as a result of competitive bidding, for the construction of any building, structure, improvement, or facility, other than a contract for the construction of housing, financed with a mortgage or mortgage insured under the provisions of title VIII of the National Housing Act.

9. Certain receipts and accruals from contracts or subcontracts for "durable productive equipment." [23]

10. Certain receipts and accruals from contracts or subcontracts for "standard commercial articles" or "standard commercial services." (See discussion below.)

2. *Exemption for standard commercial articles and services*

The standard commercial article exemption provided by section 106(e) of the Act exempts amounts received or accrued in a fiscal year under any contract or subcontract for any one of the following categories: [24]

(1) A standard commercial article;

(2) A standard commercial service; [25]

(3) A service which is "reasonably comparable" with a standard commercial service; or

(4) Any article in a standard commercial class of articles.

For the exemption to be applicable to an article or service in any one of the above categories, the item must meet what may be referred to as the 55-percent rule, as well as other tests prescribed by the Act. The 55-percent rule requires that at least 55 percent of the contractor's sales of the item be nonrenegotiable during the fiscal year under review. In other words, at least 55 percent of the contractor's sales of the item must be commercial sales or sales to Government departments and agencies not covered by the Act. (The rule prior to the 1968 legislation required that at least 35 percent of the sales for the year under review be nonrenegotiable.)

Certain other tests must also be met with respect to each category. Thus, for an article to qualify as a standard commercial article it must be one which is either "customarily maintained in stock" by the contractor or is "offered for sale in accordance with a price schedule regularly maintained" by the contractor. In addition, the 1968 legislation added a provision whereby in order to qualify for the exemption the price of any such article was not to be in excess of the lowest price at which the article was sold in similar quantity for civilian industrial or commercial use, except for "any excess attributable to the cost of delivery or other significantly different circumstances."

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[23] This subsection exempts subcontracts and contracts (prime contracts added for years after June 30, 1953) for "new durable productive equipment" (NDPE—machinery, tools, etc. having average useful life of more than 5 years) in the same ratio as five years bears to the average useful life of such equipment in Bulletin F (1942 edition) of IRS regulations or if not listed here, as determined by the Board. In other words, if, for example, a piece of equipment has a useful life of 15 years, then one-third (5/15) of the receipts from the contract or subcontract would be renegotiable and two-thirds would be nonrenegotiable. (Reg. Part 1454).

[24] Except the exemption is not applicable during a "national emergency" proclaimed by the President or the Congress after the 1956 amendments. (See § 106(e)(6)).

[25] The term "service" means any processing or other operation performed by chemical, electrical, physical, or mechanical methods directly on materials owned by another person. (Sec. 106(e)(4)(c)).

For a service to be exempt as a standard commercial service, it must meet the 55-percent test, be a "service" as defined by the statute, and not be sold at a price in excess of the lowest price for services performed under similar circumstances for civilian industrial or commercial work. And, for a service to be exempt as "reasonably comparable with a standard commercial service," it must be of the "same or a similar kind, performed with the same or similar materials," have "the same or a similar result * * * as a standard commercial service," as well as meeting the lowest commercial price and 55-percent tests.

For an article to be exempt as an article in a standard commercial class of articles, the class in which it is grouped must be a "standard commercial class." This means, under the statute, the class must consist of two or more articles with respect to which five conditions are met: (1) "at least one of such articles either is customarily maintained in stock by the contractor . . . or is offered for sale in accordance with a price schedule regularly maintained by the contractor;" (2) "all of such articles are of the same kind and manufactured of the same or substitute materials;" (3) the price of each of such articles is not in excess of the lowest price of articles sold in similar quantity for civilian, industrial and commercial use, except for "any excess attributable to the cost of accelerated delivery or other significantly different circumstances;" (4) " all of such articles are sold at reasonably comparable prices;" and (5) the sales meet the 55-percent test.

A contractor may waive the exemption for sales of any one or all of the categories discussed above for any fiscal year under certain prescribed conditions. In waiving the exemption with respect to any particular article or service, the contractor does not necessarily waive the exemption for any other article or service. The exemption for sales of a standard commercial article is "self-executing," in that it may be applied by the contractor without the filing of any application therefor, except for the proviso added in 1968 that the contractor is required to supply information to the Board if the self-applied exemption brings him under the $1,000,000 floor. However, exemptions for sales of classes of articles or services can be obtained only if the contractor files an application with the Board.

3. *Permissive exemptions*

Section 106(d) of the Act provides that the Board has discretion to exempt the following:

(1) Contracts or subcontracts to be performed outside the territorial limits of the continental U.S. or in Alaska.[26]

(2) Certain contracts or subcontracts where the Board feels that profits can be determined with reasonable certainty when the contract price is established—such as for personal services, real property, per-

[26] This exemption, as interpreted by the Board, is limited to performance by foreign nationals on foreign soil. The Regulations specify that the exemption is available if performed outside the U.S. by any person who is not engaged in a trade or business in the U.S. and is (1) an individual who is not a national of the U.S., (2) a partnership or joint venture in which individuals are not nationals of the U.S. or corporations which are not domestic corporations are entitled to more than 50 percent of the profits, or (3) a foreign corporation more than 50 percent of the voting stock of which is owned directly or indirectly by those described in (1) and (2) (Reg. § 1455.2).

ishable goods, leases and license agreements, and where the performance will not exceed 30 days.[27]

(3) Contracts or subcontracts where the Board feels the provisions of the contract are otherwise adequate to prevent excessive profits.[28]

(4) Contracts and subcontracts of a secret nature.[29]

(5) Subcontracts where the Board determines it is not administratively feasible to segregate profits to activities not subject to renegotiation.[30]

4. *"Cost allowances"*

Section 106(b) of the Act provides that "in the case of a contractor or subcontractor who produces or acquires the product of a mine, oil or gas well, or other mineral or natural deposit, or timber, and processes, refines, or treats such product to and beyond the first form or state suitable for industrial use," or one who is an integrated processor of agricultural products, the Board by regulation is to give a "cost allowance" substantially equivalent to the amount which would have been realized if the contractor or subcontractor had sold such product in the first form or state. In other words, the integrated producer is to be allowed, as an item of exempted cost, an equivalent amount as if he were producing and selling the raw materials exempted under Section 106(a) (2) and (3).

Discussion of issues

Recommendations in the three reports with respect to exemptions center on the exemptions for standard commercial articles and services (SCAS) and for new durable productive equipment (NDPE).

1. *Standard commercial articles and services*

The House Government Operations Committee Report expressed the view that the exemption for standard commercial articles and services should be repealed. It suggested also that other exemptions should be eliminated as well, but particular emphasis was placed on the SCAS exemption. The Report concluded that:

> "The interaction of competition in the marketplace does not necessarily result in fair and reasonable sales prices, particularly on sophisticated equipment such as computers and

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[27] The Board, however, has limited the 30-day exemption to contracts under $1,000, and has not exempted lease or license agreements. The Board has also exempted subcontracts for architectural design and engineering services and contracts entered into with a nonprofit making agency for the blind (Reg. § 1455.3).

[28] Under this provision, the Board has exempted certain operating differential subsidy contracts of the Maritime Administration, certain exploration project contracts of the Defense Minerals Exploration Administration of the Department of the Interior under delegation from the Defense Material Procurement Administration, certain prime contracts (but not subcontracts) with the Small Defense Plants Administration, and certain prime contracts (but not subcontracts) of the Small Business Administration with the covered agencies (Reg. § 1455.4).

[29] The Board notes that a contract will be exempt only if the agency that let the contract requests that the Board not renegotiate for security reasons (Reg. § 1455.5).

[30] Under this authority, the Board grants subcontract exemptions to so-called "stock items"; that is, items sold to a contractor for his stock and are of the type that are commingled with similar items purchased from other suppliers in such a manner that it is not administratively feasible to segregate one supplier's sales from others in order to determine the renegotiable sales attributable to the supplier. Prior to November 1, 1968, this exemption was self-applied and the exempt sales were counted as nonrenegotiable sales in calculating the then 35-percent requirement of nonrenegotiability of similar items for which the standard commercial article exemption was claimed. After this change in regulation, the Board has to grant specific approval on the application (Reg. § 1455.6).

other articles produced by industries that may not have a well established competitive marketplace price base. If procurements of these items are in fact made under noncompetive conditions, these procurements could yield excessive profits." [31]

Other arguments mentioned by advocates of repeal of the SCAS exemption include: items under the exemption may be sold exclusively to noncovered civilian Government agencies and therefore not be subject to normal commercial conditions; true market competition may not exist in the particular product line; a normal unit price in the commercial market may be excessive for very large Government purchases, especially where such purchases alter the market conditions through sudden, large impact purchases; contractors have an option under the waiver provision of excluding their SCAS sales with high profits from renegotiable sales while including SCAS sales with low profits in their renegotiable sales to reduce their overall profit level reported; the exemption works to the advantage of contractors who have data processing facilities to categorize commercial and noncommercial sales to best meet the 55-percent rule and class of articles test, as well as separating the high and low-profit items to their best advantage; and since contractors must keep records to support exemption claims and the Board must review claims, repeal would not significantly increase the Board's or the contractor's administrative workload.

The GAO report indicated that a significant amount of potential renegotiable sales has escaped renegotiation in recent years due to the SCAS exemption, but that the amount of profits (and whether they were excessive) is indeterminate. They felt that cost and profit data are needed before it can be determined whether significant amounts of excessive profits are thus escaping the renegotiation process as well as the degree in which contractors may be using the waiver option to reduce their overall profit level reported on renegotiable sales.[32]

Arguments used in support of the SCAS exemption include: Congress has previously reconsidered the exemption and concluded that the exemption is warranted, as Congress has reaffirmed the decision at various times by only making modifications in the exemption (as in the 1968 legislation), rather than complete repeal (as requested by the Board in 1968); pricing competition in the commercial marketplace is generally adequate to insure fair and reasonable profits; repeal would result in unreasonable and redundant review of contracts awarded on a competitive basis; and repeal would place an additional administrative burden on the Board and on contractors.

2. *New durable productive equipment*

The GAO noted that the rationale for the partial exemption for new durable productive equipment (NDPE) was to limit renegotiation to the portion of productive life devoted to defense-related operations and to protect industry from effects of potential Government disposal of stockpiled NDPE purchased during the Korean conflict. They fur-

[31] Government Operations Report, p. 16.
[32] GAO Report (1973), pp. 29–30.

ther reported that such a disposal of Government-owned NDPE has never occurred.[33]

Others feel, however, that the potential for Government disposal of NDPE still exists, and therefore maintain that the partial exemption should continue.

F. STATUTORY FACTORS

1. General

Study recommendations

All three study groups recommended that clearer guidelines be established governing the application of the statutory factors which must be considered in determining what constitutes "excessive profits," in other words, the crux of the whole renegotiation process. The House Government Operations Committee Report appears to put the burden on Congress to develop and clarify existing statutory factors [34] which have undergone little change since they were first developed by the War Contracts Price Adjustment Board during World War II. The factors were incorporated by Congress into the original renegotiation and revenue acts of the era,[35] and were continued in the Renegotiation Act of 1951.[34] The Government Procurement Commission, in recommending expansion and clarification of the criteria used in determining excessive profits, would appear to be urging both statutory change as well as clarification by the Board of the existing statutory factors.[36] The GAO charges the Board with the responsibility of clarifying existing statutory factors, recommending as it does that the Board set out immediately to develop guidelines codifying its 23 years of experience of interpreting these factors.[37]

The House Government Operations Report also recommended that the Board submit its legislative proposals for amending the present statutory factors to provide "more objective standards for use in determining excessive profits." [38]

Present law

There are at present six specific statutory factors listed in the law (Sec. 103(e) of the Act), which the Board is required to consider in making a determination as to whether excessive profits do or do not exist in any individual case. A seventh general "factor" is in the nature of a discretionary "other factor," giving the Board authority to promulgate, by regulation, other criteria which it deems is in the public interest (which authority the Board has not yet utilized). The six specific factors to be considered by the Board are discussed below.

1. *Efficiency of contractor*, "with particular regard to attainment of quantity and quality production, reduction of costs, and economy in the use of materials, facilities and manpower." [39]

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[33] *Ibid.*, pp. 26–27.
[34] Government Operations Report, pp. 10, 14–15.
[35] Renegotiation Act of 1942, April 28, 1942, 56 Stat. 245, as amended, 50 U.S.C. App. § 1191 et seq. (1946); 57 Stat. 347, 564 (1943), 50 U.S.C. App. § 1191 (1946); Renegotiation Act of 1943, Feb. 25, 1944, 58 Stat. (1944) 78; 50 U.S.C. App. § 1191 (1946); Renegotiation Act of 1948, May 21, 1948, 62 Stat. 259 (1948); 50 U.S.C. App. § 1193 (Supp. 1952). It was the 1943 Act amendments which provided for the first time in legislation the factors to be taken into consideration in determining excessive profits.
[36] Commission Report, pp. 190–191.
[37] GAO Report (1973), pp. 33–41.
[38] Government Operations Report, p. 15.
[39] Sec. 103(e) of the 1951 Act.

Over the years, this factor seems to have been emphasized not only in the actual language of the 1951 Act, set apart as it is from the others in the preamble of section 103(e) and thus the first to be mentioned, but also in the actual deliberations of the Renegotiation Board in the opinion of many. Based on a reading of the Board's regulations, the main criteria of efficiency are: timing of delivery ahead of schedule, not just meeting deadlines; a significantly low rejection rate; significant reduction in costs (distinguishing between controllable and noncontrollable costs); marked economy in the use of materials, facilities, and manpower; and, finally, realization of significantly lower costs than previously estimated in incentive-type contracts.[40]

2. *Reasonableness of costs and profits*, "with particular regard to volume of production, normal earnings, and comparison of war and peacetime products." [41]

Under the regulations, consideration of this factor is to be based largely on comparisons of a contractor's own renegotiable costs and profits with costs and profits of previous years, with current costs and profits of other contractors, as well as with profits of the contractor and his industry on products and services not subject to renegotiation, yet similar in nature.[42]

3. *Net worth*, "with particular regard to the amount and source of public and private capital employed." [43]

Because of the heightened interest in this specific factor and the specific recommendation which has been made with respect to this particular factor, a separate discussion of this factor will follow discussion of all factors in general.

4. *Extent of risk assumed*, "including the risk incident to reasonable pricing policies." [44]

This factor figured prominenty during the early renegotiation days when what was in effect was more a repricing of contracts rather than a renegotiation of a company's total renegotiatable business with the Government in any given year. The regulations make it clear that while risk related to price policies is not the only risk to be considered, certainly the most emphasis appears to be focused on the pricing risk.

Other risks enumerated in the regulation include: possible saturation of post-emergency markets after an industry attains maximum production during a crisis period; guaranteed delivery schedules might prove impossible to meet because of inability to obtain materials or labor; contractors may be hard put to meet the guaranteed level of quality of performance, especially in the case of products abnormal to the contractor's normal production; in diverting to defense production, commercial markets may be lost to competitors, and heavy reconversion expenses may be incurred at the end of the emergency; subcontracting, when the contractor guarantees the quality of the work, can be a riskier form of production than production which is entirely inhouse.[45] In determining degree of risk, the Board is guided

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[40] Reg. § 1460.9(b)(1–5).
[41] Sec. 103(e)(1) of the Act.
[42] Reg. § 1460.10(b)(1).
[43] Sec. 103(e)(2) of the Act.
[44] Sec. 103(e)(3) of the Act.
[45] § 1460.12(b)(1).

by past experience and actual loss realization under similar contracts rather than speculation on the possibility of future risk.[46]

5. *Contribution to defense effort*, "including inventive and developmental contribution and cooperation with the Government and other contractors in supplying technical assistance." [47]

As one of the oldest factors in renegotiation, or repricing before it, some would argue that this factor underlines the Act's orientation to the defense effort. According to the regulations, the criteria to be considered in applying this factor to renegotiation are: (1) superior performance in excess of contract requirements, such as completing urgent work ahead of schedule; (2) ingenuity in providing new uses for products, machinery, or equipment; (3) overcoming difficulties others have failed to overcome in providing materials or services; (4) experimental and developmental work of high value; (5) new inventions, techniques and processes of unusual merit; (6) performance under difficult environmental or geographical conditions or hazardous working conditions; (7) cooperation with the Government and with other contractors in contributing proprietary data or in developing and supplying technical assistance to alternative or competitive sources of supply; or (8) performance, assistance or service considered otherwise exceptional.[48]

6. *Character of business*, "including source and nature of materials, complexity of manufacturing technique, character and extent of subcontracting, and rate of turnover." [49]

According to the regulations, the relative complexity of the manufacturing technique and integration of the manufacturing process are the basic considerations in evaluating this factor. This factor has also been interpreted as offering encouragement to firms to subcontract with smaller firms "to the maximum extent practicable." [50] Specifically, the regulations indicate that "the extent to which subcontracts are placed with small business concerns, will be given favorable consideration in the renegotiation of the contractor." [51] In this respect, any assistance in the form of management, capital or financing, labor or material given to the small business firm by the contractor would of course be given special consideration in the renegotiation process.

7. *Such other factors*, "the consideration of which the public interest and fair and equitable dealing may require, which factors shall be published in the regulations of the Board from time to time as adopted." [52]

The Board has never exercised its authority under this discretionary factor to promulgate other additional "factors" thought to be essential to the determination of "excessive profits."

Discussion of issues

As has been indicated, all three studies are in agreement that the statutory factors and the regulations in their present form need considerable clarification. The point is made that the statutory factors

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[46] § 1460.12(b)(2).
[47] Sec. 103(e)(4) of the Act.
[48] § 1460.13(b).
[49] Sec. 103(e)(5) of the Act.
[50] § 1460.14(b)(3)(i).
[51] *Ibid.*
[52] Sec. 103(e)(6) of the Act.

have changed little since they were originally developed by the Price Adjustment Board during World War II. Because the factors were developed in wartime conditions to apply to the widest possible range of industries and circumstances, the factors are broad in design and open to a number of interpretations. In applying them in individual cases, the Board over the years has obviously had to interpret them and, in the absence of any congressional indication of priorities, has, it is argued, given different weight or value to each of the factors as they saw fit from case to case.

Perhaps the most concise and most often cited expression of the Board's attitude in the past is the following statement taken from the Board's *Annual Report* to Congress for the fiscal year 1967:

> "It is apparent from the statutory language that no formulae or preestablished rates can be used to determine whether the profits are, or are not, excessive in any given case. Rather, the determination in each instance must reflect the judgment of the Board on the application of each of the statutory factors * * * to the facts of the specific case." [53]

Now, after 23 years of experience with renegotiation, there seems to be a growing consensus that the time has come for the Renegotiation Board and the Congress to reexamine the present statutory factors in an effort to determine whether new or additional factors might not be necessary at this date, and for the Board to publish in appropriate form "complete descriptions of the specific matters it has taken into account in its application of these statutory factors and the relative importance it has given to such matters." [54]

The consensus of the three reports is that at the moment the statutory factors and the regulations governing their application provide little insight for firms under the jurisdiction of the Renegotiation Board or, for that matter, to the Board's staff or the Board itself in screening or renegotiation cases. In the days when renegotiation was expected to be limited to the duration of the Korean War, a disinclination to spend valuable time formulating precedents and codifying determinations might have been understandable. However, since renegotiation has continued in periods of relative peacetime it seems that the absence of administrative practices and proceedures has become a major source of concern to every organization which has examined the renegotiation process in recent years. This concern has evidently been heightened by certain proposals which would have the effect of expanding the authority and scope of the Renegotiation Board to cover all Government contracts, eliminate some of the existing statutory exemptions or permit product line renegotiation in cases of conglomerate operations. If any or all of these proposals were to be adopted at a future date, they would result in a heavier Board workload and potentially more refunds for the Government. The absence of written guidelines, it is argued, then would likely be even more critically felt than at present.

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[53] Renegotiation Board, *Annual Report* (1967), p. 3.
[54] Recommendation No. 22 of the Administrative Conference of the United States (June 1970).

2. Net Worth and Capital

Study recommendation

In addition to the general recommendations made with respect to the statutory factors, the General Accounting Office recommended that the Regenotiation Board give greater consideration to the rate of return on capital employed in producing renegotiable sales and use industry averages to provide for more objective and broader-based analyses.[55]

Present law

Under Section 103(e)(2) of the Act, one of the factors to be considered in determining excessive profits is the "net worth" of the contractor or subcontractor, with particular regard to the amount and source of public and private "capital" employed. Under this statutory factor, all aspects of net worth and capital employed are considered, and not merely the rate of return thereon. Under the regulations, the relationship of profit realized on renegotiable business to the capital and net worth employed in such business is used as one of the considerations in the final determination of excessive profits.[56] More favorable consideration is given to contractors or subcontractors who are not dependent upon Government or customer financing. The regulations state that the contractor's contribution tends to become one of management only when a large part of the capital employed is supplied by others.

Generally, the net worth employed and the source of capital are determined as of the beginning of a fiscal year, and are based on book values.[57] If significant changes occur during the year, the changes will be reflected in the determination of the net worth and capital employed during the year. However, amounts arising from revaluations are disregarded.

For purposes of renegotiation, the "capital employed" is the total of net worth, debt, and any assets furnished by the Government or other customers.[58]

Discussion of issues

Initially, it is noted by many that it is difficult to formulate a prescribed set of standards to determine the reasonableness of a profit return. It is pointed out that the standards should be both specific enough to be implemented and general enough to take into account the varieties and multiplicity of situations to which they would apply. Further, it is argued that the application of statutory factors in determining excessive profits, in view of the attendant factors and circumstances, will essentially involve a process of economic evaluation and comparison. With respect to evaluation, various ratios may be developed to determine a firm's financial position and profitability, e.g., ratios which relate net income to sales, and net income to stockholders'

[55] GAO Report (1973), p. 41.
[56] Reg. § 1460.11(b)(4).
[57] Reg. § 1460.11(b)(2).
[58] Reg. § 1460.11(b)(3).

equity or assets, and the like. Other ratios may be used to measure the firm's efficiency in the use of assets, e.g., inventory turnover ratios.

After an economic analysis is conducted, comparisons are necessary to evaluate the results of the analysis. The firm could be compared with other firms in the same type of business or with similar product lines, and with other firms of the same relative size. The results of the analysis for a given year could be compared with analyses for other years. These comparisons, indicative of the relative position of the firm, could provide a basis for an overall judgment of the firm.

The renegotiation process, it is said, appears to involve procedures similar to those employed in analyzing a firm's economic position and the results of its operations for investment purposes. In other words, various analytical ratios could be developed, including those necessitated by the peculiar nature of defense work, and then various relevant comparisons made. The result of this analysis would be an indication of the extent to which the profits of the business were substantially above what may be considered as a reasonable, competitive norm.

Some maintain that comparisons of rates of return on the "capital" or "assets" employed might be more meaningful than comparisons of the rates of return on "net worth." In the latter case, the net worth base would be affected by a contractor's decision to finance operations by borrowing rather than by equity investment. Although the rate of return on net worth may be especially important to the owners of a firm, this rate of return may not be indicative of the "reasonableness" of profits when leveraging is employed. Thus, the rate of return on net worth could be substantially different for two firms which are comparable as to the type of business and sales volume but which have substantially dissimilar debt/equity structures.

Comparisons of rates of return on net worth or capital employed may be made more difficult where the firm under consideration leases a significant portion of its operating assets, or subcontracts a significant portion of its work, and other firms in the same line of business do not.

Concern has been expressed regarding the manner in which the net worth and capital factor is applied by the Renegotiation Board in various types of situations. The General Accounting Office noted that the applications of the statutory factors have provoked criticism that the Board arbitrarily leaves contractors with widely varying rates of return on capital employed.[59] The GAO further pointed out that the Board's determinations have resulted in remarkably consistent returns on sales in contrast to the wide range of returns on capital. The GAO surmised that the Board may be emphasizing the rate of return on sales rather than rate of return on capital employed as the measure of a contractor's profitability.

The GAO report endorsed the Renegotiation Board's effort to obtain capital-employed data from contractors. The GAO urged the Renegotiation Board to issue guidelines to contractors for measuring capital employed and to develop the analytical framework and criteria for relating the capital-employed factor to renegotiable business. It was further noted that the Department of Defense profit negotiation poli-

[59] GAO Report (1973), p. 35.

cies now consider capital employed. In this regard, Defense Procurement Circular No. 107 was issued (December 11, 1972) to recognize the estimated amount of operating and facilities capital a contractor will employ in contract performance for purposes of negotiating certain contracts. The DOD circular states that the capital adjustment is designed to correct inequities and disincentives that can occur when a weighted guidelines profit objective based solely on cost is used in negotiating contracts for which the ratio of required contractor investment to contract cost varies over a wide range.

In the 1973 Senate debate relating to the extension of the Renegotiation Act, Senator Proxmire indicated that, even after excessive profits were eliminated, "a number of firms were allowed to retain profits which appear to be exorbitant and unconscionable." [60] He further noted that "of the 131 firms against whom excess profit determinations were made, the after-refund profits of 94 firms exceeded 50 percent of net worth, 49 firms made over 100 percent of net worth, 22 firms made over 200 percent of net worth, and 4 defense firms made over 500 percent profit on net worth." [61]

In presenting data with respect to excessive profits determinations for fiscal year 1973, the Renegotiation Board noted that, because of the unique nature of Government procurement, the profit results from defense contracts can be unlike the results arising from commercial transactions.[62] The Board further cautions that the data with respect to capital and net worth return rates are not appropriate for the purposes of drawing general conclusions. The Board maintained that such conclusions could only be misleading.

Another consideration involved is that comparability of rates of return on net worth may be affected by a firm's accounting practices, its asset replacement and depreciation practices, as well as its financial structure and its use of subcontractors, leased assets and customer furnished assets. In *North American Aviation, Inc.* v. *Renegotiation Board*,[63] the Tax Court determined that the contractor's book net worth did not reflect the true value of the assets used in the business. Accordingly, an adjustment was made by the court to reflect the value of manufacturing "know-how" for purposes of determining the reasonableness of the rate of return on net worth. Also, in *Boeing Company* v. *Renegotiation Board*,[64] the Tax Court indicated that no adjustment was made to book net worth to reflect current market value because there was no comparative criteria in the record based upon such an adjustment to net worth. However, the court did adjust book net worth to reflect the value of "know-how" for purposes of determining whether the rate of return on net worth was reasonable.

A matter related to this issue is the concept of current value accounting. The Cost Accounting Standards Board has requested interested parties to furnish it with reports of competent research concerning current value accounting.[65] The Cost Accounting Standards Board noted that many accountants today support the belief that, in periods of continuing inflation or deflation, the reliance on historical cost in the

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[60] *Congressional Record*, S12605 (June 30, 1973).
[61] *Ibid.*
[62] The Renegotiation Board, *Eighteenth Annual Report* (1973), p. 21.
[63] 39 T.C. 207 (1962).
[64] 37 T.C. 613, 643 (1962).
[65] Cost Accounting Standards Board, *Progress Report to the Congress, 1973* (Washton, D.C., 1973), p. 71.

preparation of financial statements can be misleading. It further indicated that considerable research has been done on the theory of "real" business income and that it is interested in all aspects of measurement of cost of contractual performance, including concepts of measurement on the basis of current value or price level accounting.

G. ACCOUNTING STANDARDS

Study recommendation

The House Committee on Government Operations recommended that the annual reports of contractor costs and profits used in renegotiation should be based on the same standards as used in the pricing of defense contracts.[66]

Present law

For purposes of determining profits derived from renegotiable contracts, the Renegotiation Act of 1951 provides that receipts and accruals and costs shall be determined in accordance with the method of accounting employed by the contractor in keeping his records, but if no such method of accounting has been employed, or if such method of accounting does not properly reflect receipts, accruals, or costs, such items shall be determined in accordance with the method which, in the opinion of the Board, properly reflects receipts, accruals, or costs.[67]

Amounts allowable as deductions and exclusions under the Internal Revenue Code (excluding taxes measured by income) are, to the extent allocable to renegotiation business, allowable as items of cost, but no cost is allowable by reason of a carryover or carryback.[68]

However, the Renegotiation Board may determine income and costs under another method of accounting if the method of accounting employed by a contractor for Federal income tax purposes ("tax method") does not properly reflect income or costs and there is disagreement as to a method which does properly reflect income and costs.[69] Furthermore, the regulations provide for "special accounting agreements" in which the contractor and the Board may agree in writing on a method if the tax method is manifestly unsuitable because it does not clearly reflect renegotiable profits and the method to be adopted does clearly reflect them.[70] Such an agreement may change the entire method of accounting, as from cash to accrual, or may change only the treatment of particular costs or classes of costs. A change to the "completed contract method" may be permitted in the case of certain contracts, such as those for construction of vessels, aircraft, etc.

Section 105(a) of the Act provides that renegotiation is to be conducted "with respect to the aggregate of the amounts received or accrued during the fiscal year (or such other period as may be fixed by mutual agreement)" and "not separately with respect to amounts received or accrued under separate contracts." The fiscal year referred to in the Act is the contractor's taxable year for Federal income tax purposes.[71]

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[66] Government Operations Report, pp. 19–20.
[67] Sections 103(i) (relating to receipts or accruals) and 103(f) (relating to costs) of the Act. These provisions are similar to sec. 446 of the Internal Revenue Code of 1954.
[68] Section 103(f) of the Act.
[69] Reg. 1459.1(b)(1).
[70] Reg. 1459.1(b)(2).
[71] Sec. 103(h) of the Act.

Renegotiation may be conducted on a consolidated basis with a parent corporation and its subsidiaries if all of the members of the affiliated group request renegotiation on such basis and consent to the application of the regulations prescribed by the Board with respect to renegotiation on a consolidated basis.[72] For this purpose, an "affiliated group" means a group of corporations which qualify as such under the Internal Revenue Code.

Section XV of the Armed Services Procurement Regulations provides rules relating to contract cost principles and procedures. These principles and procedures are applicable to the pricing of contracts and contract modifications whenever cost analysis is performed and for the determination, negotiation, or allowances of costs when such action is required by a contract clause.[73]

With respect to the allowability of costs, the Armed Services Procurement Regulations provide that costs are not allowable if they result from the application of a practice which is inconsistent with the rules, regulations and standards of the Cost Accounting Standards Board.[74] With respect to methods of allocation of indirect costs, the Armed Services Procurment Regulations provide that the method must be in accordance with standards promulgated by the Cost Accounting Standards Board, if applicable to the contract.[75]

The Cost Accounting Standards Board was created as an agent of the Congress in August 1970 by an amendment to the Defense Production Act of 1950. This Board is charged with the responsibility of developing uniform cost accounting standards applicable to all negotiated defense prime contracts and subcontracts in excess of $100,000, other than certain contracts or subcontracts where the price is based on established catalog or market prices of commercial items or the price is set by law or regulation. It is anticipated that the complete implementation of uniform cost accounting standards will take a considerable period of time.

In its 1973 progress report to the Congress, the Cost Accounting Standards Board indicated that it had some 19 studies under consideration. The Board has promulgated standards relating to consistency in estimating, accumulating and reporting costs; consistency in allocating similar costs; allocation of home office expenses; capitalization of tangible assets; cost accounting periods; and standard costs for direct material and labor.

The Cost Accounting Standards Board considers the Renegotiation Board to be a relevant Federal agency and subject to the rules, regulations, and standards adopted by the Cost Accounting Standards Board.

Discussion of issues

A threshold issue arises because of the basic differences in approach between renegotiation and procurement. Generally, renegotiation is conducted on an annual basis with respect to the aggregate amount of a contractor's renegotiable business. On the other hand, the procurement cost standards generally focus upon allowable and allocable costs under individual contracts.

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[72] Sec. 105(a) of the Act.
[73] ASPR sec. 15–000.
[74] ASPR sec. 15–201.2.
[75] ASPR sec. 15–203(d).

There are also differences in the rules governing "allowability" of costs. The Armed Services Procurement Regulations govern allowable costs under negotiated defense contracts, while Internal Revenue Service standards currently govern allowable costs for renegotiable business. Costs generally allowed by the Renegotiation Board but not under the Armed Services Procurement Regulations include charitable contributions, entertainment expenses, certain interest and financial costs, and organization costs.[76] Section 1459.1(b)(5) of the Renegotiation Board Regulations provides that a cost properly disallowed in accordance with the Armed Services Procurement Regulation will nevertheless be recognized for renegotiation purposes if the cost is a proper Federal income tax deduction. Similarly, an item allowable for procurement purposes will be disallowed for renegotiation purposes if it is not a proper Federal income tax deduction.

The Committee on Government Operations indicated that the Internal Revenue Service rules are inappropriate for renegotiation purposes.[77] The Committee pointed out that, under Internal Revenue Service accounting rules, all overhead-type expenses are considered costs of doing business and allowable as a deduction if they are ordinary and necessary expenses. However, the Committee noted that overhead expenses would not necessarily constitute appropriate costs for a defense procurement contract if the expenses are not directly related to the actual performance of the contract or not attributable to a particular division performing the contract. The Committee concluded that, in view of the fact that the purpose of renegotiation is to eliminate excessive profits on defense contracts, it seemed inconsistent to apply Internal Revenue Service rules in the determination of allowable costs rather than defense contract cost standards.

In 1971, the Chairman of the Renegotiation Board indicated that the Board disagreed with a recommendation that, with respect to the allowability of costs, the more restrictive standards of procurement should be applied in renegotiation.[78] The Chairman noted that, in procurement, only costs which relate directly or indirectly to a particular contract are allowed as charges against that contract. He stated that, in renegotiation, the costs generally allowed are the proper costs of a going business, to the extent they are allocable to renegotiable business. This position was based on the premise that renegotiation is concerned with the aggregate renegotiable profits of a contractor in a fiscal year. He therefore suggested that the present statutory basis for the allowance of costs in renegotiation is equitable and appropriate, and should not be replaced. He indicated that the use of the existing basis will be aided and facilitated by uniform cost accounting standards when promulgated. The Chairman also indicated that the first renegotiation act in 1972 provided for contract-by-contract renegotiation but that it was amended shortly afterward to provide for renegotiation on an over-all, fiscal-year basis because of the administrative

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[76] ASPR §§ 15-205.8, 15-205.11, 15-205.17, and 15-205.23, respectively. Special rules relating to contributions, entertainment expenses, and interest expenses have been issued by the Renegotiation Board. Reg. §§ 1459.8(b), 1499.2-5, 1459.6, respectively.

[77] Government Operations Report, p. 5—citing Comptroller General of the United States, *Report on the Feasibility of Applying Uniform Cost-Accounting Standards to Negotiated Defense Contracts* (Washington, D.C., U.S. General Accounting Office, 1970).

[78] *Hearing Before a Subcommittee of the Committee on Government Operations*, 92d Cong., 1st Sess., pt. 2, at 39 (1971).

problems and to enable contractors to offset profits on some contracts by losses sustained on others.

The Cost Accounting Standards Board has stated that cost accounting standards should result in the determination of costs which are allocable to contracts and other cost objectives. The Cost Accounting Standards Board has taken the position that the use of cost accounting standards has no direct bearing on the allowability of individual items of cost which are subject to limitations or exclusions set forth in the contract or are otherwise specified by the Government or its procuring agency.[79] Thus, although a contracting agency can negotiate the "allowability" of costs, any "allocation" of those costs between covered and noncovered contracts must be governed by the standards promulgated by the Cost Accounting Standards Board.

It is argued that there exists some potential for conflict between the rules of the Internal Revenue Code relating to "allowability" and the Cost Accounting Standards Board rules relating to "allocability." To date, apparently no such major conflict has arisen. The Cost Accounting Standards Board, however, has found it necessary to make one exception from the application of its rules for renegotiation purposes. With respect to cost accounting periods, the reporting period required by the Renegotiation Board may be used for renegotiation purposes where it is different from the cost accounting period otherwise required to be used for purposes of the regulations issued by the Cost Accounting Standards Board.[80]

H. CLASSIFICATION OF CONTRACTOR SALES FOR RENEGOTIATION

Study recommendation

The House Committee on Government Operations recommended that contractors' sales be classified according to individual commodity groups and base renegotiation on product lines rather than on total fiscal year sales for the company. To facilitate this, the Committee suggested that contractors should be required to report costs and profits on Government contracts over $100,000 on a contract-by-contract basis, with these cost and profit reports to be audited by the Department of Defense auditors prior to submittal to the Renegotiation Board.[81]

In addition, the Committee suggested modifying as necessary the renegotiation process to compensate for the impact that corporate mergers and acquisitions have had on renegotiation, with consideration given to "eliminating the loopholes that allow conglomerates, through fiscal operations and overhead allocations, to frustrate or avoid the recoupment of what otherwise would constitute excessive profits under the Act".[82]

Present law

The Renegotiation Act provides for renegotiation on an aggregate sales basis for each fiscal year as follows (Sec. 105(a)):

> "The Board shall exercise its powers with respect to the aggregate of the amounts received or accrued during the fiscal

[79] Cost Accounting Standards Board, *Progress Report to the Congress, 1973*, p. 54.
[80] Cost Accounting Standards Board Regulations, § 406.40(a)(4).
[81] Government Operations Report, pp. 16–17.
[82] *Ibid.*, p. 19.

> year (or such other period as may be fixed by mutual agreement) . . ., and not separately with respect to amounts received or accrued under separate contracts . . . except that the Board may exercise such powers separately . . . under any one or more separate contracts . . . at the request of the contractor or subcontractor."

Section 105(a) further states that:

> "By agreement with any contractor or subcontractor, and pursuant to regulations . . ., the Board may in its discretion conduct renegotiation on a consolidated basis in order properly to reflect excessive profits of two or more related contractors or subcontractors."

Regarding consolidation of contractor or subcontractor sales, Section 105(a) continues:

> "Renegotiation shall be conducted on a consolidated basis with a parent and its subsidiary corporations which constitute an affiliated group under . . . the Internal Revenue Code if all of the corporations . . . request renegotiation on such basis and consent to such regulations . . . with respect to (1) the determination and elimination of excessive profits of such affiliated group, and (2) the determination of the amount of the excessive profits of such affiliated group allocable . . . to each corporation included in such affiliated group."

Discussion of issues

It appears that the Board does have statutory authority to renegotiate on the basis of separate contracts or a group of contracts *but only* at the request of the contractor. The regulations state, however, that use of any procedure other than on an aggregate basis may be employed "only if authorized by the Board."[83] Further, the Board may, if agreement is reached by all affiliated corporations, renegotiate such a group on a consolidated basis. The original renegotiation statute in 1942 did provide for a contract-by-contract renegotiation; however, this was changed in 1943 to the present method of aggregating renegotiable sales to allow contractors to affect loss contracts (or low profit contracts) against high or higher profit contracts during a fiscal year.[84] Renegotiation was changed from a contract-by-contract basis to an aggregate fiscal year basis also because it was considered to lessen the administrative problems of segregating costs, profits and capital attributable to each contract.

The Government Operations Committee emphasized the potential that large, diversified companies (including the so-called conglomerates) have in averaging high and low profits on Government contracts in completely different lines of business. They pointed out that the structure of American corporations has changed substantially since the enactment of the Renegotiation Act of 1951, with one result that the conglomerate-type businesses may be able to avoid excessive profit determinations on some defense or space contracts by offsetting

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[83] Reg. 1457.1(b).

[84] Amendments to the 1951 Act provided for a two-year carryforward of a renegotiation loss (for fiscal years ending on or after December 31, 1956, and before January 1, 1959) and a five-year loss carryforward for later fiscal years.

high-profit items against lower profits or losses in other areas of business with the Government. The Committee contended that this ability of the larger corporations of offsetting high and low profit (or loss) contracts constituted a competitive advantage against small companies who may not be able to "buy in" on a contract by underbidding on some contracts and making up the low profits or losses on other contracts. The Committee noted also that most excessive profit determinations by the Board have been against smaller companies.

Renegotiation by commodity groupings or product line groupings are said to involve some definitional problems, such as which groupings are to be used. For example, commodity grouping along the lines used in the Federal Supply Catalog apparently is not extensive enough to cover all the goods and services procured under renegotiable contracts or subcontracts as presently defined. Further, commercial or industrial financial data for profit comparisons are not collected presently on the basis of such commodity groups. In addition, there are different groupings of "product lines"—the 1972 Census of Manufacturers Code (4 digit or 5 digit), the 4-digit "Line of Business" Code of the Federal Trade Commission, and the 4-digit Standard Industrial Classification Code system.

It is maintained that if renegotiation were to be conducted on a "product line" basis, contractor filings and data analysis would also have to be on the same basis. The number of filings would be increased as each company would have to file according to the number of "product lines" as defined. The question of an appropriate minimum "floor" by type of product would have to be determined. This would appear to involve a major substantive change in the renegotiation process.

I. PENALTIES FOR FAILURE TO FILE REPORTS

Study recommendation

The General Accounting Office recommended that the Act be amended to provide for the imposition of reasonable civil penalties for the failure to file as required by the Act. It was suggested that the penalty could be patterned after that imposed under the Internal Revenue Code; that is, a penalty based on a percentage of the excessive profits determined for the period for which the filing was late or, if no excessive profit determination were made, a fixed amount.[85]

Present law

Section 105(e)(1) of the Act provides that every contractor or subcontractor to whom the Act applies shall, in such form and detail as the Renegotiation Board may by regulations prescribe, file a financial statement setting forth such information as is required by the regulations. The statement is due on or before the first day of the fifth calendar month following the close of the contractor's fiscal year. (Extension of the filing deadline is available and often granted.) The Act further provides that any person who willfully fails or refuses to furnish the financial statement shall, upon conviction, be punished by a fine of not more than $10,000 or imprisonment for not more than one year, or both.

[85] GAO Report (1973), p. 4.

Discussion of issues

The GAO report noted that the major impediment to imposing criminal penalties on nonfilers is the need to prove that contractors willfully fail to file or furnish required data. The GAO further indicated that the Board and the Department of Justice have apparently found it too difficult and time-consuming to prove willful intent and seem to have abandoned these efforts.

The GAO concluded that the Board has no real legal means to encourage contractors to file on time, because the Act does not provide a civil penalty for late filing.

J. THE SCREENING PROCESS AND ASSIGNMENT OF BORDERLINE CASES

Study recommendation

The GAO suggested that a sample of "borderline" cases be selected by the Board's headquarters assignment staff for full-scale renegotiation by the regional boards to check on adequacy of the screening and assignment process in identifying potential excessive profit cases.[86]

Present procedure

The Board uses a "Screening Report and Code Sheet" (Form RB 11) as the internal review document. A 3-step review process is followed: (1) Office of the Secretary,[87] (2) Office of Accounting, and (3) Office of Review (Division of Screening and Exemptions). Following this review, the case is either "cleared without assignment" or assigned to a regional board for a full-scale review by staff accountants and "renegotiators" (or "financial analysts").

The Office of the Secretary gives a preliminary review of the contractor's filing and attempts to obtain any further information needed from the contractor, then forwards it to the Office of Accounting where the RB–11 is completed and analyzed with respect to various calculations of ratios, segregation of renegotiable and nonrenegotiable data, and review of the method of cost allocation and accounting. The Office of Review analyzes profitability data, compares the contractor's data with industry data, and reviews prior settlements with the contractors. This office makes a recommendation to clear or to assign the case. Authority is delegated to decide to clear cases where sales are under $10 million and profits are under $200,000. For other cases, approval of the Statutory Board is required before a clearance is issued. The Office of Review may assign a case without prior approval of the Board.

Discussion of issue

The initial screening and review process does not involve analysis and application of the "statutory factors," which is done by the regional board staff in the full-scale renegotiation. The screening process is therefore dependent upon the assumption—until proven otherwise—that the contractor's submission of data is correct and in order. However, where there is a question of the contractor's method of sales

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[86] *Ibid.*

[87] Prior to the February 1974 reorganization of the Headquarters Staff, the Office of Assignments (now abolished) had the initial screening function.

segregation between renegotiable and nonrenegotiable sales or cost allocation method, the case is automatically assigned for further review by the regional board.

The GAO Report noted that until shortly before the publication of their report the Board did not have written guidelines for the screening process nor did the files contain information on the reasons for clearing or assigning a filing. The GAO felt, however, that the new guidelines (Board administrative letter of February 22, 1973), if properly implemented, would provide a basis for evaluating consistency and uniformity of the screening process in the future.

The Board pointed out that approximately 87 percent of the 50,129 cases screened in the 12-year period, 1962–1973, were cleared and thus not assigned to the regional boards. Of the 6,735 assignments, 5,835 (or about 87 percent) were cleared by the regional boards, with the remaining 900 being determined to have excessive profits.

K. AUTOMATIC DATA PROCESSING FACILITIES

Study recommendation

The House Committee on Government Operations recommended that the Board establish a sophisticated Automatic Data Processing System to collect and analyze available financial data on contractors.[88]

Present procedure

The Board reports that it has developed an automatic data processing system, to be operational in the very near future. Initial trial programs have been tested.

The Board indicates that the system will provide a complete picture of a contractor's cost and financial data, along with pertinent ratios with comparable contractors in the same or related industries and by Standard Industrial Code. Such data will be made available (and stored for future retrieval) for the screening process, the regional assignment process, and the Headquarters review process.

The Board estimates that for fiscal 1975 the computer services will cost $40,000. The services are to be provided by the Department of Agriculture on a reimbursable basis.

Discussion of issue

Prior to establishing the automatic data processing system, the Board has had to utilize manual retrieval and computation when analyzing the considerable data it had to process and compare.

L. IMPROVING LIAISON WITH PROCUREMENT AGENCIES ON RELATED DATA

Study recommendation

The GAO recommended establishing better liaison with the Armed Services Board of Contract Appeals and other claims settlements review groups to assure itself that contractors are reporting accurate data on pending and paid claims.[89]

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[88] Government Operations Report, pp. 13–14.
[89] GAO Report (1973), pp. 17, 21–22.

The GAO also felt that the Renegotiation Board should forward data on excessive profit determination cases to the procurement agencies for their possible use in negotiating contracts.[90]

Present law

Under present law, such liaison and sharing of information is not required and, as a matter of fact, present law places an outer limit on the kind of detailed financial information, particularly that gained from tax returns, the Board could share with other Government agencies.

Discussion of issue

The GAO concluded after its review of the Board that the Board was limiting the effectiveness of procurement agencies as well as its own through lack of better liaison with other agencies operating in the procurement area.

Liason with the Armed Services Board of Contract Appeals was felt to be important, in view of the magnitude of both contractors' claims pending against the Government and the amounts eventually settled in favor of the contractors. Such settlements when they occur obviously have an impact on profits.

However, it is maintained that because of definitional problems as to exactly what constitutes a "claim" and uncertainty over whether there is any agency in the Government in a position to have the most up-to-date information on claims that have been settled, liaison could be extremely demanding and raises the question of whether the results would justify the energy and labor involved. In some respects, the GAO's recommendation appears to be related to a number of recent proposals for improving the entire procurement system and criticisms that have been made of its lack of central direction. While there is no question that the Board would benefit from possession of the most up-to-date information on pending and settled claims, the availability and accuracy of such information, it is argued, would seem to require some basic reforms of the procurement system.

As for sharing data with the procurement agencies, the argument is made that it would result in better contract negotiating. It is maintained that renegotiation ultimately is but the last resort of the Government to ensure that Government contracts will not result in excessive profits, and it is felt that more collaboration and coordination between the Renegotiation Board and those responsible for entering into contracts would not only alleviate some of the Board's workload, but would lead to better procurement in the first instance.

While any information which assists contract negotiators in negotiating better contracts from the point of view of the Government is desirable, it is also pointed out that the confidentiality of a tax return—a confidentiality which has already been stretched to include possible review by the Renegotiation Board—would at a minimum require serious congressional consideration about the wisdom of the Renegotiation Board in turn sharing such tax returns with other Government Departments. On the other hand, if what is meant by sharing the Board's information on contractors is compiling and circulating general statistical data on an industry-wide basis, as

[90] *Ibid*, pp. 45-46.

obtained from the required filings with the Board, this would not only appear to be something of potential benefit to the procuring agencies, but to the Board itself.

M. BOARD STAFFING

Study recommendations

The report of the House Committee on Government Operations is the only one which treated the personnel requirements of the Renegotiation Board as a separate area of review. Even then, the review never dealt with specific details, concentrating instead on a board consideration of the principle that if the Board had more staff it could do a more thorough job of screening, analyzing, and renegotiating the heavy volume of filings it receives each year.

Rather than making specific recommendations in this area, such as the number of additional employees to be hired, and in which categories, the Committee instead simply called for a "substantial increase" and requested a detailed analysis of staff needs and organization be made at a later date by the GAO.[91] The GAO report to Congress on the Renegotiation Board on May 9, 1973, however, did not contain a detailed analysis of the Board's employment requirements to meet its current responsibilities, nor did it contain recommendations for staff reorganization. Further, in recommending several changes in the current renegotiation process, the GAO did not attempt to measure their implications either in terms of additional workload or manhours.

Present employment levels

The Board presently has a currently authorized staff level of 200,[92] which includes 29 nonsupervisory accountants at the regional boards and 13 financial analysts, or renegotiators. This breaks down to an approximate caseload of 25 assignments per regional accountant. Another ratio considered important in the past to the Board is the ratio of accountants to renegotiators. At the present employment level, this works out to approximately one renegotiator to every two accountants, considered to be the norm by the Board.

The GAO report contained a breakdown on Board employment as of June 30, 1972 as follows: the Board employed 223 persons—109 in headquarters, 78 in the Eastern region, and 36 in the Western region.[93]

Discussion of issues

The main cause for concern to the House Committee on Government Operations appeared to be the fact that filings finally selected for "full-scale renegotiation" were found in one year reviewed to understate the profits accruing to the companies in question in more than 50 percent of the cases.[94] The Committee inferred that if more staff were available, more filings could be investigated; with this, the likely result would be that more profits would be found to be understated on contractors' filings, ultimately leading to greater amounts of excessive profits being recovered by the Board each year. The Committee was particularly concerned with the fact that at the time of its report

[91] Government Operations Report, pp. 10, 12–13.
[92] As of Jan. 31, 1974.
[93] GAO Report (1973), p. 6.
[94] Government Operations Report, p. 13.

the Board had only 9 accountants at Headquarters Office, and that the two regional boards had a total of only 45 accountants in the field to determine the acceptability of the accounting procedures followed by more than 5,000 corporations.[95]

The Government Operations Committee seemed to indicate that the crucial stage in the renegotiation process is the initial screening and review process. Of the 5,085 filings received by the Board in fiscal 1970, the screening process determined that only 805 warranted a more thorough investigation. In the case of the remainder, or 4,280, the renegotiation process in effect was terminated at the screening stage as far as those particular contractors were concerned.[96] It was the opinion of the Government Operations Committee that these crucial screenings appeared to involve a "relatively cursory review."[97] They further concluded that "it is obvious that with an adequate staff, a substantially larger portion of the renegotiation filings submitted to the Board could have been made subject to rudimentary review and audit."[98]

As has been indicated, the GAO did not follow up the House Government Operations Committee recommendation that more staff would help in this respect, but instead concentrated on other recommendations involving various possible changes in the present renegotiation process—changes which, if adopted, could necessitate a significant expansion in the size of the Board's present staff.

One of the staffing needs emphasized in the studies by outside groups dealt with the lack of sufficient staff devoted full time to planning and research for the Board. The orientation of the present staff of the Board has been almost exclusively toward completing the task of processing the thousands of annual filings. As has been indicated previously, one of the problems of this approach to renegotiation has been the neglect of such elementary features of any quasi-judicial agency in Government as published guidelines and rules of procedure.

Finally, the general impression received from these three reports on the renegotiation process is that if additional personnel would improve the efficiency of the Board and lead to a recovery by the Government of more excessive profits, then the additional expense involved would be more than justified.

N. BOARD REPORTING REQUIREMENTS

Study recommendation

The House Committee on Government Operations suggested that Congress require the Renegotiation Board to report "relevant information" to Congress and the public concerning renegotiation determinations. The report stated:

> As a minimum, the Renegotiation Board should publish a list of all contractors who must file with the Board, together with: The total amount of each firm's Government sales; and specific lists of items that qualify as an exemption under ex-

[95] *Ibid.*
[96] *Ibid.*
[97] *Ibid.*, p. 12.
[98] *Ibid.*, p. 13.

isting legislation. Also, the Board should publish a list of contractors found to have made excessive profits and the amount of such excessive profits.[99]

Section 114 of the Renegotiation Act, which was added in 1956,[100] provides that the Renegotiation Board shall submit annual reports to the Congress on or before January 1 of each year of Board activities for the fiscal year ending the previous June 30. The annual report is to include the following types of information:

(1) number of personnel and location;
(2) administrative expenses incurred;
(3) data on filings and the conduct and disposition of proceedings with respect to such filings;
(4) explanation of principal changes in regulations and operating procedures;
(5) number of renegotiation cases disposed of by the courts and number of cases pending; and
(6) other information as the Board deems appropriate.

Discussion of issues

The basic format of the annual report of the Renegotiation Board in recent years has been the following (plus a statistical appendix on excessive profit determination cases added in fiscal years 1972 and 1973, discussed below):

(1) "The Purpose and Process of Renegotiation;"
(2) "Changes in Regulations During the Fiscal Year;"
(3) "Changes in Operating Procedures During the Fiscal Year;"
(4) "Filings, Screening, Processing, and Completions;"
(5) "Renegotiable Sales and Profits;"
(6) "Excessive Profit Determinations;"
(7) "Appeals;"
(8) "Exemptions of Commercial Articles and Services;" and
(9) "Expenses and Personnel."

The basic data are aggregate figures which reflect the activities of the Board during the fiscal year. Renegotiable sales reviewed are listed by whether the contracts were prime, subcontracts, or management fees as well as by type of pricing of the contract (such as fixed price, cost-plus-fixed fee, etc.). The Board reports the number of applications (and related amounts) for commercial exemptions, including a classification of amounts by product groupings (such as petroleum, bearings, food, screws and bolts, electronics, etc.). Regarding information on examples of items considered exempt under the statute, the Board's regulations list examples of agricultural commodities and other raw materials[101] and perishable subsistence supplies (food).[102] No list is presented of examples of items qualifying under the exemption for standard commercial articles and services.

As mentioned above, the Board added some statistical data on excessive profit cases beginning with its fiscal year 1972 report. The 1972

[99] Government Operations Report, pp. 10–11.
[100] Public Law 870, 84th Cong.
[101] Reg. § 1453.2.
[102] Reg. § 1455.3(b)(4).

report included a list of all excessive profit determinations but excluded the name of the contractor. The list included the contractor's fiscal year, major product or service, renegotiable sales and profits before and after determination, renegotiable cost of goods sold (material and subcontracting, direct labor and overhead, but in percentages), ratio of net worth to long term debt, turnover rate (after determination) on capital and net worth, and ratio of profit (after determination) as a percent of sales, capital and net worth.

In its 1973 report, the Board noted that they had discontinued deletion of contractor names from copies of final orders and final opinions which are maintained in the public information section of the Board's library. This was in response to the district court decision in *Fisher* v. *Renegotiation Board*, 355 F. Supp. 1171 (D.D.C. 1973), with respect to a suit under the Freedom of Information Act. The Board added the name and address of the contractor for each of the excessive profit determinations in its 1973 report.

Thus, the only remaining items not now included in the Board's Annual Report as suggested by the House Committee on Government Operations are the list of all contractors required to file with the Board and specific lists of items that qualify under all of the exemption provisions under the Act. The Board itself does not have a list of all contractors potentially subject to renegotiation, but only has a record of those who have filed at one time or who may be listed as a Government contractor by one of the procurement agencies (but which do not list subcontractors).

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