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SENATE

REPORT
No. 92-245

RENEGOTIATION AMENDMENTS OF 1971

JUNE 29 (legislative day, JUNE 28), 1971.—Ordered to be printed

Mr. LONG, from the Committee on Finance, submitted the following

REPORT

[To accompany H.R. 8311]

The Committee on Finance, to which was referred the bill (H.R. 8311) to amend the Renegotiation Act of 1951 to extend the Act for two years, to modify the interest rate on excessive profits and on refunds, to provide that the Court of Claims shall have jurisdiction of renegotiation cases, and for other purposes, having considered the same, reports favorably thereon without amendment and recommends that the bill do pass.

I. SUMMARY

The Renegotiation Act of 1951, as amended, authorizes the Government to recapture excessive profits on certain Government contracts and subcontracts. In the absence of legislation, this act will expire as of June 30, 1971. H.R. 8311 extends the act for 2 years, or until June 30, 1973.

The bill also amends the Renegotiation Act in two other respects. The first amendment deals with interest rates on excessive profits determinations and on refunds where excessive profits determinations are found to be erroneous. In these cases the bill provides for flexible interest rates to be determined by the Secretary of the Treasury (at 6-month intervals) on the basis of current commercial rates at the time of the excessive profits determinations. The second amendment provides the U.S. Court of Claims with exclusive jurisdiction over redeterminations of excessive profits determined by the Renegotiation Board. The U.S. Tax Court up to this time has had jurisdiction of these cases.

The bill also makes two minor changes in the present law provisions relating to the U.S. Tax Court. Present law is modified to make it clear that judges who have retired from active duty can be

immediately recalled for judicial duty. The bill also provides that their salary base period, for purposes of computing survivors' annuities, is to be the period of 5 consecutive years in which the judges receive the largest amount of compensation for their services.

II. GENERAL STATEMENT

A. Renegotiation

1. THE RENEGOTIATION PROCESS

The Renegotiation Act of 1951, in general, provides that the Renegotiation Board is to review the total profit derived by a contractor during a year from all of his renegotiable contracts and subcontracts in order to determine whether or not this profit is excessive.[1] The Board is empowered to eliminate those profits found to be excessive in accordance with certain statutory factors. Thus, renegotiation is determined not with respect to individual contracts but with respect to all receipts or accruals from renegotiable contracts and subcontracts of a contractor during a year. These contracts vary in form from cost-plus-fixed-fee to firm fixed-price contracts. Some may be prime contracts, while others are subcontracts, and they may be concerned with many different services and products. With respect to any given year they may also reflect only partial payments made on the contracts.

For purposes of renegotiation, profits generally are defined and determined in much the same way as for tax purposes. This similarity is also reflected in that provision is made in renegotiation for a 5-year loss carryforward, as well as the offsetting of losses and profits on different contracts within the year.

The Act provides, in general terms, that the Renegotiation Board in determining whether profits are excessive is to give favorable recognition to the efficiency of the contractor with particular regard to attainment of quantity and quality production, reduction of costs, and economy. The Board must also consider the reasonableness of costs and profits, the net worth (with particular regard to the amount and source of public and private capital employed), the extent of the risk assumed, the nature and extent of the contribution to the defense effort, and the character of the business. Thus, in effect, the Board in its judgment must consider all of these factors, and the producer, where these factors are present to the greatest extent (e.g., is most efficient or makes the greatest contribution to the defense effort), is permitted to retain more profit than the producer who satisfies these factors to a lesser extent.

Various types of contracts are excluded from the Act; some on a mandatory and others on a permissive basis. The mandatory exemptions include contracts with a State, local, or foreign government, those dealing with certain agricultural commodities, those dealing with minerals and related products, those with certain regulated common carriers or public utilities and those for standard commercial articles or services.

[1] Contractors with renegotiable sales exceeding the $1,000,000 statutory "floor" for a fiscal year must file a report with the Renegotiation Board. "Renegotiable" contracts and subcontracts are those with the following agencies: the Departments of Defense, the Army, the Navy, and the Air Force, the Maritime Administration, the General Services Administration, the National Aeronautics and Space Administration, the Federal Aviation Administration, and the Atomic Energy Commission.

2. TWO-YEAR EXTENSION OF THE ACT

In the absence of legislation, the Renegotiation Act will expire as of June 30, 1971. The committee agrees with the House that in view of existing international conditions, the continuation of the Renegotiation Act is in the national interest. The renegotiation process allows an after-the-fact review of the profits on renegotiable contracts and subcontracts relating to the national defense and space efforts. This is a renegotiation of a contractor's fiscal-year aggregate profits on these contracts; thus, it is completely different from price adjustments or redeterminations with respect to individual contracts. The renegotiation process therefore provides a further check on the reasonableness of the prices (and the related overall profits of the contractor) that the Government has to pay in order to maintain its defense commitments.

Modern military and space procurement is characterized by changing technical requirements and increasing complexity. The nature of the procurement often means that there is a lack of established market costs or prices to guide procurement officers. Accordingly, negotiated contracts are used for the bulk of the dollar amount of these procurements. This includes contracts negotiated with sole-source suppliers as well as contracts negotiated with some degree of market price competition. Negotiated Department of Defense military contracts accounted for 89 percent of the value of the Defense Department's military procurement in fiscal 1970, which was a continuation of the increase in percentage from 82 percent in fiscal 1965 to 87 percent in fiscal 1967. In addition, negotiated NASA contracts represented 99 percent of the value of NASA's procurement in fiscal 1970 as compared to 91 percent in fiscal 1961.

A second factor which indicates the need to extend the Renegotiation Act is the continued high level of defense-related procurement during 1968–70. Total military procurement rose from $28 billion in fiscal 1965 to a peak of $44.6 billion in fiscal 1967; military procurement then declined slightly to $43.8 billion in fiscal 1968, to $42 billion in fiscal 1969 and to $36 billion in fiscal 1970. Although the military procurement level has declined somewhat during 1968–70, the level of overall defense-related procurement is expected to remain relatively high. Moreover, in view of the normal timelag between the time a contract is awarded and the time renegotiation filings are made with respect to the contract or subcontract, the amounts from military procurement awards made during the peak of the Southeast Asia conflict will continue to be reported in Renegotiation Board filings during the next 2 years. For example, although total military and space procurement has declined since fiscal 1967, the level of renegotiable sales filed with the Board increased substantially from $33.1 billion in fiscal 1967 to $48.5 billion in fiscal 1969 and $48 billion in fiscal 1970. The timelag also is reflected by the increase in the number of above the $1,000,000 floor filings received by the Board—from 3,737 in fiscal 1967 to 5,030 in fiscal 1969 and 5,085 in fiscal 1970. Furthermore, the level of excessive profit determinations made by the Board has risen during this period—from $16 million in fiscal 1967 to $21.4 million in fiscal 1969 and $33.5 million in fiscal 1970.

The committee agrees with the House that in view of the extent of our defense effort and the nature of much of defense and space-related

procurement, the Renegotiation Act should be extended for a 2-year period, from June 30, 1971, to June 30, 1973. The 2-year extension is in place of the permanent extension recommended by the administration. The nature of the renegotiation process and its inherent reliance on human judgment are factors that lead the committee to consider it desirable to have periodic congressional review of the renegotiation process. The 2-year extension of the Act will give Congress another opportunity to review the renegotiation process and the impact of the military procurement buildup in recent years on defense and space-related profits.

In connection with this extension of the Act, the committee has considered the matter of fiscal year renegotiation. Although renegotiation is conducted on a fiscal year basis, in some cases events occurring in other years are taken into account to improve equity. For example, a contractor may incur high startup costs under a long-term contract and as a result realize deficient profits on his aggregate renegotiable business in the early years of the contract. His profits under the contract, however, may be substantially higher in a later year and the aggregate renegotiable profits in that year may be excessive if considered apart from the early years' startup costs, but quite reasonable in view of those costs. To alleviate inequities in this and other situations, the Renegotiation Board uses a variety of methods to adjust the effect of fiscal year renegotiation:

1. By special accounting agreement with the contractor, the Board may permit preproduction or startup costs incurred prior to the year or years of production to be prorated over the period of production.

2. By special accounting agreement with the contractor, the Board may permit a contractor to adopt for renegotiation purposes the completed contract method of accounting for certain contracts to be performed over a period of more than 1 fiscal year.

3. The Board may permit the use of the periodic estimate method of accounting employed by many large defense contractors (notably airframe and missile manufacturers) for Federal income tax purposes.

4. The Board may consider research and development expenses incurred in prior years when these expenses relate to sales in the fiscal year under review.

5. The Board gives consideration to evidence showing risks through actual realization of losses incurred by the contractor in performing contracts in other years similar to the contracts undergoing renegotiation.

6. The Board gives consideration under the risk factor, in the fiscal year under review, to the possible saturation of the contractor's market in subsequent years.

The committee agrees that methods such as these should be utilized to eliminate the inequities which could otherwise follow from conducting renegotiation on a strict fiscal year basis. Moreover, the committee believes that the Renegotiation Board (and the Court of Claims in redetermination cases) should give greater emphasis to the the applicability of these various forms of relief. In addition, the committee believes that consideration also should be given by the Board (and the Court of Claims) to certain other situations where a contractor had deficient profits on renegotiable sales in a year or years

prior to that under review. Where it can be established that deficient profits in prior years resulted from nonrecurring costs in the early stages of production which relate to production in the year under review, the committee believes the Board (and the Court of Claims) should take this into account in reviewing the contractor's renegotiable business in the year under review. (This is particularly related to the statutory factor of reasonableness of costs and profits.) Thus, for example, labor costs and a proper portion of the related overhead may be high in the early stages of production because of (a) excessive defective work resulting from inexperienced labor, (b) idle time and subnormal production occasioned by testing and changing methods of production, or (c) the cost of training employees. There may also be high material costs due to abnormal scrap losses. Further, there may be instances where deficient profits resulted in prior years from expenses incurred in the design of a product or of special tooling, in the planning of production processes and layout, or in the rearrangement of the contractor's plant, when incurred for a renegotiable contract or contracts. Of course, in evaluating the extent to which items such as these should be taken into account the Board (or Court of Claims) is to consider the reasonableness of the management practices followed.

Circumstances such as those set forth above which can be present under a long-term contract can also be equally present in the case of a series of two or more short-term successive contracts for the production of the same or similar items.

Matters such as those discussed above may well bear on the reasonableness of the contractor's profits in subsequent years and, where they do, they should be taken into account in determining excessive profits for a subsequent year.

3. INTEREST RATES UNDER THE RENEGOTIATION ACT

Reasons for provision.—Under present law, a contractor who disagrees with a determination of excessive profits as made by the Renegotiation Board may petition the U.S. Tax Court for a review of the Board's findings. In such circumstances, the Government does not at that time collect the excessive profits as then determined if the contractor (pursuant to sec. 108 of the act) posts a bond which assures payment of any excessive profits as ultimately determined by the Tax Court. Under existing law, interest at the rate of 4 percent accrues on these unpaid excessive profits beginning 30 days after the Board's determination and running until these excessive profits (or any lesser excessive profits as determined by the Tax Court) are repaid. Interest at the same rate also accrues on any additional excessive profits determined by the Tax Court from the date of the determination until the time of the repayment. Interest at the same rate is also payable on excessive profits determined pursuant to agreement where the Board extends the time for payment.

In any of the situations outlined above the contractor has, in effect, borrowed funds from the Government for a period extending from the time of the Board's determination, or the Tax Court's redetermination, to the time when any excessive profits are repaid. Not to charge realistic interest on these unpaid excessive profits tends to encourage the filing of petitions for redetermination with the Tax Court merely in order to secure low-interest-rate "loans" from the Government.

Although a bond must be posted upon petitioning the Tax Court, the bond may represent the deposit of interest-bearing Treasury obligations which do not significantly increase the cost of the "loan" to the contractor.

Accordingly, the committee agrees with the House that the contractor should be required to pay interest on these "borrowed" funds at a rate which is reasonable in light of the prevailing commercial rates of interest for borrowed money. Although the present statutory rate of 4 percent may have been reasonable when it was adopted, it is unrealistic in view of presently prevailing interest levels.

In the reverse situation, if excessive profits as determined by the Board are repaid and subsequently the court determines that there were no excessive profits or that they were less than the amount determined by the Board, it seems equally clear that the Government has, in effect, borrowed money from the contractor for a period extending from the time of the repayment of the erroneously determined excessive profits to the time of the refund. Under existing law, interest at the rate of 4 percent is paid on such refunds. Here too, the committee agrees with the House that interest should be paid on the refund at a rate which is reasonable in light of prevailing commercial interest rates.

Explanation of provision.—The bill provides that the rate of interest to be used with respect to excessive profits is to be determined by the Secretary of the Treasury for the 6-month period beginning on July 1, 1971, and for each 6-month period thereafter. He is to determine the rate by taking into consideration current rates of interest on new private commercial loans maturing approximately 5 years in the future. The prevailing rates are to be determined on the basis of interest charges for such loans for a 5-year period because 5 years approximates the average time over which interest payable on excessive profits recovered in the past has been paid.

The rate of interest, determined in the manner provided above, for any particular 6-month period is to apply to all determinations of excessive profits, and to all overcollections of excessive profits, on which interest begins to run in the period in question. The interest rate once determined in this manner with respect to any specific excessive profits determination is to continue unchanged thereafter with respect to those excessive profits. If subsequently in a redetermination there are additional excessive profits, the interest rate applicable to these additional profits is to be the interest rate applicable for the period in which the redetermination occurs.

Under the bill, the new interest rate provision is to apply only to excessive profits determinations made after June 30, 1971, and to overcollections made after that date. The present 4-percent interest rate is to continue to apply to situations in which the determination of excessive profits or the overcollection was made prior to July 1, 1971.

4. TRANSFER OF JURISDICTION OVER RENEGOTIATION CASES FROM TAX COURT TO COURT OF CLAIMS

Reasons for provision.—Under present law, in those cases where a contractor on a Government contract (or on related subcontracts) does not agree with a determination of excessive profits made by the Renegotiation Board, he may petition the U.S. Tax Court for a

redetermination. In such a proceeding, the Tax Court may determine an amount of excessive profits which is less than, equal to, or greater than the amount determined by the Board.

The committee agrees with the House that for several reasons it is desirable to transfer the jurisdiction over redeterminations of excessive profits to the U.S. Court of Claims. First, the subject matter of renegotiation cases is similar to matters presently being handled in the Court of Claims—for example, actions brought by contractors for refunds in cases involving contracts with the Government. Second, the procedures normally followed in the Court of Claims are believed to be better suited to the process of renegotiation than those which generally prevail in a Tax Court proceeding. It is not unusual, for example, for the Court of Claims to handle cases extending over a long period of time, and for that Court (or a Court of Claims Commissioner) to conduct a lengthy hearing involving a large volume of evidence. Both of these elements customarily exist in a renegotiation case. On the other hand, a Tax Court judge often has a calendar of cases (predominantly tax cases) which must be disposed of as expeditiously as possible, and the technique needed for this type of work is not closely related to the procedures required in renegotiation cases.

Third, the workload of the Tax Court recently has been much heavier than that of the Court of Claims with the result that a shifting of renegotiation cases to the latter should make a substantial contribution to the evening-out of the workload of the two courts. Finally, it is the committee's understanding that both the Court of Claims and the Tax Court believe that this transfer of jurisdiction in renegotiation cases is appropriate.

Explanation of provision.—The bill provides that petitions for redeterminations of excessive profits determined by the Renegotiation Board are to be filed with the U.S. Court of Claims, and that 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.

As in the case of the present proceeding before the Tax Court, 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 United States Code for the review of other cases in the Court of Claims.

The bill provides that the change in jurisdiction with respect to renegotiation cases is to apply with respect to any case in which the time for filing a petition for a redetermination of an order of the Renegotiation Board expires on or after the date of enactment of this bill. Any petition for a redetermination which is filed with the Tax Court on or after the date of enactment of the bill and within 90 days thereafter is to be considered as if filed with the Court of Claims and is to be transferred from the Tax Court to the Court of Claims within 30 days after the petition is filed. In addition, all cases arising under the Renegotiation Act which are pending in the Tax Court on the date

of enactment of this bill are to be transferred within 30 days from the Tax Court to the Court of Claims except where the chief judge of the Tax Court determines otherwise. If he finds that the proceedings have progressed to the point where the case can be more expeditiously decided by the Tax Court than the Court of Claims, he can direct that the case be retained by the Tax Court. Any case remaining with the Tax Court because of the application of this rule after the effective date of this bill or any case on appeal from a judgment of the Tax Court on the effective date of this bill is to be governed by the same rules and provisions of the Renegotiation Act as are applied under present law.

B. Tax Court Amendments

1. RECALL OF RETIRED JUDGES

Since 1953, the Internal Revenue Code (as part of the Tax Court judges retirement provisions; Public Law 83–219, 67 Stat. 482) has authorized the chief judge of the Tax Court to recall retired Tax Court judges to perform judicial duties. This provision (sec. 7447(c) of the 1954 Code, sec. 1106(c) of the 1939 Code) applies to any judge "who is receiving retired pay" under the Tax Court retirement system. One of the major reasons advanced for instituting this system was the need to "facilitate the handling of the very heavy workload of the court." (H. Rept. 83–846, p. 4; S. Rept. 83–675, p. 4.)

Frequently, a judge is recalled to perform judicial duties immediately upon his retirement. Recently, it has been suggested that the statute might technically be read to permit recall of a judge only after he or she has actually received some retired pay. The committee does not believe that the statute and legislative history would support such a reading. Nevertheless, the committee agrees with the House that it is appropriate to remove any possible ambiguity currently existing in the statutory language by amending section 7447(c) to provide that the chief judge may recall a judge who *has elected to receive* retired pay, whether or not the judge has actually received any retirement pay before being recalled.

Since this amendment is merely a clarification of existing law, the bill makes the amendment effective as if included in the Internal Revenue Code of 1954 on the date of its enactment and provides that provisions having the same effect as the amendment shall be treated as having been included in the Internal Revenue Code of 1939 effective on and after August 7, 1953 (the date of enactment of Public Law 83–219).

2. SURVIVORS' BENEFITS

Under section 7448(m) of the code, a Tax Court judge's survivors' annuity is based on the average annual salary received by the judge for his judicial service and any other prior allowable service during "the last 5 years of such service prior to his death, or prior to his receiving retired pay," whichever occurs first. The effect of this provision is to freeze the base for computation of survivors' annuities at the time that a retired judge first receives retired pay.

A Tax Court judge electing survivors' annuity coverage must deposit in the survivors' annuity fund 3 percent of his retired pay (as well as 3 percent of his salary before retirement and 3 percent of his compensation (in lieu of retired pay) for any period during which

he is on recall status; see sec. 7448(c)). If a judge's compensation or retired pay is increased after the time he has first received retired pay, he must deposit into the fund 3 percent of the increased compensation or retired pay.

The committee agrees with the House that it is inequitable to freeze the base for determining benefits while requiring the judge to increase his contributions to the fund. To remove this inequity, the bill provides that the base for determining benefits may take into account the period after the judge has first received retired pay. The bill amends section 7448(m) to provide that the base of the survivors' annuity is to be computed on the period of 5 consecutive years in which a judge receives the largest amount of compensation (treating retired pay as compensation for these purposes) for his services. The bill also clarifies the fact that (as under existing law) the years of service used in computing the amount of the survivor's annuity includes periods during which a judge receives retired pay.

The change made by this amendment is to apply to Tax Court judges dying on or after the date of the enactment of this act.

III. COSTS OF CARRYING OUT THE BILL AND EFFECT ON THE REVENUES OF THE BILL

In compliance with section 252(a) of the Legislative Reorganization Act of 1970, the following statement is made relative to the costs to be incurred in carrying out this bill and the effect on the revenues of the bill. The committee estimates that the Renegotiation Board's administrative expenses in carrying out its functions under the Renegotiation Act will be approximately $5 million a year. Accordingly, it is estimated that the 2-year extension of the act provided by the bill (which in effect requires new cases to be filed with the Board for an additional 2 years) will result in additional costs of $10 million. Because the cases to which this 2-year extension applies are likely to be processed by the Board about 2 years after the years to which the cases relate, it is probable that this additional $10 million of expense will be incurred in the period from 2 to 3 years beyond the fiscal year 1972.

On the other hand, based on experience in recent years, the committee estimates that the 2-year extension of the Renegotiation Act provided by the bill will result in excessive profits determinations by the Renegotiation Board in cases filed with the Board during the 2-year period of from $40 to $70 million in total. After allowance of the credit for Federal income taxes previously paid on the profits, the amount actually recovered by the Government will be approximately one-half of this amount or from $20 to $35 million. On the basis of the current trend in commercial interest rates, the committee estimates the change made by the bill in the interest rate payable on excessive profits (and on overcollections of excessive profits) when fully effective will result in a net revenue gain of approximately $0.5 million for a 1-year period. The committee does not believe that the change made by the bill regarding the transfer of jurisdiction over renegotiation cases to the Court of Claims will result in additional costs in the current fiscal year or in any of the 5 following years. The Renegotiation Board agrees with this statement.

The committee estimates that the costs in the current fiscal year and in the 5 following fiscal years of the two changes made by the bill regarding Tax Court judges (i.e., those dealing with the recall of retired judges and survivors' benefits) will be negligible.

IV. VOTE OF COMMITTEE IN REPORTING THE BILL

In compliance with section 133 of the Legislative Reorganization Act, as amended, the following statement is made relative to the vote of the committee on reporting the bill. This bill was ordered favorably reported by the committee without a roll call vote and without objection.

V. CHANGES IN EXISTING LAW

In compliance with subsection (4) of Rule XXIX of the Standing Rules of the Senate, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman):

RENEGOTIATION ACT OF 1951

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TITLE I—RENEGOTIATION OF CONTRACTS

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SEC. 102. CONTRACTS SUBJECT TO RENEGOTIATION.

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(c) TERMINATION.—

(1) IN GENERAL.—The provisions of this title shall apply only with respect to receipts and accruals, under contracts with the Departments and related subcontracts, which are determined under regulations prescribed by the Board to be reasonably attributable to performance prior to the close of the termination date. Notwithstanding the method of accounting employed by the contractor or subcontractor in keeping his records, receipts or accruals determined to be so attributable, even if received or accrued after the termination date, shall be considered as having been received or accrued not later than the termination date. For the purposes of this title, the term "termination date" means June 30, [1971.] *1973.*

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SEC. 103. DEFINITIONS.

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(f) PROFITS DERIVED FROM CONTRACTS WITH THE DEPARTMENTS AND SUBCONTRACTS.—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 and determined to be allocable thereto. All items estimated to be allowed as deductions and exclusions under chapter 1 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, except that no amount shall be allowed as an item of cost by reason of the application of a carry-over or carry-back. Notwithstanding any other provision of this section, there shall be allowed as an item of cost in any fiscal year ending before December 31, 1956, subject to regulations of the Board, an amount equal to the excess, if any, of costs (computed without the application of this sentence) paid or incurred in the preceding fiscal year with respect to receipts or accruals subject to the provisions of this title over the amount of receipts or accruals subject to the provisions of this title which were received or accrued in such preceding fiscal year, but only to the extent that such excess did not result from gross inefficiency of the contractor or subcontractor. For the purposes of the preceding sentence, the term "preceding fiscal year" does not include any fiscal year ending prior to January 1, 1951. Costs shall be determined in accordance with the method of accounting regularly employed by the contractor or subcontractor in keeping his records, but, if no such method of accounting has been employed, or if the method so employed does not, in the opinion of the Board, or, upon redetermination, in the opinion of [The Tax Court of the United States] *the Court of Claims*, properly reflect such costs, such costs shall be determined in accordance with such method as in the opinion of the Board, or, upon redetermination, in the opinion of [The Tax Court of the United States] *the Court of Claims*, does properly reflect such costs. In determining the amount of excessive profits to be eliminated, proper adjustment shall be made on account of the taxes measured by income, other than Federal taxes, which are attributable to the portion of the profits which are not excessive.

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(i) RECEIVED OR ACCRUED AND PAID OR INCURRED.—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 records, but if no such method of accounting has been employed, or if the method so employed does not, in the opinion of the Board, or, upon redetermination, in the opinion of [The Tax Court of the United States] *the Court of Claims*, properly reflect his receipts or accruals or payments or obligations, such receipts or accruals or such payments or obligations shall be determined in accordance with such method as in the opinion of the Board, or, upon redetermination, in the opinion of [The Tax Court of the United States] *the Court of Claims*, does properly reflect such receipts or accruals or such payments or obligations.

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SEC. 105. RENEGOTIATION PROCEEDINGS.

(a) PROCEEDINGS BEFORE THE BOARD.—Renegotiation proceedings shall be commenced by the mailing of notice, to that effect, in such form as may be prescribed by regulation, by registered mail or by certified mail to the contractor or subcontractor. The Board shall endeavor to make an agreement with the contractor or subcontractor with respect to the elimination of excessive profits received or accrued, and with respect to such other matters, relating thereto as the Board deems advisable. Any such agreement, if made, may, with the con-

sent of the contractor or subcontractor, also include provisions with respect to the elimination of excessive profits likely to be received or accrued. If the Board does not make an agreement with respect to the elimination of excessive profits received or accrued, it shall issue and enter an order determining the amount , if any, of such excessive profits, and forthwith give notice thereof by registered mail or by certified mail to the contractor or subcontractor. In the absence of the filing of a petition with [The Tax Court of the United States] *the Court of Claims* under the provisions of and within the time limit prescribed in section 108, such order shall be final and conclusive and shall not be subject to review or redetermination by any court or other agency. The Board shall exercise its powers 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) by a contractor or subcontractor under contracts with the Department and subcontracts, and not separately with respect to amounts received or accrued under separate contracts with the Departments or subcontracts, except that the Board may exercise such powers separately with respect to amounts received or accrued by the contractor or subcontractor under any one or more separate contracts with the Departments or subcontracts at the request of the contractor or, subcontractor. By agreement with any contractor or subcontractor, and pursuant to regulations promulgated by it, 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. Renegotiation shall be conducted on a consolidated basis with a parent and its subsidiary corporations which constitute an affiliated group under section 141(d) of the Internal Revenue Code if all of the corporations included in such affiliated group request renegotiation on such basis and consent to such regulations as the Board shall prescribe 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, for the purposes of section 3806 of the Internal Revenue Code, to each corporation included in such affiliated group. Whenever the Board makes a determination with respect to the amount of excessive profits, and such determination is made by order, it shall, at the request of the contractor or subcontractor as the case may be, prepare and furnish such contractor or subcontractor with a statement of such determination, of the facts used as a basis therefor, and of its reasons for such determination. Such statement shall not be used in [The Tax Court of the United States] *the Court of Claims* as proof of the facts or conclusions stated therein.

(b) METHODS OF ELIMINATING EXCESSIVE PROFITS.—

(1) IN GENERAL.—Upon the making of an agreement, or the entry of an order, under subsection (a) of this section by the Board, or the entry of an order under section 108 by [The Tax Court of the United States] *the Court of Claims*, determining excessive profits, the Board shall forthwith authorize and direct the Secretaries or any of them to eliminate such excessive profits—

(A) by reductions in the amounts otherwise payable to the contractor under contracts with the Departments, or by other revision of their terms;

(B) by withholding from amounts otherwise due to the contractor any amount of such excessive profits;

(C) by directing any person having a contract with any agency of the Government, or any subcontractor thereunder, to withhold for the account of the United States from any amounts otherwise due from such person or such subcontractor to a contractor, or subcontractor, having excessive profits to be eliminated, and every such person or subcontractor receiving such direction shall withhold and pay over to the United States the amounts so required to be withheld;

(D) by recovery from the contractor or subcontractor, or from any person or subcontractor directed under subparagraph (C) to withhold for the account of the United States, through payment, repayment, credit, or suit any amount of such excessive profits realized by the contractor or subcontractor or directed under subparagraph (C) to be withheld for the account of the United States; or

(E) by any combination of these methods, as is deemed desirable.

(2) INTEREST.—Interest at the rate [of 4 per centum per annum] *per annum determined pursuant to the next to the last sentence of this paragraph for the period which includes the date on which interest begins to run* shall accrue and be paid on the amount of such excessive profits from the thirtieth day after the date of the order of the Board or from the date fixed for repayment by the agreement with the contractor or subcontractor to the date of repayment, and on amounts required to be withheld by any person or subcontractor for the account of the United States pursuant to paragraph (1)(C), from the date payment is demanded by the Secretaries or any of them to the date of payment. When [The Tax Court of the United States] *the Court of Claims*, under section 108, redetermines the amount of excessive profits received or accrued by a contractor or subcontractor, interest at the rate [of 4 per centum per annum] *per annum determined pursuant to the next to the last sentence of this paragraph for the period which includes the date on which interest begins to run* shall accrue and be paid by such contractor or subcontractor as follows:

(A) When the amount of excessive profits determined by [the Tax Court] *the Court of Claims* is greater than the amount determined by the Board, interest shall accrue and be paid on the amount determined by the Board from the thirtieth day after the date of the order of the Board to the date of repayment and, in addition thereto, interest *at the same rate* shall accrue and be paid on the additional amount determined by [the Tax Court] *the Court of Claims* from the date of its order determining such excessive profits to the date of repayment.

(B) When the amount of excessive profits determined by [the Tax Court] *the Court of Claims* is equal to the amount determined by the Board, interest shall accrue and be paid on such amount from the thirtieth day after the date of the order of the Board to the date of repayment.

(C) When the amount of excessive profits determined by [the Tax Court] *the Court of Claims* is less than the amount determined by the Board, interest shall accrue and be paid on such lesser amount from the thirtieth day after the date

of the order of the Board to the date of repayment, except that no interest shall accrue or be payable on such lesser amount if such lesser amount is not in excess of an amount which the contractor or subcontractor tendered in payment prior to the issuance of the order of the Board.

Interest shall accrue and be paid at a rate which the Secretary of the Treasury shall specify as applicable to the period beginning on July 1, 1971, and ending on December 31, 1971, and to each six-month period thereafter. Such rate shall be determined by the Secretary of the Treasury, taking into consideration current private commercial rates of interest for new loans maturing in approximately five years.

(3) SUITS FOR RECOVERY.—Actions on behalf of the United States may be brought in the appropriate courts of the United States to recover, (A) from the contractor or subcontractor, any amount of such excessive profits and accrued interest not withheld or eliminated by some other method under this subsection, and (B) from any person or subcontractor who has been directed under paragraph (1)(C) of this subsection to withhold for the account of the United States, the amounts required to be withheld under such paragraph, together with accrued interest thereon.

(4) SURETIES.—The surety under a contract or subcontract shall not be liable for the repayment of any excessive profits thereon.

(5) ASSIGNEES.—Nothing herein contained shall be construed (A) to authorize any Department or agency of the Government, except to the extent provided in the Assignment of Claims Act of 1940, as now or hereafter amended, to withhold from any assignee referred to in said Act, any moneys due or to become due, or to recover any moneys paid, to such assignee under any contract with any Department or agency where such moneys have been assigned pursuant to such Act, or (B) to authorize any Department or agency of the Government to direct the withholding pursuant to this Act, or to recover pursuant to this Act, from any bank, trust company or other financing institution (including any Federal lending agency) which is an assignee under any subcontract, any moneys due or to become due or paid to any such assignee under such subcontract.

(6) INDEMNIFICATION.—Each person is hereby indemnified by the United States against all claims on account of amounts withheld by such person pursuant to this subsection from a contractor or subcontractor and paid over to the United States.

(7) TREATMENT OF RECOVERIES.—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 from appropriations from the Treasury, the Secretary shall certify the amount thereof to the Treasury and the appropriations of his Department shall be reduced by an amount equal to the amount so withheld or credited. The amount of such reductions shall be transferred to the surplus fund of the Treasury.

(8) CREDIT FOR TAXES PAID.—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.

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SEC. 106. EXEMPTIONS.

(a) MANDATORY EXEMPTIONS.—The provisions of this title shall not apply to—

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(6) any contract which the Board determines does not have a direct and immediate connection with the national defense. The Board shall prescribe regulations designating those classes and types of contracts which shall be exempt under this paragraph; and the Board shall, in accordance with regulations prescribed by it, exempt any individual contract not falling within any such class or type if it determines that such contract does not have a direct and immediate connection with the national defense. In designating those classes and types of contracts which shall be exempt and in exempting any individual contract under this paragraph, the Board shall consider as not having a direct or immediate connection with national defense any contract for the furnishing of materials or services to be used by the United States, a Department or agency thereof, in the manufacture and sale of synthetic rubbers to a private person or to private persons which are to be used for nondefense purposes. If the use by such private person or persons shall be partly for defense and partly for nondefense purposes, the Board shall consider as not having a direct or immediate connection with national defense that portion of the contract which is determined not to have been used for national defense purposes. The method used in making such determination shall be subject to approval by the Board. Notwithstanding section 108 of this title, regulations prescribed by the Board under this paragraph, and any determination of the Board that a contract is or is not exempt under this paragraph, shall not be reviewed or redetermined by [the Tax Court] *the Court of Claims* or by any other court or agency; or

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SEC. 108. REVIEW BY THE [TAX COURT] *COURT OF CLAIMS.*

Any contractor or subcontractor aggrieved by an order of the Board determining the amount of excessive profits received or accrued by such contractor or subcontractor may—

(a) if the case was conducted initially by the Board itself—within ninety days (not counting Sunday or a legal holiday in the District of Columbia as the last day) after the mailing under section 105(a) of the notice of such order, or

(b) if the case was not conducted initially by the Board itself—within ninety days (not counting Sunday or a legal holiday in the District of Columbia as the last day) after the mailing under section 107(e) of the notice of the decision of the Board not to review the case or the notice of the order of the Board determining the amount of excessive profits,

file a petition with [The Tax Court of the United States] *the Court of Claims* for a redetermination thereof. Upon such filing such court shall have exclusive jurisdiction, by order, to determine the amount, if any, of such excessive profits received or accrued by the contractor or subcontractor, and such determination shall not be reviewed or redetermined by any court or agency except as provided in Section 108A. The court may determine as the amount of excessive profits an amount either less than, equal to, or greater than that determined by the Board. A proceeding before the [Tax Court] *Court of Claims* to finally determine the amount, if any, of excessive profits shall not be treated as a proceeding to review the determination of the Board, but shall be treated as a proceeding de novo. [For the purposes of this section the court shall have the same powers and duties, insofar as applicable in respect of the contractor, the subcontractor, the Board, and the Secretary, and in respect of the attendance of witnesses and the production of papers, notice of hearings, hearings before divisions, review by the Tax Court of decisions of divisions, stenographic reporting, and reports of proceedings, as such court has under sections 1110, 1111, 1113, 1114, 1115(a), 1116, 1117(a), 1118, 1120, and 1121 of the Internal Revenue Code in the case of a proceeding to redetermine a deficiency.] In the case of any witness for the Board, the fees and mileage, and the expenses of taking any deposition shall be paid out of appropriations of the Board available for that purpose, and in the case of any other witnesses shall be paid, subject to rules prescribed by the court, by the party at whose instance the witness appears or the deposition is taken. The filing of a petition under this section shall operate to stay the execution of the order of the Board under subsection (b) of section 105 only if within ten days after the filing of the petition the petitioner files with the [Tax Court] *Court of Claims* a good and sufficient bond, approved by such court, in such amount as may be fixed by the court. Any amount collected by the United States under an order of the Board in excess of the amount found to be due under a determination of excessive profits by the [Tax Court] *Court of Claims* shall be refunded to the contractor or subcontractor with interest thereon [at the rate of 4 per centum per annum] from the date of collection by the United States to the date of refund *at the rate per annum determined pursuant to the next to the last sentence of section 105(b)(2) for the period which includes the date on which interest begins to run.*

[SEC. 108A. REVIEW OF TAX COURT DECISIONS IN RENEGOTIATION CASES.

[(a) JURISDICTION.—Except as provided in section 1254 of title 28 of the United States Code, the United States Courts of Appeals shall have exclusive jurisdiction to review decisions by the Tax Court of the United States under section 108 of this Act in the same manner and to the same extent as decisions of the district courts in civil actions tried without a jury, except as otherwise provided in this section. In no case shall the question of the existence of excessive profits, or the extent thereof, be reviewed, and findings of fact by the Tax Court shall be conclusive unless such findings are arbitrary or capricious. The judgment of any such court shall be final except that

it shall be subject to review, under the limitations herein provided for, by the Supreme Court of the United States upon certiorari, in the manner provided in section 1254 of title 28 of the United States Code.

[(b) POWERS.—Upon such review, such courts shall have only the power to affirm the decision of the Tax Court or to reverse such decision on questions of law and remand the case for such further action as justice may require, except that such court shall not reverse and remand the case for error of law which is immaterial to the decision of the Tax Court.

[(c) VENUE OF APPEALS FROM TAX COURT DECISIONS IN RENEGOTIATION CASES.—A decision of the Tax Court of the United States under section 108 of this Act may, to the extent subject to review, be reviewed by—

[(1) the United States Court of Appeals for the circuit in which is located the office to which the contractor or subcontractor made his Federal income tax return for the taxable year which corresponds to the fiscal year with respect to which such decision of the Tax Court was made, or if no such return was made for such taxable year, then by the United States Court of Appeals for the District of Columbia, or

[(2) any United States Court of Appeals designated by the Attorney General and the contractor or subcontractor by stipulation in writing.]

SEC. 108A. REVIEW OF COURT OF CLAIMS DECISIONS.

The decisions of the Court of Claims under section 108 shall be subject to review by the Supreme Court upon certiorari in the manner provided in section 1255 of title 28 of the United States Code for the review of other cases in the Court of Claims.

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SEC. 114. REPORTS TO CONGRESS.

The Board shall on or before January 1, 1957, and on or before January 1 of each year thereafter, submit to the Congress a complete report of its activities for the preceding year ending on June 30. Such report shall include—

(1) the number of persons in the employment of the Board during such year, and the places of their employment;

(2) the administrative expenses incurred by the Board during such year;

(3) statistical data relating to filings during such year by contractors and subcontractors, and to the conduct and disposition during such year of proceedings with respect to such filings and filings made during previous years;

(4) an explanation of the principal changes made by the Board during such year in its regulations and operating procedures;

(5) the number of renegotiation cases disposed of by the *Court of Claims, the United States* Tax Court, each United States Court of Appeals and the Supreme Court during such year, and the number of cases pending in each such court at the close of such year; and

(6) such other information as the Board deems appropriate.

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SECTIONS 7447 AND 7448 OF THE INTERNAL REVENUE CODE OF 1954

SEC. 7447. RETIREMENT.

(a) * * *

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(c) RECALLING OF RETIRED JUDGES.—[Any individual who is receiving] *At or after his retirement, any individual who has elected to receive* retired pay under subsection (d) may be called upon by the chief judge of the Tax Court to perform such judicial duties with the Tax Court as may be requested of him for any period or periods specified by the chief judge; except that in the case of any such individual—

(1) the aggregate of such periods in any one calendar year shall not (without his consent) exceed 90 calendar days; and

(2) he shall be relieved of performing such duties during any period in which illness or disability precludes the performance of such duties.

Any act, or failure to act, by an individual performing judicial duties pursuant to this subsection shall have the same force and effect as if it were the act (or failure to act) of a judge of the Tax Court; but any such individual shall not be counted as a judge of the Tax Court for purposes of section 7443(a). Any individual who is performing judicial duties pursuant to this subsection shall be paid the same compensation (in lieu of retired pay) and allowances for travel and other expenses as a judge.

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SEC. 7448. ANNUITIES TO WIDOWS AND DEPENDENT CHILDREN OF JUDGES.

(a) * * *

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(m) COMPUTATION OF ANNUITIES.—The annuity of the widow of a judge electing under subsection (b) shall be an amount equal to the sum of (1) [1¼ percent of the average annual salary received by such judge for judicial service and any other prior allowable service during the last 5 years of such service prior to his death, or prior to his receiving retired pay under section 7447(d), whichever first occurs, multiplied by the sum of his years of judicial service,] *1¼ percent of the average annual salary (whether judge's salary or compensation for other allowable service) received by such judge for judicial service (including periods in which he received retired pay under section 7447(d)) or for any other prior allowable service during the period of 5 consecutive years in which he received the largest such average annual salary, multiplied by the sum of his years of such judicial service,* his years of prior allowable service as a Senator, Representative, Delegate, or Resident Commissioner in Congress, his years of prior allowable service performed as a member of the Armed Forces of the United States, and his years, not exceeding 15, of prior allowable service performed as a congressional employee (as defined in section 2107 of title 5 of the United States Code, and (2) three-fourths of 1 percent of such average annual salary multiplied by his years of any other prior allowable service,

but such annuity shall not exceed 37½ percent of such average annual salary and shall be further reduced in accordance with subsection (d), if applicable.

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