

DATA ON S4122
RENEGOTIATION OF CONTRACTS

DECEMBER 9, 1943



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PART I

PRINCIPAL CHANGES RECOMMENDED IN RENEGOTIATION LAW BY HOUSE BILL.

FOLLOWED BY DEPARTMENTAL COMMENTS IN PARENTHESES

1. In lieu of the existing provision, exempting contracts or subcontracts of \$100,000 or less, it is provided that contracts or subcontracts shall be exempt from renegotiation for a particular year if the aggregate of the amounts received or accrued during the fiscal year does not exceed \$500,000. This change is being made at the suggestion of the Departments. (Approved.)

2. The definition of subcontract has been rewritten to include only subcontracts for the article, work, services, building, structure, improvement or facility contracted for under the prime contract or for articles to be incorporated in the item contracted for under the prime contract. (No position taken but attention called to the fact that very large amounts of excessive profits will be eliminated from renegotiation.)

3. Contracts or subcontracts for agricultural commodities, such as grains of all kinds, vegetables, cotton, tobacco, cattle, hogs, wool, eggs, milk and cream, including canned, bottled, or packed fruits or vegetables or their juices, are exempt from renegotiation. (No objection to agricultural exemption but specific objection to inclusion therein of exemption of canned, bottled or packed fruit or vegetables or their juices.)

4. The bill grants discretionary authority in the War Contracts Price Adjustment Board (a new Board hereafter discussed) to exempt from renegotiation standard commercial articles, if in its opinion normal competitive conditions exist affecting the sale of such articles. (No objection as long as limited to discretionary power. Strong objections to any mandatory exemption of standard commercial articles.)

5. The bill also exempts from renegotiation contracts or subcontracts with religious, charitable, or educational organizations if such organizations are exempt from income tax. (Approved and suggest that the same be made retroactive.)

6. Your committee has set forth in the bill certain factors to be taken into consideration in determining excessive profits. These factors are as follows:

(a) Efficiency of contractor, with particular regard to attainment of quantity and quality production, reduction of costs, and economy in the use of raw materials, facilities, and manpower;

(b) Reasonableness of costs and profits, with particular regard to volume of production and normal pre-war earnings;

(c) Amount and source of public and private capital employed and net worth;

(d) Extent of risk assumed, including the risk incident to reasonable pricing policies;

(e) Nature and extent of contribution to the war effort, including inventive and developmental contribution and cooperation with the Government and other contractors in supplying technical assistance;

(f) Character of business, including complexity of manufacturing technique, character and extent of subcontracting, rate of turn-over;

(g) Such other factors the consideration of which the public interest and fair and equitable dealing may require.

Your committee believes that in computing excessive profits, consideration should be given to the financial problems in connection with reconversion in applying factor (g). (A list of factors approved. Strong objection to committee statement that consideration should be given to reconversion costs.)

7. In computing profits, costs are determined in accordance with the method of cost accounting regularly employed by the contractor or subcontractor in keeping his books. All items of the character allowed as deductions and exclusions for income and excess-profits tax purposes, including the currently deductible annual amortization allowance, are allowed as items of cost to the extent allocable to contracts with the departments and subcontracts. (Approved.)

8. State income taxes are allowed only with respect to income after eliminating excessive profits upon renegotiation, and then only to the extent allocable to the renegotiable business. (Approved.)

9. Credit is allowed against excessive profits for income and excess-profits tax paid with respect to such profits. (Approved.)

10. The present system of future or forward repricing is continued under the bill. However, the bill gives the contractor or subcontractor the right to petition The Tax Court of the United States in case he is dissatisfied with the price as refixed by the Secretary. The repricing portion of the bill is made effective from the date of the enactment of the act. (Approved although the amendment eliminates the present right of the departments to recapture excessive profits realized under individual contracts. (Objection to jurisdiction of Tax Court noted under comment to item 16 below).)

11. A central board called the War Contracts Price Adjustment Board, is created to have charge of renegotiation. This Board is to consist of five members, selected from the departments. Though the Board may delegate its powers of renegotiation, every contractor or subcontractor is entitled upon request, to have his case reviewed by the Board. (Creation of Board approved. Strong objection to granting to the Board of any power to conduct renegotiation or to review renegotiation proceedings conducted by the departments.)

12. The contractor or subcontractor is required to file with the War Contracts Price Adjustment Board a statement of actual costs of production and such other financial statements as the Board may by regulations prescribe unless the aggregate of the amounts received in the fiscal year by the contractor or subcontractor does not exceed \$500,000. (Approved.)

13. The War Contracts Price Adjustment Board is required to determine excessive profits with respect to the aggregate amounts re-

ceived or accrued during the fiscal year by a contractor or subcontractor and not separately. However, at the request of the contractor or subcontractor, the Board may make such determination with respect to the amounts received under any one or more separate contracts. (No objection to provision for renegotiation on a fiscal-year basis but authority requested to renegotiate certain general classes or types of contracts on an individual-contract basis instead of a fiscal-year basis.)

14. If the War Contracts Price Adjustment Board finds that the amounts received under the contracts with the Department and the subcontracts may reflect excessive profits, the Board is required to give to the contractor or subcontractor reasonable notice of the time and place for a conference. This notice is required to be sent to the contractor by registered mail and constitutes the commencement of the renegotiation proceedings. (Approved.)

15. The War Contracts Price Adjustment Board is required to furnish, upon request of the contractor or subcontractor a statement of its determination, of the facts used as a basis therefor, and of the reasons for such determination. (Objected to by departments, particularly with reference to requirement of statement in cases where agreements are concluded.)

16. The contractor or subcontractor is given the right to have his excessive profits determined by The Tax Court of the United States in a de nov. proceeding, in case he is unable to reach an agreement with the War Contracts Price Adjustment Board. (Objected to on the basis of the recommendations of the Department of Justice and the Treasury Department. The Court of Claims is suggested as a preferable forum with scope of review limited as in the case of equitable adjustments under standard type of Government contracts.)

17. If the contractor or subcontractor is aggrieved by a determination of the Secretary made prior to the enactment of this act with respect to a fiscal year ending before July 1, 1943, whether or not such determination is embodied in an agreement, he is also entitled to have a determination in a de novo proceeding before The Tax Court of the United States. (Strong objection to review of closed agreements except for fraud, etc.)

18. Proceedings must be commenced by the Board within 1 year after the close of the fiscal year in which the excessive profits were received or accrued, or within 1 year after financial statements are filed by the contractor or subcontractor, whichever is the later; otherwise, liabilities for the excessive profits for such fiscal year will be discharged. (Approved.)

19. In order to expedite the disposition of the case, after a proceeding has been commenced, the bill provides that the liabilities for excessive profits with respect to which such proceeding was commenced, will be discharged if a determination by agreement or order is not made within 1 year following the commencement of the renegotiation proceedings. This limitation does not apply to a review by the Board of an order by the Secretary. The 1-year period of limitation may also be extended by agreement between the parties. (Approved generally, provided special provision is made for certain types of long-term contracts.)

20. Your committee continued the provisions of existing law as to war contract brokers, who are subject to renegotiation if the aggregate

of the amounts received by such broker for the fiscal year exceeds \$25,000. This provision was further strengthened by disallowing as costs to the prime contractor any commission, percentage, brokerage, or contingent fee paid or payable to any person for, or in connection with, the soliciting or securing by such person of a contract with a department, unless such person is a bona fide established commercial or selling agency maintained by the contractor for the purpose of securing business. (Attention is called to the fact that the disallowance of commission deductions may result in a double recapture.)

21. The bill provides for closing agreements. Such agreements, according to their terms, in the absence of fraud or willful misrepresentation, cannot be reopened, so far as the determination of excessive profits is concerned. (Approved.)

22. The renegotiation provisions of the bill are terminated with respect to contracts or subcontracts made after the date proclaimed by the President as the termination of hostilities, or such earlier date as may be specified in a concurrent resolution of Congress. (Approved.)

23. The bill applies to fiscal years ending after June 30, 1943. Exceptions are made with respect to the exemption for agricultural commodities which is effective as of April 28, 1942, and the right to petition The Tax Court of the United States which applies to fiscal years ending before July 1, 1943, as well as fiscal years ending on or after that date. (General application approved. Application of agricultural exemption approved. The right of court review with respect to renegotiations for fiscal periods ending before July 1, 1943, approved except as to review of closed agreements. It is suggested that the exemption of charities, the exemption of subcontracts under exempt prime contracts and the fair cost allowance at the exemption line in the case of integrated companies be made retroactive to April 28, 1942.)

24. All amounts of excessive profits, whether recovered by repayment, withholding, or credit, shall be covered into the Treasury as miscellaneous receipts. (No objection.)

25. The War Shipping Administration was not specifically named in the Renegotiation Act as originally adopted. However, the War Shipping Administration derives substantially all of its powers from the Maritime Commission, and has been one of the renegotiating agencies pursuant to Executive order. The amendments continue the War Shipping Administration as one of the renegotiating agencies, since under the amendments all of the renegotiating agencies (including the War Shipping Administration) are specifically named. (Approved.)

26. It is the opinion of your committee that under the existing renegotiation law, or such law as amended by this bill, there is no authority to renegotiate the profits accruing to a company by reason of the increment in value of its long inventories (i. e., inventories over and above its normal requirements to fulfill existing contracts. (Approved on the assumption that it is not intended to conflict with the principles outlined in paragraph 7 above.)

PART II

SUMMARY OF THE PRINCIPAL CHANGES MADE BY THE HOUSE BILL OVER EXISTING LAW ON THE RENEGOTIATION OF WAR CONTRACTS

Title VII of the pending revenue bill of 1943 completely rewrites section 403, as amended, of the Sixth Supplemental National Defense Appropriation Act, 1942.

1. *General plan of the bill.*—The bill divides renegotiation into two separate parts. The portion of renegotiation having to do with repricing, that is, the reduction of prices in existing contracts with respect to future deliveries thereunder is placed completely in the hands of the Secretaries of the Departments. The portion of renegotiation having to do with the recovery of excessive profits already paid out to the contractor is lodged in the hands of a new Joint Board called the War Contracts Price Adjustment Board.

A. *Creation of the Joint Board:* This Joint Board created by the bill would be composed of five members, one an officer or employee of the Department of War to be appointed by the Secretary of War, one an officer or employee of the Department of the Navy to be appointed by the Secretary of the Navy, one an officer or employee of the Department of the Treasury to be appointed by the Secretary of the Treasury, one an officer or employee of the United States Maritime Commission or the War Shipping Administration to be appointed jointly by the Chairman of the United States Maritime Commission and the Administrator of the War Shipping Administration and one an officer or employee of the Reconstruction Finance Corporation to be appointed by the Chairman of the Board of Directors of the Reconstruction Finance Corporation. They are authorized to elect a chairman from among their members.

The principal office of the Board is required to be in the District of Columbia, but it is authorized to establish such number of field offices throughout the United States as it deems necessary. Three members of the Board constitute a quorum and the Board may exercise any of its functions through a majority of the members present if the members present constitute at least a quorum.

The Board is authorized to employ and fix the compensation of such officers and employees as it deems necessary to carry out its duties. It may with the consent of the head of any department or agency of the United States utilize the services of any such officer or employee of such department or agency.

The Board is empowered to delegate in whole or in part any of its powers, functions, or duties except the power, function, and duty to review orders determining excessive profits. These powers may be delegated to the Secretary of a department and the Secretary is authorized to redelegate them in whole or in part to such officers or agencies of the United States as he may designate.

The Chairman of the Board is authorized to divide the Board into divisions of one or more members, assign the members of the Board to such divisions and in case of a division of more than one member designate the chief thereof. The Board, also, may by regulations or otherwise, determine the character of cases to be conducted initially by the Board through any officer or agency of the Board or any other officer or agency utilized by it. It may also determine the character of cases to be conducted initially by the officers and agencies of the departments to which such powers have been delegated.

It is specifically provided that any contractor or subcontractor who so desires is entitled to a review by the Board itself of any order of any officer or agency either of the departments or of the Board. The Board is authorized to review any such determination of its own motion and is authorized to determine amounts of excessive profits either less than, equal to, or greater than that determined by the officer, agency, or division whose action it so reviews.

B. The repricing power: The power to secure lower prices in current contracts with respect to future deliveries thereunder is placed in the hands of the Secretaries of the departments and in any case in which a Secretary of a department is of the opinion that the price under any contract with such department or subcontract which affects such department exceeds a fair price, the Secretary may require the contractor or subcontractor to negotiate a fair price thereunder. If an agreement is not reached, the Secretary is given the specific authority to fix the price for future performance under such contract or subcontract. In determining a fair price, the Secretary is directed to take into consideration all of the factors to be considered in determining excessive profits. These powers may be executed by the Secretary in any way he so desires, that is, contract by contract or by groups of contracts or subcontracts. Each Secretary is authorized to delegate the repricing power to any individuals or agencies in his own department if he so desires and, with the consent of the Secretary of any other department he may delegate such power to such department. These powers may be redelegated in the discretion of the Secretary.

2. *Narrowing the scope of the renegotiation field.*—

A. The elimination of auxiliary contracts: The bill continues the renegotiation of all prime contracts as does the existing law. In the field of subcontracts, however, it eliminates all subcontracts except those for articles or services going into the end product, or components thereof. Thus, the entire line of auxiliary subcontracts is eliminated from renegotiation. This means that the machine-tool industry, the expendable-tool industry, and other industries of like nature whose products are used in the processing of an end product or components thereof, but which do not actually go into an end product or its components, are exempted from renegotiation. Of course, if the Government buys the machine tool or other such article, it becomes an end product and comes within the scope of renegotiation.

B. Exemptions (1) Mandatory (i) Agricultural products: The bill exempts from renegotiation, in addition to the exemptions now contained in the existing law, any contract or subcontract for an agricultural commodity up through the first form or state in which it is customarily sold or in which it has an established market. This exemption applies to all commodities resulting from the cultivation of soil, to the saps and gums of trees, and to all animals and marine

life and the produce of live animals such as wool, eggs, and milk. It also applies to canned or bottled fruits or vegetables which are customarily canned or bottled in the season in which they are harvested.

(ii) The bill also exempts from renegotiation all contracts or subcontracts with charitable, religious, or educational organizations exempt from taxation under section 101 (6) of the Internal Revenue Code.

(iii) All subcontracts directly or indirectly under contracts or subcontracts specifically exempted from renegotiation are also exempted.

(iv) The bill increases the exemption measured by renegotiable volume from \$100,000 a year to \$500,000 a year.

(2) Discretionary exemptions: The Board is authorized, in its discretion, to exempt from some or all of the provisions of section 403 the following contracts or subcontracts in addition to those included in the discretionary exemptions contained in the existing law.

(i) Any contract or subcontract for the making or furnishing of a "standard commercial article," if, in the opinion of the Board, normal competitive conditions affecting the sale of such article exist.

(ii) The Board is authorized, in its discretion, to exempt any other contract or subcontract, if, in its opinion, competitive conditions affecting the making of such contract or subcontract are such as are likely to result in effective competition with respect to price.

(iii) Whenever, in the opinion of the Board, in the case of any subcontract or group of subcontracts, it is not feasible to determine and segregate the renegotiable business from the nonrenegotiable business, the Board is authorized to exempt such subcontracts.

c. The allowance of a fair cost at the exemption line for raw materials and agricultural products in the case of integrated producers: The bill spells out the practice which the price adjustment boards are now following with respect to the allowances of a fair amount of cost at the exemption line for raw materials in the case of an integrated producer who acquires such products below such line, or produces them initially, and processes them up to and beyond such line. The same treatment is authorized in the case of the agricultural products exempted from renegotiation by this bill.

3. Provisions for a redetermination of excessive profits by the Tax Court of the United States.—

A. Recovery cases determined by the Board: Any contractor or subcontractor aggrieved by the determination of excessive profits by the Board is authorized to petition the Tax Court of the United States for a redetermination of such excessive profits. The proceedings before the Tax Court are de novo. The Tax Court may find an amount of excessive profits less than, equal to, or greater than the amount found by the Board. The decisions of the Tax Court are not subject to further review. The filing of the petition before the Tax Court will not operate to stay the execution of the Board's orders. Petitions must be made to the Tax Court within 90 days after the entry of the order of the Board determining the excessive profits. The bill provides that, in addition to the unilateral determination cases, those contractors or subcontractors who have entered into agreements prior to the date of the enactment of this act may also petition the Tax Court for a redetermination of excessive profits. In such cases the petition must be filed within 90 days after the enactment of this act.

B. Repricing cases: In cases where the contractor or subcontractor is aggrieved by the order of the Secretary fixing the contract price, petition may also be made to the Tax Court for a refixing of such price. This procedure closely parallels that provided in the case of a redetermination of excessive profits by the Tax Court.

4. *The determination of excessive profits.*—

A. In determining the profits from renegotiable business, the Board is instructed to allow the cost determined in accordance with the method of cost accounting regularly employed by the contractor, or, if such method does not properly reflect such costs, the Board is authorized by regulations to prescribe the method under which such costs shall be determined. The Board is specifically authorized to disallow any item of cost which is unreasonable or not properly chargeable to the contract or subcontract. With these exceptions, the Board is instructed to allow all cost items, of the character allowed as deductions or exclusions for tax purposes. It is specifically provided, however, that State income taxes allocable to excessive profits shall not be allowed as deductions.

Excessive profits are defined to be the profits from the renegotiable business of the contractor or subcontractor which, in the light of a list of factors set out in the bill, are determined to be excessive for the work and articles furnished.

B. Report to the contractor or subcontractor: The bill specifically provides that if the contractor or subcontractor so requests, the Board shall prepare and furnish such contractor or subcontractor with a statement setting out the determination of excessive profits made in his case, the facts used as a basis therefor, and the Board's reasons for such determination. The bill provides that this statement or report shall not be admissible in evidence or otherwise considered by the Tax Court of the United States in connection with its redetermination of excessive profits.

5. *Mandatory filing.*—The bill provides that every contractor or subcontractor, not specifically exempted from renegotiation, shall file with the Board such financial statements as the Board may require at such time or times and in such form and detail as the Board may by regulations prescribe.

6. *Time limitations.*—The bill specifically provides that renegotiation proceedings commence with the mailing of a notice to a contractor or subcontractor. Such proceedings must be commenced within 1 year after the close of the fiscal year in which the excessive profits arose, or within 1 year after the filing of the information required, whichever is the later. Further, the Board is directed to either reach an agreement or to make a determination within 1 year following the commencement of the renegotiation proceedings.

7. *Terms to be incorporated in contracts.*—The bill sets out a new list of terms which the Departments are required to incorporate in all procurement contracts. A special procedure is provided, however, under which these terms may be incorporated by reference.

8. *Applicability.*—

A. Termination of renegotiation: The bill provides that contracts entered into after the cessation of hostilities shall not be subject to renegotiation.

B. *Applicability of the bill in general:* In general, the provisions of the bill apply to all fiscal years ending after June 30, 1943. This means that those fiscal years ending June 30, 1943, or earlier, are covered by the provisions of the existing law, while those ending after such date come within the provisions of the bill. There are several exceptions to this general rule:

(i) The provisions of the bill dealing with the terms to be incorporated in the procurement contracts are made effective 30 days after the enactment of this act. This 30 days is provided so that the departments may prepare contracts in accordance with the provisions of the bill.

(ii) The repricing portion of the bill, that is, the part authorizing the Secretaries to refix the contract price on future deliveries, is made effective from the date of the enactment of this act.

(iii) The portion of the bill providing for the exemption of agricultural products is made effective as if it had been a part of the original section 403 on the date of its enactment. The portion of the bill which provides that for all purposes this legislation may be referred to by the short title of "Renegotiation Act" is also made retroactive to April 28, 1942.

9. *Miscellaneous provisions.*—

A. The provisions for collection and withholding to eliminate excessive profits remain unchanged to any substantial degree.

B. It is provided that nothing in the bill shall be considered to limit or restrict any authority or discretion of the Secretary of a department under the provisions of any other law.

C. The bill continues the provisions of existing law as to war contract brokers, who are subject to renegotiation if the aggregate of the amounts received by such broker for the fiscal year exceeds \$25,000. This provision was further strengthened by disallowing as costs to the prime contractor any commission, percentage, brokerage, or contingent fee paid or payable to any person for, or in connection with, the soliciting or securing by such person of a contract with a department, unless such person is a bona fide established commercial or selling agency maintained by the contractor for the purpose of securing business.

D. If the War Contracts Price Adjustment Board finds that the amounts received under the contracts with the Department and the subcontracts may reflect excessive profits, the Board is required to give to the contractor or subcontractor reasonable notice of the time and place for a conference. This notice is required to be sent to the contractor by registered mail and constitutes the commencement of the renegotiation proceedings.

E. The War Shipping Administration was not specifically named in the Renegotiation Act as originally adopted. However, the War Shipping Administration derives substantially all of its powers from the Maritime Commission, and has been one of the renegotiating agencies pursuant to Executive order. The amendments continue the War Shipping Administration as one of the renegotiating agencies, since under the amendments all of the renegotiating agencies (including the War Shipping Administration) are specifically named.

F. All amounts of excessive profits, whether recovered by repayment, withholding, or credit, shall be covered into the Treasury as miscellaneous receipts.

PART III

SUMMARY OF MAJOR PROPOSALS MADE BY THE DEPARTMENTS BEFORE THE SENATE FINANCE COMMITTEE IN CONNECTION WITH THE CONSIDERATION OF THE RENEGOTIATION PROVISIONS OF THE REVENUE BILL OF 1943

(1) The departments believe that the Court of Claims is a more appropriate forum for the review of departmental determinations in renegotiation than The Tax Court of The United States.

(2) The departments believe that the scope of judicial review of unilateral determinations should be limited so that such determinations will be final and conclusive unless the contractor can establish that the determination was the result of a mistake of law, fraud, arbitrary action, or so grossly erroneous as to imply bad faith.

(3) The departments approve the creation of a War Contract Price Adjustment Board to bring about uniformity in the purposes and policies in renegotiation, but oppose strenuously granting such a Board the authority and duty either to conduct renegotiation in individual cases or to review departmental determinations in renegotiation.

(4) The departments oppose the provisions in the House bill which provide for a review of "closed" cases—that is cases which have resulted in an agreement with the contractor.

This summary makes no attempt to enumerate all of the suggestions which the departments have advanced with a view to improving the pending legislation but only the most important of them. Other suggestions are developed more fully in the attached statement of the Joint Price Adjustment Board and in the revised draft of bill which is being submitted herewith.

STATEMENT OF THE JOINT PRICE ADJUSTMENT BOARD FOR THE INFORMATION OF THE SENATE FINANCE COMMITTEE WITH RESPECT TO THE PROVISIONS OF THE PENDING REVENUE ACT OF 1943 (H. R. 3687) EMBODIED IN TITLE VII—RENEGOTIATION OF WAR CONTRACTS

The Joint Price Adjustment Board, comprising representatives of the several departments concerned with renegotiation of war contracts and authorized by the Secretaries of the War, Navy, and Treasury Departments, the chairman of the Maritime Commission and Administrator of the War Shipping Administration, and the Reconstruction Finance Corporation Price Adjustment Board to formulate and adopt statements of purposes, principles, policies, and interpretations binding on the several departments, has carefully considered the provisions of H. R. 3687, title VII—Renegotiation of War Contracts—and submits the following comments with respect thereto for the information of the Senate Finance Committee:

(1) *Scope and method of judicial review.*—The departments concerned with renegotiation have repeatedly stated that they had no objection to the making of some statutory provision for judicial review and, in fact, have expressed the opinion that such right of review exists under the present law. There has recently been brought to the attention of the Joint Price Adjustment Board the strong objections of the Treasury Department and the Department of Justice to the proposed granting of jurisdiction over renegotiation review to The Tax Court of the United States. The strength of these arguments is recognized by the

other departments concerned and in the light thereof the Joint Price Adjustment Board agrees that jurisdiction over appeals from renegotiation determinations should be assumed by the Court of Claims in order that The Tax Court of the United States may be kept free for exclusive attention to tax matters.

With respect to the scope of review, the Joint Price Adjustment Board agrees with the position of the Department of Justice, as expressed to the Joint Board, to the effect that any determinations of the secretaries of the departments or of the proposed War Contracts Price Adjustment Board should be final and conclusive except to the extent that the contractor can establish on the basis of the record made by the contractor in the court review proceeding that the determination was the result of a mistake of law, fraud, arbitrary or capricious action, or was so grossly erroneous as to imply bad faith. This is the traditional procedure which has been adopted in connection with court review of similar governmental determinations.

(2) *Review by the War Contracts Price Adjustment Board.*—The proposed bill gives the contractor an absolute right to require review by the newly created Board, and the act specifically provides that the Board may not delegate "the power, function and duty to review orders determining excessive profits" [subsection (d) (4), page 118]. It is respectfully submitted that in the light of contemplated provisions providing for review by a court in those cases where no agreement can be reached, it is entirely unnecessary and would constitute a very real administrative burden to provide for another review by the War Contracts Price Adjustment Board. The Joint Price Adjustment Board, created by voluntary action of the interested departments, is now functioning satisfactorily for the purpose of setting up uniform purposes, principles, policies and interpretations, and there is no reason why a similar Board should not be established by legislative action. But the requirement that such Board should review all orders determining excessive profits would require the creation of a substantial administrative staff, and would impose burdens and duties upon the individual members of the Board which would interfere with the performance by them of their duties in connection with current renegotiations in the various departments for which they are responsible.

(3) *Review of closed agreements.*—The proposed bill provides for court review of past and future determinations of excessive profits (subsections (e) (1) and (e) (2), pages 119 to 122). Included in this review are determinations

"made prior to the date of the enactment of the Revenue Act of 1943 with respect to a fiscal year ending before July 1, 1943, * * * whether or not such determination is embodied in an agreement with the contractor or subcontractor."

The Joint Price Adjustment Board is opposed to this provision which would render subject to court review thousands of voluntary bilateral agreements under which excessive profits refunded or to be refunded and specific price reductions on articles delivered or to be delivered will aggregate (without giving consideration to the effect of taxes) upward of \$5,000,000,000. This provision would not only create a potential administrative burden, which might be literally impossible of effective accomplishment, but might be construed to invalidate the bilateral character of the agreements in such a manner as to jeopardize the right of the Government to retain the refunds which have been made and to collect the refunds which are to be made thereunder.

There might also be placed in jeopardy the provisions of the agreements providing for past and future price reductions. Many renegotiation agreements include clauses providing generally for the elimination of excessive profits likely to be realized in the future through price reductions without specifying the amount of the reductions to be made on specific articles or contracts. Total reductions and refunds under such clauses may well represent an amount equal to or greater than the recoveries and specific price reductions referred to above. The proposed review of closed agreements would render uncertain the status of such clauses and frustrate present conscientious efforts to keep procurement on a current basis and to avoid the lengthy litigation between the Government and contractors such as resulted from the last war.

The refunds and price reductions provided for under these voluntary agreements were made as a part of a repricing policy which was in fact inaugurated sometime prior to the passage of the original Renegotiation Act of April 28, 1942; and, if the act had not been available for this purpose, there is no doubt that the departments concerned would have endeavored to effect similar results through the use of other war powers relating to the placing and cancellation of contracts and the subsequent modification thereof. In no case have the departments accepted agreements which

are made conditional on the validity of the renegotiation statute or which, under their terms, could be effected by subsequent legislation or court decisions. These agreements represent accepted transactions between the departments concerned and the contractors.

It is respectfully submitted that to reopen these agreements would provide a procedure by which contractors with clearly excessive profits could delay indefinitely repricing and other corrective action. It would be wasteful administratively and clearly prejudicial to the best interests of the Government.

In addition to the foregoing matters which involve major questions of policy, there is attached hereto as exhibit A a list of certain additional suggested revisions which it is believed are consistent with the general purpose and intent of the bill but which would operate to clarify or improve, from an administrative standpoint, certain specific provisions of the bill as noted.

JOINT PRICE ADJUSTMENT BOARD,
By JOSEPH M. DODGE, *Chairman.*

EXHIBIT A

ADMINISTRATIVE OR CLARIFYING AMENDMENTS OF TITLE VII—RENEGOTIATION OF WAR CONTRACTS—OF THE REVENUE ACT OF 1943, H. R. 3687, SUGGESTED FOR CONSIDERATION OF THE SENATE FINANCE COMMITTEE BY THE JOINT PRICE ADJUSTMENT BOARD

A. Centralization of all repricing authority under the Secretaries of the Departments.—The provisions of the Act defining the powers of the Secretaries, as distinguished from the powers of the Board, with respect to all matters affecting repricing should be modified so that the Secretaries would be given all powers relating to repricing or exemption of individual contracts and subcontracts. The proposed bill creates a clear distinction between repricing of individual contracts with respect to which authority and responsibility is centered in the Secretaries of the Departments and over-all retroactive renegotiation with respect to which authority and responsibility are vested in the War Contracts Price Adjustment Board. The suggested revisions make it clear that this distinction or division of responsibility should be maintained in all of its phases and, in this connection, it is further suggested that it should be expressly provided that unless specifically exempted adjustments of prices made from time to time under the repricing power should not preclude the Board from considering profits derived from such contracts in connection with subsequent over-all renegotiations on a fiscal-year basis.

B. Raw material exemption [subsection (b), pages 124 and 125].—In order to make it clear that this exemption does not prohibit the renegotiation of management or operating contracts for Government plants to be used for processing, refining, or treatment of exempted raw materials, it is requested that the following clause should be added at the end of the raw material exemption [page 125, line 3, after the word "use"]:

except that this provision shall not be construed to eliminate from renegotiation any contract or arrangement otherwise subject to renegotiation with one of the Departments (a) for services performed on a fee or cost-plus-fixed-fee basis with respect to any such products or (b) for the use or operation of a plant or facility by a Department for the production, processing, treatment, manufacture, or transportation of any such products.

C. Special cost allowance, in the case of integrated producers.—The attention of the Committee is further directed to an apparent error in connection with the provision of the bill relating to the allowance of market value as an element of cost in the case of a producer processing an exempted product "to or beyond the first form or state" [page 126, lines 14 and 17] at which the exemption terminates. It is believed that the word "and" should be substituted for the word "or" in the above-quoted phraseology so that it would be clear that the allowance of market value would apply only to the producer who processes the exempted product to and beyond the exempted stage and would not apply to a producer who purchased the product at the exempted stage at a cost which might vary materially from the market value at the time of its use.

D. Authorization of individual contract renegotiation under special circumstances.—It is believed that the provisions of the Act requiring over-all renegotiation on a fiscal-year basis [subsection (c), pages 109 and 110] should be modified in order to give the Board authority to require renegotiation either on an indi-

vidual contract basis or on the basis of classes or types of contracts. This provision will be necessary in the case of certain classes or types of contracts or subcontracts, such as shipbuilding or other long-term construction contracts, various types of profits-limitation contracts, or contracts which have not been completed during the fiscal year in question or with respect to which it is not practicable for accounting or other reasons to conduct renegotiation on an over-all fiscal-year basis.

In this connection attention is further directed to the fact that there should be some provision for the relaxation of the provision of the bill requiring completion of renegotiation within one year from the date of commencement where the nature of the contract is such that it is impossible to reach an accurate and final result on the basis of a yearly fiscal period. Long-term shipbuilding contracts are an example of contracts falling in this category.

E. Limitation of mandatory requirement for insertion of repricing clause in all contracts [subsection (b), page 107].—The bill in its present form directs the Secretary of each Department to insert in all contracts entered into after thirty days after the enactment of this Act certain terms which are specified in the legislation. It is suggested that the insertion of such terms should be made mandatory on the Secretaries only in the case of contracts in excess of \$100,000 as provided in the existing law, since it is manifestly impracticable to include such a clause either directly or by reference in the many thousands of small contracts and purchase orders which constitute a large proportion of the total number of contracts entered into by the Departments although representing in the aggregate only a relatively small dollar volume.

It is suggested that consideration be given to the possible elimination of the provision specifying the type of renegotiation clause to be inserted in all contracts, since the bill specifically provides that the required contractual provisions shall be "binding, only if the contract or subcontract, as the case may be, is subject to subsection (c)" [page 109, lines 1 and 2] and if subsection (c) is valid there would appear to be no necessity for a supplemental contractual commitment.

F. Retroactive application of new exemptions and related provisions.—It is suggested that the exemptions of charitable contracts [subsection (i) (1) (D), page 125, line 25] and of subcontracts under exempt prime contracts [subsection (i) (1) (E), page 126, line 3] and the provision for special cost allowances at the exemption line in the case of exempted products used by integrated companies [subsection (i) (3)] should be added to the list of provisions of the Act which are made effective as though they had been made a part of Section 403 on the date of its enactment, April 28, 1942 [see subsection (d) effective date, page 130, line 7].

G. Exemption of seasonal cannery.—Since the Committee on Ways and Means completed action on the bill, an investigation has been made of the possible effect of the provision which would exempt "any contract or subcontract for canned, bottled or packed fruits or vegetables (or their juices) which are customarily canned, bottled or packed in the season in which they are harvested." This investigation indicates that substantial excessive profits may have been realized in this field and that such contracts should not be included in the agricultural exemption [subsection (i) (1) (C), page 125, lines 10 to 13].

H. Definition of subcontracts.—The attention of the Committee is directed to the fact that the definition of "component article" embodied in subsection (5) (A) (ii) [page 104, line 21] does not clearly evidence the intention of Congress with respect to products, portions of which do not actually appear as a part of the end product ultimately acquired by the Government because of the fact that they either disappear or are reduced as the result of intermediate processing, refining or treatment. If it is the intent of Congress that contracts for all such articles which enter into the end product or a component part thereof at any stage of the manufacturing process should be subject to renegotiation, it is suggested that the phrase "in whole or in part, directly or ultimately, or in the same or some other form" should be inserted immediately following the word "which" in the second line of the definition of component article [line 22, page 104].

The attention of the Committee is further directed to the fact that the revised definition of subcontract embodied in the proposed bill will result in the exclusion from renegotiation of a very large field of subcontracts for both durable products used directly for war production purposes, such as all types of machinery and equipment and also large volumes of expendable supplies and equipment, such as grinding wheels, acetylene torches, and all types of mill supplies. It is estimated that the total recoveries of excessive profits from contracts of this character subject to renegotiation under the existing law were very substantial for fiscal

periods ending on or before the proposed effective date of the new Act, June 30, 1943. There is attached hereto an exhibit setting forth a number of refunds secured from companies which would be exempted under the new provisions. These examples indicate the increased cost of the war which will necessarily result from this exclusion from renegotiation of large numbers of contractors who have profited largely and directly from war business. The exemption of these contractors is also going to make it more difficult to close voluntary agreements with other contractors who will necessarily feel that there has been some discrimination based on artificial concepts of subcontract rather than on participation in the war effort.

I. The attention of the Committee is directed to the requirement that the Board, at the request of the contractor, furnish him with a statement of the determination of excessive profits, of the facts used as a basis therefor, and of its reasons for such determination [page 110, lines 24 and 25, and page 111, lines 1 to 6].

In complying with this requirement it will be necessary to set out in writing to the contractor a statement of the facts and factors, unfavorable as well as favorable, of his efficiency, ability, contribution to the war effort, risk, and other elements necessary in the determination of excessive profits. This material cannot be flattering in all cases. We can anticipate a greater dispute and dissatisfaction from the detail of reducing these criteria to writing, even though they may be generally understood as between the contractor and the renegotiators in informal discussion, than over the amount of settlement itself. We do not believe this requirement, on balance, will be of sufficient benefit to contractors to outweigh the harm it may do in impairing the informal atmosphere in which these renegotiation proceedings are conducted and agreements are reached in the great majority of cases.

J. Under the present law, it is clear that patent-royalty contracts and other agreements involving intangible property rights are subject to renegotiation. The House bill, in defining "subcontract" and "excessive profits" raises a substantial question as to whether contracts of this type are renegotiable. This question should be resolved by clarifying the definition of a contract "article" by adding the words "tangible or intangible" immediately following the phrase "other personal property."

K. *Miscellaneous technical changes.*—In addition to the foregoing, it is believed that the bill would be clarified and that administrative problems thereunder considerably lessened if the following changes are made:

1. Page 102, line 5, strike out the word "raw". There is no reason for confining this factor to the use of raw materials.

2. Page 102, line 8, strike out the word "and", and in line 9, after the word "earnings", insert "and comparison of war and peacetime products". A contractor now manufacturing a product substantially different from his peacetime product should have this important factor fully considered.

3. Page 112, lines 18 and 19, strike out the word "determining" in line 18 and insert, in lieu thereof, "eliminating"; and in line 19 strike out "to be eliminated." This change is necessary to correct a technical error. Under the bill, the Board determines the excessive profits while the Secretary eliminates them.

4. Page 126, lines 4 and 5, strike out "exempted from the provisions of this section, or". The present language is ambiguous. The change is needed to make it clear that the subcontracts to which the provision relates are only those under prime contracts or subcontracts exempted by reason of subsection (f) (1).

PART IV

SUGGESTED DEPARTMENTAL DRAFT

TITLE VII—RENEGOTIATION OF WAR CONTRACTS

SEC. 701. RENEGOTIATION OF WAR CONTRACTS.

(a) **TERMS USED.**—Terms used in this section shall have the same meaning as when used in section 403 of the Sixth Supplemental National Defense Appropriation Act, 1942.

(b) **RENEGOTIATION OF WAR CONTRACTS.**—Section 403, as amended, of the Sixth Supplemental National Defense Appropriation Act, 1942, is amended to read as follows:

“Sec. 403. (a) For the purposes of this section—

“(1) The term ‘Department’ means the War Department, the Navy Department, the Treasury Department, the Maritime Commission, the War Shipping Administration, Defense Plant Corporation, Metals Reserve Company, Defense Supplies Corporation, and Rubber Reserve Company, respectively.

“(2) In the case of the Maritime Commission, the term ‘Secretary’ means the Chairman of such Commission, in the case of the War Shipping Administration, the term ‘Secretary’ means the Administrator of such Administration, and in the case of Defense Plant Corporation, Metals Reserve Company, Defense Supplies Corporation, and Rubber Reserve Company, the term ‘Secretary’ means the board of directors of the appropriate corporation.

“(3) (A) The terms ‘renegotiate’ and ‘renegotiation’ include a determination by agreement or order under this section of the amount of any excessive profits.

“(B) The terms ‘reprice’ and ‘repricing’ include a determination by agreement or order under this section of a fair price for performance under a contract or subcontract.

“(4) (A) The term ‘excessive profits’ means the portion of the profits derived from contracts with the Departments and subcontracts which is determined in accordance with this section to be excessive for the work and articles furnished. In determining excessive profits there shall be taken into consideration the following factors:

“(i) efficiency of contractor, with particular regard to attainment of quantity and quality production, reduction of costs and economy in the use of raw materials, facilities, and manpower;

“(ii) reasonableness of costs and profits, with particular regard to volume of production, and normal pre-war earnings and comparison of war and peace-time products;

“(iii) amount and source of public and private capital employed and net worth;

“(iv) extent of risk assumed, including the risk incident to reasonable pricing policies;

“(v) nature and extent of contribution to the war effort, including inventive and developmental contribution and cooperation with the Government and other contractors in supplying technical assistance;

“(vi) character of business, including complexity of manufacturing technique, character and extent of subcontracting, and rate of turn-over;

“(vii) such other factors the consideration of which the public interest and fair and equitable dealing may require.

“(B) The term ‘profits derived from contracts with the Departments and subcontracts’ means the excess of the amount received or accrued under such contracts and subcontracts over the costs paid or incurred with respect thereto. Such costs shall be determined in accordance with the method of cost accounting regularly employed by the contractor or subcontractor in keeping his books, but if no such method of cost accounting has been employed, or if the method so em-

ployed does not, in the opinion of the Secretary properly reflect such costs, such costs shall be determined in accordance with such method as in the opinion of the Secretary does properly reflect such costs. Irrespective of the method employed or prescribed for determining such costs, no item of cost shall be charged to any contract with a Department or subcontract or used in any manner for the purpose of determining such cost, to the extent that in the opinion of the Secretary, such item is unreasonable or not properly chargeable to such contract or subcontract. Except as otherwise provided in the foregoing provisions of this paragraph, all items of the character allowed as deductions and exclusions under Chapters 1 and 2 E of the Internal Revenue Code (excluding taxes measured by income) shall, to the extent allocable to such contracts and subcontracts, be allowed as items of cost, but in determining the amount of excessive profits to be eliminated proper adjustment shall be made on account of the taxes so excluded, other than Federal taxes, which are attributable to the portion of the profits which are not excessive.

“(6) The term ‘subcontract’ means—

“(A) any purchase order or agreement (other than a contract with a Department) to make or furnish, or to perform any part of the work required for the making or furnishing of, a contract item or a component article. For the purposes of this subparagraph—

“(i) A ‘contract item’ means any article, work, services, building, structure, improvement, or facility contracted for by a Department;

“(ii) A ‘component article’ means any article which is to be incorporated in or as a part of a contract item in whole or in part, directly or ultimately, in the same or some other form.

“(B) Any contract or arrangement other than a contract or arrangement between two contracting parties, one of which parties is found by the Secretary to be a bona fide executive officer, partner, or full-time employee of the other contracting party, (i) any amount payable under which is contingent upon the procurement of a contract or contracts with a Department or of a subcontract or subcontracts, or determined with reference to the amount of such a contract or subcontract or such contracts or subcontracts, or (ii) under which any part of the services performed or to be performed consists of the soliciting, attempting to procure, or procuring a contract or contracts with a Department or a subcontract or subcontracts: *Provided*, That nothing in this sentence shall be construed (1) to affect in any way the validity or construction of provisions in any contract with a Department or any subcontract, heretofore at any time or hereafter made, prohibiting the payment of contingent fees or commissions; or (2) to restrict in any way the authority of the Secretary to determine the nature or amount of selling expenses under subcontracts as defined in this subparagraph, as a proper element of the contract price or as a reimbursable item of cost, under a contract with a Department or a subcontract.

“(6) The term ‘article’ includes any material, part, assembly, machinery, equipment, or other personal property.

“(7) The term ‘standard commercial article’ means an article—

“(A) which is not specially made to specifications furnished by a Department or by another contractor or subcontractor,

“(B) which is identical in every material respect with an article which was manufactured and sold, and in general civilian, industrial, or commercial use prior to January 1, 1940,

“(C) which is identical in every material respect with an article which manufactured and sold, as a competitive product, by more than one manufacturer, or which is an article of the same kind and having the same use or uses as an article manufactured and sold, as a competitive product, by more than one manufacturer, and

“(D) for which a maximum price has been established and is in effect under the Emergency Price Control Act of 1942, as amended, or under the Act of October 2, 1942, entitled ‘An Act to amend the Emergency Price Control Act of 1942, to aid in preventing inflation, and for other purposes or which is sold at a price not in excess of the January 1, 1941, selling price

An article made in whole or in part of substitute materials but otherwise identical in every material respect with the article with which it is compared under sub paragraphs (B) and (C) shall be considered as identical in every material respect with such article with which it is so compared.

"(8) The term 'fiscal year' means the taxable year of the contractor or subcontractor under Chapter 1 of the Internal Revenue Code.

"(9) The terms 'received or accrued' and 'paid or incurred' shall be construed according to the method of accounting employed by the contractor or subcontractor in keeping his books.

"(b) Subject to subsection (i), the Secretary of each Department is authorized and directed to insert in each contract made by such Department thirty days or more after the date of the enactment of the Revenue Act of 1943 and involving an estimated amount in excess of \$100,000, a provision under which the contractor agrees—

"(1) to repricing, and to the elimination of excessive profits through renegotiation;

"(2) that there may be retained by the United States from amounts otherwise due the contractor, or that he will repay to the United States, if paid to him, any excessive profits;

"(3) that he will insert in each subcontract described in (a) (5) (B), involving an estimated amount in excess of \$25,000, and in each subcontract described in (a) (5) (A), involving an estimated amount in excess of \$100,000, a provision under which the subcontractor agrees—

"(A) to repricing, and to the elimination of excessive profits through renegotiation;

"(B) that there may be retained by the contractor for the United States from amounts otherwise due the subcontractor, or that the subcontractor will repay to the United States, if paid to him, any excessive profits, or any amount in excess of the fair price under the subcontract determined as a result of repricing;

"(C) that the contractor shall be relieved of all liability to the subcontractor on account of any amount so retained, or so repaid by the subcontractor to the United States;

"(D) that he will insert in each subcontract, involving an estimated amount in excess of \$100,000, provisions corresponding to those of subparagraphs (A), (B), and (C) and to those of this subparagraph;

"(4) that there may be retained by the United States from amounts otherwise due the contractor, or that he will repay to the United States, as the Secretary may direct, any amounts which under paragraph (3) (B) the contractor is directed to withhold from a subcontractor and which are actually unpaid at the time the contractor receives such direction.

The obligations assumed by the contractor or subcontractor under paragraph (1) or (3) (A), as the case may be, agreeing to the elimination of excessive profits through renegotiation shall be binding on him only if the contract or subcontract, as the case may be, is subject to subsection (c). A provision inserted in a contract or subcontract, which recites in substance that the contract or subcontract shall be deemed to contain all the provisions required by this subsection shall be sufficient compliance with this subsection. Whether or not there is inserted in a contract with a Department or subcontract, to which this subsection is applicable, the provisions required by this subsection, such contract or subcontract, as the case may be, shall be considered as having been made subject to this subsection in the same manner and to the same extent as if such provisions had been inserted.

"(c) (1) Whenever, in the opinion of the Secretary, the amounts received or accrued under contracts with the Departments and subcontracts may reflect excessive profits, the Secretary shall give to the contractor or subcontractor, as the case may be, reasonable notice of the time and place of a conference to be held with respect thereto. The mailing of such notice by registered mail to the contractor or subcontractor shall constitute the commencement of the renegotiation proceeding. At the conference, which may be adjourned from time to time, the Secretary shall endeavor to make a final or other agreement with the contractor or subcontractor with respect to the elimination of excessive profits realized or likely to be realized, and with respect to such other matters relating thereto as the Secretary deems advisable. If the Secretary does not make such an agreement, he shall issue an order determining the amount, if any, of such excessive profits, and forthwith give notice thereof by registered mail to the contractor or subcontractor. The Secretary shall insofar as practicable exercise his powers with respect to the aggregate of the amounts received or accrued during the fiscal year by a contractor or subcontractor under contracts with the Departments and subcontracts, and not separately with respect to amounts received or accrued under separate contracts with the Departments or subcontracts,

except that the Secretary may exercise such powers separately with respect to amounts received or accrued by the contractor or subcontractor under (A) any such classes or types of contracts or subcontracts as the Secretary may by regulation prescribe; (B) at the request of the contractor or subcontractor, any one or more separate contracts with the Departments or subcontracts.

"(2) Upon the making of an agreement, or the entry of an order, under paragraph (1), the Secretary eliminate such excessive profits (A) by reductions in the amounts otherwise payable to the contractor under contracts with the Departments and subcontracts, or by other revision of their terms; or (B) by withholding from amounts otherwise due to the contractor or subcontractor any amount of such excessive profits; or (C) by directing a contractor to withhold for the account of the United States, from amounts otherwise due to a subcontractor, any amount of such excessive profits of such subcontractor; or (D) by recovery from the contractor or subcontractor, through repayment, credit, or suit any amount of such excessive profits actually paid to him; or (E) by any combination of these methods, as is deemed desirable. Actions on behalf of the United States may be brought in the appropriate courts of the United States to recover from such contractor or subcontractor any amount of such excessive profits actually paid to him and not withheld or eliminated by some other method under this subsection. The surety under a contract or subcontract shall not be liable for the repayment of any excessive profits thereon. Each contractor and subcontractor is hereby indemnified by the United States against all claims by any subcontractor on account of amounts withheld from such subcontractor pursuant to this paragraph or pursuant to subsection (f) and the United States hereby assumes liability to such subcontractor to the extent, if any, that the contractor or subcontractor would be liable to the subcontractor on account of amounts withheld from such subcontractor pursuant to this paragraph or pursuant to subsection (f). All money recovered by way of repayment or suit under this subsection shall be covered into the Treasury as miscellaneous receipts. Upon the withholding of any amount of excessive profits or the crediting of any amount of excessive profits against amounts otherwise due a contractor, the Secretary shall transfer to the Treasury, from appropriations of his Department, to the credit of miscellaneous receipts an amount equal to the amount so withheld or credited by him. In eliminating excessive profits the Secretary shall allow the contractor or subcontractor credit for Federal income and excess-profits taxes as provided in section 3806 of the Internal Revenue Code. For the purposes of this paragraph the term 'contractor' includes a subcontractor.

"(3) No proceeding to determine the amount of excessive profits shall be commenced by the Secretary more than one year after the close of the fiscal year in which such excessive profits were received or accrued, or more than one year after the statements required under paragraph (5) are filed, whichever is the later, and if such proceeding is not so commenced, then upon the expiration of one year following the close of such fiscal year, or one year following the date upon which such statements are so filed, whichever is the later, all liabilities of the contractor or subcontractor for excessive profits received or accrued during such fiscal year shall thereupon be discharged. If an agreement or order determining the amount of excessive profits with respect to a fiscal year ending after June 30, 1943, is not made within one year following the commencement of the renegotiation proceeding, then upon the expiration of such one year all liabilities of the contractor or subcontractor for excessive profits with respect to which such proceeding was commenced shall thereupon be discharged, except that (A) if, in his opinion, sufficient information is not available to the Secretary, from which the amount of excessive profits can be determined within such one year under contracts or subcontracts with respect to which the Secretary may exercise his powers separately pursuant to the provisions of subsection (c) (1), such one-year limitation shall not apply, and (B) such one-year period may be extended by mutual agreement.

"(4) For the purposes of this section the Secretary may make final or other agreements with a contractor or subcontractor for the elimination of excessive profits and for the discharge of any liability for excessive profits under this section. Such agreements may cover such past and future period or periods, may apply to such contract or contracts of the contractor or subcontractor, and may contain such terms and conditions as the Secretary deems advisable. Any such agreement shall be conclusive according to its terms; and except upon a showing of fraud or malfeasance or a willful misrepresentation of a material fact, (A) such agreement shall not for the purposes of this section be reopened as to the matters agreed upon, and shall not be modified by any officer, employee, or agent of the United States, and (B) such agreement and any determination made in accordance there-

with shall not be annulled, modified, set aside, or disregarded in any suit, action, or proceeding.

"(5) (A) Every contractor and subcontractor who holds contracts or subcontracts, to which the provisions of this subsection are applicable, shall, at such time or times and in such form and detail, as the Secretary may by regulations prescribe, file with the Secretary statements of actual costs of production and such other financial statements as the Secretary may by regulations proscribe. Any person who willfully fails or refuses to furnish any statement required of him under this subsection, or who knowingly furnishes any such statement containing information which is false or misleading in any material respect, shall, upon conviction thereof, be punished by a fine of not more than \$10,000 or imprisonment for not more than two years, or both.

"(B) For the purposes of this section the Secretary shall have the same powers with respect to any such contractor or subcontractor that any agency designated by the President to exercise the powers conferred by title XIII of the Second War Powers Act, 1942, has with respect to any contractor to whom such title is applicable. In the interest of economy and the avoidance of duplication of inspection and audit, the services of the Bureau of Internal Revenue shall, upon request of the Board and the approval of the Secretary of the Treasury, be made available to the extent determined by the Secretary of the Treasury for the purpose of making examinations and audits under this section.

"(6) This subsection shall be applicable to all contracts and subcontracts, to the extent of amounts received or accrued thereunder in any fiscal year ending after June 30, 1943, whether such contracts or subcontracts were made on, prior to, or after the date of the enactment of the Revenue Act of 1943, and whether or not such contracts or subcontracts contain the provisions required under subsection (b), unless (A) the contract or subcontract provides otherwise pursuant to subsection (i), or is exempted under subsection (i), or (B) the aggregate of the amounts received or accrued in such fiscal year by the contractor or subcontractor and all persons under the control of or controlling or under common control with the contractor or subcontractor, under contracts with the Departments and subcontracts (including those described in clause (A), but excluding subcontracts described in subsection (a) (5) (B)) do not exceed \$500,000 and under subcontracts described in subsection (a) (5) (B) do not exceed \$25,000 for such fiscal year. If such fiscal year is a fractional part of twelve months, the \$500,000 amount and the \$25,000 amount shall be reduced to the same fractional part thereof for the purposes of this paragraph.

"(d) (1) There is hereby created a War Contracts Price Adjustment Board (in this section called the 'Board'), which shall consist of six members. One of the members shall be an officer or employee of the Department of War and shall be appointed by the Secretary of War, one shall be an officer or employee of the Department of the Navy and shall be appointed by the Secretary of the Navy, one shall be an officer or employee of the Department of the Treasury and shall be appointed by the Secretary of the Treasury, one shall be an officer or employee of the United States Maritime Commission or the War Shipping Administration and shall be appointed jointly by the Chairman of the United States Maritime Commission and the Administrator of the War Shipping Administration, one shall be an officer or employee of the War Production Board and shall be appointed by the War Production Board, and one shall be an officer or employee of the Reconstruction Finance Corporation and shall be appointed by the Chairman of the board of directors of the Reconstruction Finance Corporation. The members of the Board shall not receive additional compensation for service on the Board but shall be allowed and paid necessary travel and subsistence expenses (or a per diem in lieu thereof) while away from their official station on duties of the Board. They shall elect a chairman from among their members. The Board shall have a seal which shall be judicially noticed.

"(2) The principal office of the Board shall be in the District of Columbia, but it may meet and exercise its powers at any other place within the United States. Four members of the Board shall constitute a quorum, and any power, function, or duty of the Board may be exercised or performed by a majority of the entire Board.

"(3) The Board may, with the consent of the head of the Department, agency, or instrumentality of the United States concerned, utilize the services of any officers or employees of the United States.

"(4) The Board shall with respect to the provisions of this section relating to renegotiation have authority—

"(A) to formulate and adopt statements of purposes, principles, policies, and interpretations under this section;

"(B) To exercise the powers conferred on it by "subsection (i) (2);

"(C) to make exemptions of general classes or types of contracts of the character included under subsection (i) (4) and to formulate standards for such exemptions by the Secretaries;

"(D) to prescribe the form and detail of statements under subsection (e) (5);

"(E) to make assignments for renegotiation among the several Departments;

"(F) to perform such other functions as may be requested of it by the Secretaries for the purpose of achieving a more uniform administration under this section.

"(e) (1) If no agreement is reached in proceedings for renegotiation authorized in subsection (c), the officer, employee or agency conducting such proceedings shall make a recommendation to the Secretary for the disposition of the renegotiation and shall furnish to the contractor or subcontractor a statement of such recommendation. The Secretary may designate an officer, employee, or agency within the Department as his representative for the consideration and disposition of reviews of renegotiation proceedings. No renegotiation order shall be issued until there has been a review by the Secretary or such officer, employee, or agency of the renegotiation proceedings theretofore had and of such recommendation.

"(2) The Secretary shall prescribe regulations governing the conduct of renegotiation proceedings prior to review, and the consideration and disposition of reviews of such proceedings. Such regulations shall provide full opportunity for the presentation of such documents, memoranda, briefs and other written materials, either in the original proceedings or upon review, as are relevant, and may authorize or provide for additional proceedings.

"(3) Any renegotiation order issued hereunder shall be communicated to the contractor or subcontractor.

"(4) As used in paragraphs (1), (2), and (3) of this subsection, the term 'renegotiation' shall include repricing, and the reference to subsection (c) shall be deemed to include a reference to subsection (f).

"(5) Any contractor from whom money determined by renegotiation to represent excessive profits, or by repricing to represent the excess over a fair price, has been withheld or otherwise recovered by the United States, and any subcontractor from whom money determined by a renegotiation to represent excessive profits, or by repricing to represent the excess over a fair price, has been withheld by a contractor or subcontractor or has been recovered by the United States, may, only after all administrative remedies within the Department have been availed of and exhausted, sue the United States for such amount thereof as he claims was improperly withheld or recovered, in any District Court of the United States or in the Court of Claims in accordance with the provisions of sections 24 (20) and 145 of the Judicial Code (U. S. C., title 28, secs. 41 (20) and 250).

"(6) In any suit or action by a contractor or subcontractor pursuant to the preceding paragraph, or in any suit or action by the United States for the recovery of excessive profits pursuant to renegotiation or the excess over a fair price pursuant to repricing, any determination in an agreement or order made under subsection (c) or subsection (f) shall be final and conclusive (A) except for fraud, malfeasance, or a willful misrepresentation of a material fact, in a suit or action involving a renegotiation or repricing by agreement, and (B) unless, in a suit or action involving a renegotiation or repricing by order, it appears upon the record made in such suit or action that such order is arbitrary, capricious, fraudulent, or so grossly erroneous as to imply bad faith.

"(7) In any suit or action within the provisions of paragraph (5) or (6) of this subsection, the Court shall have jurisdiction to hear, determine, and render judgment upon any counterclaim involving any renegotiation or repricing pertaining to the claim asserted in the suit or action, and shall have jurisdiction, subject to the limitations of paragraph (6) of this subsection, to enter an order sustaining or setting aside the renegotiation or repricing, with or without remanding the cause for further proceedings.

"(8) If any renegotiation or repricing is set aside pursuant to the provisions of this subsection, the Court may then proceed to find the excessive profits or the excess over the fair price, as the case may be, to be the same as, more than, or

less than, the amount of excessive profits determined in such renegotiation, or the excess over the fair price determined in the repricing, or may remand the cause for further proceedings.

"(9) Upon the commencement of any suit or action as provided in this section, the Court shall have exclusive jurisdiction of all questions determined in the renegotiations or repricing reviewed in such cause, and no other court shall have jurisdiction, except upon appeal from the judgment entered or upon certiorari, to entertain any proceeding involving such renegotiation or repricing.

"(10) No suit brought for the purpose of restraining a renegotiation or repricing or the enforcement of either or the withholding or recovery of any amounts pursuant thereto, or for the purpose of compelling any action in disregard of a renegotiation or repricing, shall be maintained in any court.

"(11) No suit, other than by the United States, against a contractor or subcontractor to collect money withheld by the contractor or subcontractor from a subcontractor pursuant to renegotiation or repricing, shall be maintained in any court.

"(12) (A) The provisions of paragraphs (5) through (11) of this subsection shall be applicable also to any contractor with respect to whom excessive profits are determined by a renegotiation pursuant to section 403, prior to its amendment by the Revenue Act of 1943, and to any subcontractor with respect to whom excessive profits are determined by such a renegotiation.

"(B) Each such contractor and subcontractor is hereby indemnified by the United States against all claims by any subcontractor on account of amounts withheld from such subcontractor pursuant to such renegotiation; and the United States hereby assumes liability to such subcontractor to the extent, if any, that the contractor or subcontractor would be liable to the subcontractor on account of amounts withheld from such subcontractor pursuant to such renegotiation.

"(f) (1) Whenever, in the opinion of the Secretary of a Department, the price under any contract with such Department or subcontract which affects such Department exceeds a fair price, the Secretary may require the contractor or subcontractor to negotiate to fix a fair price thereunder. If an agreement is not reached, the Secretary by order may fix the price which he determines to be a fair price for performance under such contract or subcontract after the date of the order. Any such agreement or order may prescribe the period during which the price so fixed shall be effective, and may contain such other terms and conditions as the Secretary deems appropriate. In determining a fair price under this subsection, the Secretary shall take into consideration all of the factors enumerated under subsection (a) (4) (A) of this section, and such other factors as he deems appropriate.

"(2) Upon the making of an agreement or order under this subsection, the Secretary may—

"(A) withhold from amounts otherwise payable to the contractor or subcontractor any portion of the contract price in excess of the price so fixed, or

"(B) direct the contractor or another subcontractor to withhold for the account of the United States from amounts otherwise due the subcontractor any portion of the contract price in excess of the price so fixed.

"(3) Where a contractor or subcontractor holds two or more contracts or subcontracts the Secretary, in his discretion, may exercise the authority conferred by this subsection with respect to some or all of such contracts and subcontracts as a group.

"(4) The authority and discretion herein and in this section conferred upon the Secretary of each Department may be delegated in whole or in part by him to such individuals or agencies as he may designate in his Department, or in any other Department with the consent of the Secretary of that Department, and he may authorize such individuals or agencies to make further delegations of such authority and discretion.

"(g) If any provision of this section or the application thereof to any person or circumstance is held invalid, the remainder of the section and the application of such provision to other persons or circumstances shall not be affected thereby.

"(h) This section shall not apply to any contract with a Department, or any subcontract, made after the date proclaimed by the President as the date of the termination of hostilities in the present war, or the date specified in a concurrent resolution of the two Houses of Congress as the date of such termination, whichever is the earlier.

"(i) (1) The provisions of this section shall not apply to—

"(A) any contract by a Department with any other department, bureau, agency, or governmental corporation of the United States or with any Territory, possession, or State or any agency thereof or with any foreign government or any agency thereof; or

"(B) 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 except that this provision shall not be construed to eliminate from renegotiation or repricing any contract or arrangement otherwise subject to renegotiation or repricing with one of the Departments (a) for services performed on a fee or cost-plus-a-fixed-fee basis with respect to any such products or (b) for the use or operation of a plant or facility by a Department for the production, processing, treatment, manufacture or transportation of any such products; or

"(C) 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, in the first form or state, beyond the raw or natural state, in which it is customarily sold or in which it has an established market. The term 'agricultural commodity' as used herein shall include but shall not be limited to—

"(i) commodities resulting from the cultivation of the soil such as grains of all kinds, fruits, nuts, vegetables, hay, straw, cotton, tobacco, sugarcane, and sugar beets;

"(ii) saps and gums of trees;

"(iii) animals such as cattle, hogs, poultry, and sheep, fish and other marine life, and the produce of live animals, such as wool, eggs, milk and cream; or

"(D) any contract or subcontract with an organization exempt from taxation under section 101 (6) of the Internal Revenue Code; or

"(E) any subcontract, directly or indirectly under a contract or subcontract exempted from the provisions of this section, or to which this section does not apply, by reason of this paragraph.

"(2) The Board is authorized by regulation to interpret and apply the exemptions provided for in paragraph (1) (A), (B), (C), and (E), and interpret and apply the definition contained in subsection (a) (7).

"(3) 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 a product to and beyond the first form or state suitable for industrial use, or who produces or acquires an agricultural product and processes, refines, or treats such a product to and beyond the first form or state in which it is customarily sold or in which it has an established market, the Secretary shall prescribe such regulations as may be necessary to give such contractor or subcontractor a cost allowance substantially equivalent to the amount which would have been realized by such contractor or subcontractor if he had sold such product at such first form or state.

"(4) The Secretary is authorized, in his discretion, to exempt from some or all of the provisions of this section—

"(A) any contract or subcontract to be performed outside of the territorial limits of the continental United States or in Alaska;

"(B) any contracts or subcontracts under which, in the opinion of the Secretary, the profits can be determined with reasonable certainty when the contract price is established, such as certain classes of agreements for personal services, for the purchase of real property, perishable goods, or commodities the minimum price for the sale of which has been fixed by a public regulatory body, of leases and license agreements, and of agreements where the period of performance under such contract or subcontract will not be in excess of thirty days;

"(C) any contract or subcontract or performance thereunder during a specified period or periods, if in the opinion of the Secretary, the provisions of the contract are otherwise adequate to prevent excessive profits;

"(D) any contract or subcontract for the making or furnishing of a standard commercial article, if, in the opinion of the Secretary, normal competitive conditions affecting the sale of such article exist;

"(E) any other contract or subcontract, if, in the opinion of the Secretary, competitive conditions affecting the making of such contract or subcontract are such as are likely to result in effective competition with respect to the contract or subcontract price; and

"(F) any subcontract or group of subcontracts not otherwise exempt from the provisions of this section, if, in the opinion of the Secretary, it is not administratively feasible in the case of such subcontract or in the case of such group of subcontracts to determine and segregate the profits attributable to such subcontract or group of subcontracts from the profits attributable to activities not subject to renegotiation.

"(j) Nothing in sections 109 and 113 of the Criminal Code (U. S. C., title 18, secs. 198 and 203) or in section 190 of the Revised Statutes (U. S. C., title 5, sec. 99) shall be deemed to prevent any person by reason of service in a Department or the Board during the period (or a part thereof) beginning May 27, 1940, and ending six months after the termination of hostilities in the present war, as proclaimed by the President, from acting as counsel, agent, or attorney for prosecuting any claim against the United States: *Provided*, That such person shall not prosecute any claim against the United States (1) involving any subject matter directly connected with which such person was so employed or (2) during the period such person is engaged in employment in a Department.

"(k) Nothing in this section shall be construed to limit or restrict any authority or discretion of the Secretary of a Department under the provisions of any other law.

"(l) This section may be cited as the 'Renegotiation Act'."

(c) TECHNICAL AMENDMENTS.—(1) Section 3806 (a) (1) (B) and (C) of the Internal Revenue Code (relating to mitigation of effect of renegotiation of war contracts) are respectively amended by striking out "by the Revenue Act of 1942".

(2) Section 3806 (b) (1) and (b) (2) of the Internal Revenue Code (relating to credit against repayment on account of renegotiation) are respectively amended by inserting after "Chapter 2A," wherever appearing therein "Chapter 2B,".

(3) The amendments made by paragraph (2) shall be effective as if they were a part of section 3806 of the Internal Revenue Code on the date of the enactment of the Revenue Act of 1942.

(d) EFFECTIVE DATE.—The amendments made by subsection (b) shall be effective only with respect to the fiscal years ending after June 30, 1943, except that (1) the amendment inserting subsection (b) in section 403 of the Sixth Supplemental National Defense Appropriation Act of 1942, shall be effective thirty days after the date of the enactment of this Act, and (2) the amendments adding subsections (e) (2) and (f) to said section 403 shall be effective from the date of the enactment of this Act, and (3) the amendments inserting subsections (i) (1) (C), (D), and (E), (i) (3), and (l) shall be effective as if such subsections had been a part of section 403 on the date of its enactment.

