

REPORT OF THE COMMITTEE ON CLAIMS ADJUDICATIONS IN SUPPORT OF RECOMMENDATION NO. 22

Prepared by
Dennis S. Aronowitz
Professor of Law
Boston University

War may be hell for most; historically, however, it has proved exceedingly profitable for a few. Occasionally war profiteering is the result of fraud, or bribery of government representatives; more often it is the consequence of contractors being asked either to produce novel items or to achieve unprecedented production levels for which there is no cost experience.¹ Under such circumstances it ordinarily is impossible to arrive at reasonable estimates of production costs. The result frequently has been wind-fall profits at the expense of the public treasury. Prior to World War II the major devices for controlling this problem were taxation of excess profits,² as well as rigid, percentage limitations on profits under ship and airplane contracts.³ When these techniques failed to bring about appropriate relief, post-procurement renegotiation was adopted.

The earliest renegotiation procedures were instituted administratively by the War Department in an attempt to recover unusually high profits being realized from fixed price contracts that had been let during the initial procurement spurt in the forties.⁴ The procedures adopted were wholly voluntary and, when successful, resulted in reduction of prices in light of actual cost experience. In 1942, Congress adopted the First Renegotiation Act which required all military procurement con-

¹ See, e.g., Marbury and Bowie, *Renegotiation and Procurement*, 10 Law & Contemp. Prob. 218, 219 (1943).

² See generally Hensel and McClung, *Profit Limitation Controls Prior to the Present War*, 10 Law & Contemp. Prob. 187, 196-199 (1943).

³ Under the original Vinson-Trammell Act, ch. 95, 48 Stat. 505 (1934), contractors of naval vessels were limited to a ten percent profit. The same profit restriction was imposed on contractors of merchant ships (Merchant Marine Act, 1936, ch. 858, § 505, 49 Stat. 1998 (1936)), and a twelve percent profit limitation on contracts for production of army aircraft (Act of April 3, 1939, ch. 35, § 14, 53 Stat. 560).

⁴ See Marbury and Bowie, *supra* note 1 at 218-220.

tracts and sub-contracts in excess of \$100,000 to contain a provision for renegotiation of the contract price and directing the Secretaries of each Department to renegotiate such contracts to recover any excessive profits received thereunder.⁵ The Act did not define "excessive profits" although it did direct the Secretaries in making their determinations to disregard excess salaries and reserves in computing costs.⁶ As originally enacted it authorized renegotiation on a single contract basis; a subsequent amendment during 1942 authorized renegotiation of contracts either singly or in groups.⁷ This first renegotiation statute, which was based upon the practice developed by the War Department, emphasized a process of negotiation and bilateral agreement rather than adjudication and order, although the Departments were authorized to enter unilateral orders if agreement could not be attained. In large measure, the procedure was conceived of as a part of the continuum of the contracting process.⁸

In 1944, Congress adopted the Second Renegotiation Act,⁹ which has been the principal model for all subsequent renegotiation legislation. The 1944 Act made some basic alterations in the process. For one, it created the War Contracts Price Adjustment Board which was authorized to administer the policy of renegotiation in place of each Department acting individually.¹⁰ In addition, the Act authorized a contractor aggrieved by an order of the Board to petition the Tax Court for a redetermination in a "proceeding de novo" which was "not [to] be treated as a proceeding to review the determination of the Board. . . ." ¹¹ Further, renegotiation was specifically required to be on a fiscal year basis rather than a contract by contract basis.¹² Finally, the other major change was the inclusion of the following definition of the term "excessive profits," which was taken from War Department regulations adopted under the prior legislation.¹³

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 title to be excessive. In determining ex

⁵ Ch. 247, § 403, 56 Stat. 245-46 (1942).

⁶ *Id.* at 246.

⁷ Revenue Act of 1942, ch. 619, § 801, 56 Stat. 982, 983.

⁸ See, *e.g.*, Marbury and Bowie, *supra* note 1 at 224-31.

⁹ Revenue Act of 1943, ch. 63, § 701, 58 Stat. 78-92 (1944).

¹⁰ *Id.* at 85-86.

¹¹ *Id.* at 86.

¹² *Id.* at 83.

¹³ See *Lichter v. United States*, 334 U.S. 742, 773-774, 783 (1948).

cessive 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 materials, facilities, and manpower;
- (ii) reasonableness of costs and profits, with particular regard to volume of production, normal pre-war earnings and comparison of war and peacetime 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 turnover;
- (vii) such other factors the consideration of which the public interest and fair and equitable dealing may require, which factors shall be published in the regulations of the Board from time to time as adopted.¹⁴

A persistent feature of renegotiation has been its temporary character. The Second Renegotiation Act was by its terms to remain in effect only with respect to contracts performed through December 31, 1944, unless extended beyond that date by the President.¹⁵ The President exercised this authority and extended the Act's effective date an additional year.¹⁶ No renegotiation authority existed for contracts performed during the next two calendar years. In 1948 Congress enacted new renegotiation legislation which was applicable to contracts performed after June 30, 1948 but was limited principally to contracts for procurement of aircraft.¹⁷ Later that same year Congress authorized the Secretary of Defense to apply this legislation to other categories of procurement contracts¹⁸ and then ultimately specified that all negotiated contracts entered into by the Defense establishment during fiscal year 1951 were to be subject to renegotiation.¹⁹ With the outbreak of the Korean War and the ensuing crash, procurement activity, Congress enacted the Renegotiation Act of 1951.²⁰ Most of its major provisions were based upon the 1944 Act. The principal change under the new legislation was

¹⁴ Revenue Act of 1943, ch. 63, § 701, 58 Stat. 79 (1944).

¹⁵ *Id.* at 88.

¹⁶ Proclamation No. 2631, 3 C.F.R. 42 (1943-1948 Comp.).

¹⁷ Renegotiation Act of 1948, 50 U.S.C. App. § 1193 (1964).

¹⁸ Second Deficiency Appropriation Act, 1948, ch. 658, § 401, 62 Stat. 1049-50.

¹⁹ General Appropriation Act, 1951, ch. 896, § 618, 64 Stat. 751 (1950).

²⁰ 50 U.S.C. App. §§ 1211-33 (1964).

the creation of the Renegotiation Board, a five man body independent of the departments whose procurement would be subject to renegotiation.²¹ Although by its terms the Act was to apply to proceeds earned by contractors only during the calendar years 1951 through 1953,²² the Act has been extended on nine separate occasions for periods ranging from six months to three years.²³ The most recent extension, adopted in October 1968, was for a three year period through June 30, 1971.²⁴

Scope and application of the current Act.

Although the 1951 Act, as amended, contains a number of important modifications of the earlier statutes, the basic concept of renegotiation and its applicability have changed little since the 1944 legislation. The present statute applies to any contractor or subcontractor who during his regular fiscal year has receipts or accruals in excess of one million dollars from contracts²⁵ involving one or more of ten federal agencies—the Departments of Defense, Army, Navy, Air Force, the Maritime Administration, the Federal Maritime Board, the General Service Administration, the National Aeronautics and Space Administration, the Federal Aviation Administration and the Atomic Energy Commission.²⁶ In addition, the Act applies to brokers and manufacturers' agents who receive or accrue more than \$25,000 for soliciting or procuring contracts or subcontracts involving these same agencies.²⁷ Various types of contracts which otherwise would be subject to renegotiation have been expressly exempted—for example, contracts for agricultural commodities, mineral products, or standard commercial articles, and contracts with governmental subdivisions, common carriers and tax exempt organizations.²⁸

Under the Act, contracts awarded by the covered agencies are to contain a provision under which contractors agree "to the elimination of excessive profits through renegotiation" and

²¹ *Id.* § 1217.

²² *Id.* § 1212.

²³ Act of September 1, 1954, ch. 1209, § 1, 68 Stat. 1116 (one year extension); Act of August 3, 1955, ch. 499, § 1, 69 Stat. 447 (two year extension); Renegotiation Amendments Act of 1956, ch. 821, § 2, 70 Stat. 786 (two year extension); Act of September 6, 1958, Pub. L. No. 85-930, § 1, 72 Stat. 1789 (six month extension); Act of July 13, 1959, Pub. L. No. 86-89, § 1, 73 Stat. 210 (three year extension); Act of July 3, 1962, Pub. L. No. 87-520, § 76 Stat. 134 (two year extension); Act of June 30, 1964, Pub. L. No. 88-339, § 1, 78 Stat. 2 (two year extension); Act of June 30, 1966, Pub. L. No. 89-480, 80 Stat. 232 (two year extension); Renegotiation Amendments Act of 1968, 50 U.S.C.A. App. § 1212 (Supp. 1970).

²⁴ 50 U.S.C. § 1212 (1964), as amended, 50 U.S.C.A. App. § 1212 (Supp. 1970).

²⁵ *Id.* § 1215(f) (1).

²⁶ 50 U.S.C. App. § 1213(a) (1964).

²⁷ *Id.* §§ 1213(g) (3), 1215(f) (2).

²⁸ 50 U.S.C. App. § 1216 (1964), as amended, 50 U.S.C.A. App. § 1216 (Supp. 1970).

to include a corresponding provision in any subcontracts let in furtherance of their prime contracts.²⁹ The renegotiation process is commenced by the contractor filing with the Board a financial statement for the preceding fiscal year in a form which segregates renegotiable and non-renegotiable income, expenses and profit.³⁰ In most cases, after the Board reviews the filing, and without further proceedings, the contractor receives a clearance—a determination of no excessive profits—for that fiscal year.³¹ Where the Board cannot readily determine from the statements filed that excessive profits have not been realized the cases are subjected to further scrutiny. In some of these instances a clearance issues after the contractor supplies additional information.³² If the matter cannot be disposed of in this fashion, it is then assigned to one of two Regional Boards for investigation and processing.³³

The authority of a Regional Board depends upon the amount of profits involved. Cases where a contractor's reported aggregate profits from renegotiable business are not in excess of \$800,000 are designated Class B cases over which Regional Boards have final authority to issue clearances, enter into refund agreements, or if an agreement cannot be reached to enter unilateral orders determining the amount of excess profits.³⁴ A unilateral order of a Regional Board may be reviewed by the headquarters Board either on its own motion or upon the request of the contractor.³⁵

Class A cases are those involving aggregate renegotiable profits exceeding \$800,000.³⁶ The Regional Boards do not have final authority to dispose of Class A cases and all clearances and agreements must be approved by the Board.³⁷ When a clearance or agreement cannot be reached in these cases, they are reassigned to the headquarters Board together with the Regional Board's recommendation.³⁸

The original renegotiation process instituted by the War De-

²⁹ 50 U.S.C. App. § 1214 (1964).

³⁰ *Id.* § 1215(e) (1). See also 32 C.F.R. § 1470.3 (1969).

³¹ Out of a total of 20,027 filings screened during the period fiscal years 1965 through 1969, 16,796 clearances (83.8%) were granted by the Board without further proceedings. See Renegotiation Board, Thirteenth Annual Report 6-7 (1968) [hereinafter referred to as "1968 Annual Report"].

³² Joint Comm. on Internal Revenue Taxation, Report on the Renegotiation Act of 1951, H.R. Doc. No. 322, 87 Cong., 2d Sess. 29-30 (1962 [hereinafter referred to as 1962 Joint Comm. Rep.]).

³³ 32 C.F.R. § 1471.1 (1969). See also 1962 Joint Comm. Rep. 30-37.

³⁴ 32 C.F.R. §§ 1471.2(b), 1472.3, 1475.3(b) (1969).

³⁵ 50 U.S.C. App. § 1217(e) (1964); 32 C.F.R. § 1475.3(b) (1969).

³⁶ 32 C.F.R. § 1471.1 (1969).

³⁷ 32 C.F.R. §§ 1473.2(a), 1474.3(a) (1969).

³⁸ 32 C.F.R. § 1475.3(a) (1969).

partment was of a purely voluntary nature requiring the cooperation of contractors and seeking to achieve agreement as to refunds of excessive profits. The process was essentially non-adversarial and was treated in the main as part of the contracting process.³⁹ When renegotiation was formally enacted into law, Congress attempted to preserve this feature. Both the 1944 and 1951 Acts strongly emphasized agreement between the contractor and the Board as the desired objective.⁴⁰ And although the establishment of a body separate from the procurement agencies to conduct renegotiation tends to make the procedure somewhat more formal and less a part of the continuum of the contracting process, the Board's procedures as contained in its regulations are an attempt to de-emphasize formality and to strive for disposition by agreement rather than unilateral order.⁴¹ This philosophy is reflected in the opportunities that are provided to contractors to discuss the matter with responsible personnel of the Board during different phases of the procedure; ⁴² it is also reflected in the provision of the Act which exempts the Board from all requirements of the Administrative Procedure Act except those contained in section 3.⁴³ During various stages of a proceeding the contractor is permitted to make presentations in support of his position and, under the Board's stated practice, he is to be advised of those matters adverse to him which are being considered.⁴⁴

When a case is assigned to a Regional Board for a full investigation, a team composed of a staff accountant and a renegotiator is assigned to the matter. The accountant will review the contractor's financial statement, attempt to gain clarification of any questionable aspects and have the contractor provide whatever additional data is needed. Ultimately, the accountant will produce an accounting statement which contains, *inter alia*, detailed cost and profit analyses, as well as data on the contractor's products, plant investment, pricing, executive compensation, etc. This statement ordinarily is referred to as Part I of the renegotiation report and is made available to the contractor. Typically the contractor does not disagree with the data contained in this part of the report or its presentation.⁴⁵

³⁹ See Marbury and Bowie, *supra* note 1 at 224.

⁴⁰ Revenue Act of 1943, ch. 63, § 701; Renegotiation Act of 1951, 50 U.S.C. App. § 1215 (1964).

⁴¹ See *e.g.*, 32 C.F.R. §§ 1472.1-1472.5 (1969).

⁴² See generally 1962 Jt. Comm. Rep. 31-40.

⁴³ 50 U.S.C. App. § 1221 (1964).

⁴⁴ See 1962 Jt. Comm. Rep. 31-37; 32 C.F.R. § 1472.3 (1969).

⁴⁵ This account of these procedures is taken from the more complete description in 1962 Jt. Comm. Rep. 31-32.

The "renegotiator" has the responsibility for evaluating the case from the standpoint of the statutory factors and making the initial recommendation concerning the existence and amount, if any, of excessive profits. Typically, the renegotiator will meet with representatives of the contractor and make on-site inspections of facilities. He will analyze reports received from procurement agencies and others regarding the contractor's performance and will give the contractor an opportunity to discuss the proper application of the statutory factors. Ultimately he will prepare a report containing his analysis and recommendations. Ordinarily this is referred to as Part II of the renegotiation report and is not made available to the contractor. The full report is then submitted to the Regional Board and it will reach a tentative determination of the existence and amount of excessive profits. The contractor will then be advised of this determination and will be invited to attend a conference with the renegotiator and accountant at which time the reasons for the tentative decision are supposed to be made known to him. If the contractor does not assent to the determination he is given an opportunity to meet with a panel of the Regional Board to discuss the matter further. After this meeting a panel report will be written which reviews and analyzes the case and contains the panel's recommendation with respect to the amount of excessive profits. If an agreement still cannot be reached with the contractor, who does not receive a copy of the panel report, the case goes to the full Regional Board and it reaches a final determination. At this stage the contractor is entitled to receive a written statement summarizing the Regional Board's reasons for its determination.¹⁶

If the contractor is unconvinced and refuses to enter into an agreement, a unilateral order is entered if the case does not involve more than \$800,000 of excessive profits or is assigned to the Headquarters Board if the excessive profits determined were more than that amount. The proceedings on the Headquarters Board level, both in reassigned cases and those on appeal from a unilateral order, parallel the proceedings at the Regional Board

¹⁶ *Id.* at 32-37. This so-called "Summary of Facts and Reasons," issued by the Regional Boards, is provided for by the Board's regulations (32 C.F.R. § 1477.3 (1969)) and should not be confused with the statutory statement required under 50 U.S.C. App. § 1215(a) (1964):

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 thereof, and of its reasons for such determination. Such statement shall not be used in the Tax Court of the United States as proof of the facts or conclusions stated therein.

See 32 C.F.R. § 1477.2 (1969) governing the issuance of the statutory statement in cases when a Regional Board determination is "deemed to be the determination of the Board."

level. If the contractor remains unconvinced and refuses to enter into an agreement, a unilateral order is then entered.⁴⁷ The contractor has ninety days from entry of a unilateral order to commence a proceeding in the Tax Court for redetermination.⁴⁸

Cases that go through the full procedure and result in the entry of a unilateral order are a small minority of the total number filed. During each of the fiscal years 1965, 1966 and 1967 the Board received an average of approximately 3,500 filings from contractors and subcontractors whose renegotiable business exceeded the statutory minimums.⁴⁹ In fiscal 1968 and 1969 the number of filings rose to 4,552 and 5,030 respectively,⁵⁰ reflecting an increase in military procurement which rose from \$28 billion in 1965 to \$44.6 billion in 1967.⁵¹ The percentage of total filings that received clearances without assignment to a Regional Board ranged from approximately 90% in 1965 to 80% in 1969.⁵² These were cases in which, based on the statements of income and expenses filed by contractors, the Board was able without further investigation to make the judgment that the profits reported were not excessive. Those filings which raised questions that could not be resolved on the basis of the financial statements filed by contractors were assigned to Regional Boards.^{52a} From the Board's inception in 1951 through June 30, 1968 determinations of excessive profits were made in 3,801 cases for a total of more than \$975 million.⁵³ Of these, 3,402 determinations were the result of bilateral agreement with contractors and aggregated over \$688 million.⁵⁴ Of the 399 unilateral orders entered, 152 were taken by contractors to the Tax Court for redetermination.⁵⁵ These latter cases involved excessive profit determinations totalling nearly \$172 million.⁵⁶ Of the cases that went to the Tax Court, fifty-three were dismissed, thirty-five were disposed of by agreement, thirty-two resulted in redetermination by the Court and thirty-two were still pending on June 30, 1968.⁵⁷

⁴⁷ See 1962 Jt. Comm. Rep. 37-40.

⁴⁸ 50 U.S.C. App. § 1218 (1964).

⁴⁹ 1968 Annual Report 6.

⁵⁰ The 1968 data was derived from the Annual Report, *id.*; the 1969 data was provided by the Board at my request.

⁵¹ H.R. Rep. No. 1398, 90th Cong., 2d Sess. 3 (1968).

⁵² The 1965 data was derived from 1968 Annual Report 7; the 1969 data was provided by the Board at my request.

^{52a} An undetermined number of cases assigned to Regional Boards ultimately receive clearances. Although the precise number is not known, it is not believed to represent a significant portion of the cases assigned.

⁵³ 1968 Annual Report 12.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.* at 13.

⁵⁷ *Id.*

Despite the rather large percentage of dispositions by the Board that are either agreed to or not further contested, the renegotiation process, as well as the manner in which it is administered, has been the subject of continuous debate almost from its inception. The principal criticism, raised periodically each time Congress considers extending the Act, is directed to the need and desirability for post-procurement renegotiation by a separate agency. The arguments against extending the Act have included, *inter alia*, the claims that: procurement agencies adequately perform the same function on a contract by contract basis; the process as administered by the Board does not produce sufficient results to justify its continuation; the process reduces profits to a level so low as to discourage manufacturers from accepting government contracts.⁵⁸ These arguments have not dissuaded Congress from continuing the Act in essentially its original form and have at most resulted in amendments that exempt a large number of contractors from renegotiation.⁵⁹ This study has not been concerned with the dispute over the wisdom or necessity of the policy of renegotiation or the means adopted by Congress for its administration. The study has been concerned with a number of recurring criticisms directed at the manner in which the Act has been administered by both the Renegotiation Board and the Tax Court.

The principal criticisms levelled against the Board are: (1) its failure to articulate the criteria and standards it applies in arriving at a determination of the existence and amount of excessive profits;⁶⁰ and (2) its refusal to make available to contractors reports concerning their performance which the Board solicits from procurement officials and other contractors.⁶¹ The criticism direct-

⁵⁸ Typical of these criticisms is the statement of Rep. Charles S. Gubser, Hearings on Extending and Amending the Renegotiation Act Before the House Comm. on Ways and Means, 90th Cong., 2d Sess. 67-85 (1968). *But see* Statement of Rep. Henry B. Gonzalez, *id.* at 117-189.

⁵⁹ This has been accomplished by a variety of modifications, *e.g.*, exempting contracts for sales of "standard commercial articles or services" (50 U.S.C. App. § 1216(e) (1964), as amended, 50 U.S.C.A. App. § 1216(e) (Supp. 1970)); raising the minimum amount of aggregate annual receipts which bring a contractor within the Act from \$250,000 (Renegotiation Act of 1951, ch. 15, § 105(f), 65 Stat. 16-17 to \$1 million (50 U.S.C. App. § 1215(f) (1) (1964))).

⁶⁰ See, *e.g.*, Marcus, *The Need for Standards in Renegotiation and Other Determinations of Defense Profits*, 32 Geo. Wash. L. Rev. 23, 29-43 (1963); Kochler, *Renegotiation: Evidence and Burden of Proof in Appeal Proceedings*, 45 Va. L. Rev. 1, 3-7 (1959); Mahoney, *The Conduct of a Renegotiation Case*, 47 A.B.A.J. 872, 874-75 (1961). See also K. Davis, *Discretionary Justice: A Preliminary Inquiry*, 16-17 (1969); Staff Report on the Renegotiation Act of 1951, Joint Comm. on Internal Revenue Taxation 55-58 (1968).

⁶¹ The Board's regulations formally preclude discovery of these reports. 32 C.F.R. § 1480.9 (b) (2) (1969). This regulation is presently under attack. See Brief for Appellant at 15-23, *Grumman Aircraft Engineering Corp. v. The Renegotiation Board*, Court of Appeals for the District of Columbia, No. 22,635 (D.C. Cir. 1969). Compare *Boeing v. Coggshall*, 280 F.2d 654 (D.C. Cir. 1960).

ed at the Tax Court is that contrary to the Act it has failed to provide aggrieved contractors with "de novo" redeterminations of excessive profits and instead has treated renegotiation cases as review proceedings.⁶²

I. BOARD'S FAILURE TO ARTICULATE CRITERIA

As previously noted, the First Renegotiation Act did not contain a definition of the term "excessive profits"—the Secretaries of the various departments were merely "directed to eliminate any excessive profits" realized by a contractor.⁶³ The Second Renegotiation Act, enacted in 1944, elaborated on the term by providing a number of factors to be taken into account by the War Contracts Price Adjustment Board in determining the existence and amount of excessive profits.⁶⁴ The definition adopted in 1944 was, with minor modification,⁶⁵ repeated in the Renegotiation Act of 1951 and has remained unaltered since. Under the Act: ⁶⁶

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 title to be excessive. In determining excessive profits favorable recognition must be given to the efficiency of the contractor or subcontractor, with particular regard to attainment of quantity and quality production, reduction of costs, and economy in the use of materials, facilities, and manpower; and in addition, there shall be taken into consideration the following factors:

(1) Reasonableness of costs and profits, with particular regard to volume of production, normal earnings, and comparison of war and peacetime products;

(2) The net worth, with particular regard to the amount and source of public and private capital employed;

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

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

(5) Character of business, including source and nature of materials, complexity of manufacturing technique, character and extent of subcontracting, and rate of turn-over;

(6) Such other factors the consideration of which the public interest and fair and equitable dealing may require, which factors shall

⁶² See, e.g., Koehler, *Renegotiation: Evidence and Burden of Proof in Appeal Proceedings*, 45 Va. L. Rev. 1, 8-20 (1959); Marcus, *The Need for Standards in Renegotiation and Other Determinations of Defense Profits*, 32 Geo. Wash. L. Rev. 23, 43-51 (1963).

⁶³ Sixth Supplemental National Defense Appropriation Act, 1942, ch. 247, § 403, 56 Stat. 245, 246. See text at note 6 *supra*.

⁶⁴ Revenue Act of 1943, ch. 63, § 701, 58 Stat. 79 (1944). See text at notes 13-14 *supra*.

⁶⁵ Compare quote at p. 3 *supra* with quote at p. 13 *supra*.

⁶⁶ 50 U.S.C. App. § 1213 (e) (1964).

be published in the regulations of the Board from time to time as adopted.

In 1948 the Supreme Court, in *Lichter v. United States*,⁶⁷ held that the predecessor definition contained in the Second Renegotiation Act was not an invalid delegation by Congress and was sufficiently definite to guide those administering the Act. In reaching that conclusion the Court suggested that the elaboration contained in the 1944 Act was probably not essential to the Act's validity; it further stated, "it is not necessary that Congress supply administrative officials with a specific formula for their guidance in a field where flexibility and the adaptation of the congressional policy to infinitely variable conditions constitute the essence of the program."⁶⁸ There is no reason to believe that the Court would change its ruling if the present Act were challenged on the same ground.

The Court's holding on the constitutional issue, however, has not prevented very sharp criticism of the manner in which the Board has administered the Act. Although very extensive and detailed regulations have been promulgated with respect to almost every phase of the renegotiation process, the Board's regulations pertaining to the meaning of and manner of applying the statutory criteria for determining excessive profits are of nominal, if any, assistance in predicting a result in a given case or in evaluating the propriety of a determination by the Board.⁶⁹ This is not to suggest that absolutely no attempt is made to provide guidance. The Board has supplied some very general statements of the manner in which each factor will be treated. What it has not attempted to do is to give any sort of quantitative or other specific content to any of the factors or to give any meaningful indication of the appropriate mix of factors that will produce favorable or unfavorable results. The Board's attitude is summarized in its preface to the regulations governing "Principles and Factors in Determining Excessive Profits":

Reasonable profits will be determined in every case by over-all evaluation of the particular factors present and not by the application of any fixed formula with respect to rate of profit, or otherwise. Renegotiation proceedings will not result in a profit based on the principle of a percentage of cost.⁷⁰

In his recent work, *DISCRETIONARY JUSTICE*, Professor Kenneth Davis summarized the dissatisfaction of many critics of

⁶⁷ 334 U.S. 742 (1948).

⁶⁸ *Id.* at 785.

⁶⁹ See 32 C.F.R. §§ 1460.8-1460.15 (1969).

⁷⁰ 32 C.F.R. § 1460.8 (1969).

the Board when he used renegotiation as a prime example to illustrate his contention that administrative discretion in the United States too often lacks sufficient standards to guide its exercise.

The history of renegotiation since enactment of the Act of 1951 is an outstanding example of discretion which is needlessly broad. Senator Taft aptly said in 1951 that "this Board would have perfectly unlimited discretion." The Renegotiation Board has not significantly confined its own discretion through regulations, policy statements, or adjudicatory opinions. The thousands of decided cases could have become important guides for discretion, but a regulation explicitly provides that opinions and orders are unavailable to the public "inasmuch as they are regarded as confidential for good cause shown, by reason of the confidential data furnished by contractors and relating to their business." The regulation also provides that "Opinions and orders are not cited as precedents in any renegotiation proceedings." Although the board properly protects confidential business information, its concealment of its grounds for decisions seems clearly unjustified. Whatever standards, principles, or rules it has developed should be out in the open. This kind of disclosure can easily be accomplished without revealing confidential information; even when facts need to be stated, the identification of particular parties can be withheld.⁷¹

Some critics go further, casting doubt upon the existence of any meaningful standards and suggesting that the Board's determinations are unguided, unprincipled judgments which are essentially arbitrary in nature.⁷² This claim gains support from the Board's refusal to publish any sort of opinions or interpretative type regulations providing detailed elaboration of the manner in which it applies the statutory factors.

These arguments have great appeal: the question this study is concerned with is whether they have any validity. Is it true that the Board's determinations amount largely to pulling numbers out of a hat? If the Board's decisions are principled is it feasible or wise to provide greater specificity for the standards and criteria being applied as well as the manner in which they are applied? These questions cannot be answered by a doctrinaire analysis based upon comparisons with licensing departments, tax collectors, or zoning boards. A fair analysis can proceed only from a recognition that the renegotiation process and the Board are largely *sui generis*. At best, there are some activities carried on by more traditional agencies that are analogous although not identical. For example, few agencies that engage in adjudicator

⁷¹ Davis, *Discretionary Justice: A Preliminary Inquiry*, 16-17 (1969).

⁷² Although no one has explicitly stated a position as strong as this in print, a number of practitioners who handle renegotiation matters have seriously expressed this view in conversations with the author.

reach their decisions almost entirely on the basis of confidential financial information supplied by those whose interests are being determined. Moreover, few administrative bodies are required to apply a statutory term as amorphous as "excessive profits" and are further directed to do so by taking into account a set of touchstones as variable and uncertain as efficiency, extent of risk, reasonableness of costs, contribution to defense effort, etc. Add to these considerations the almost inexhaustible variety of products and services contracted for as well as the infinite variations between industries, contractors within the same industry and the type of contracting used by the various procurement agencies. To all of this, add in one of the principal features of the process which is to proceed by "negotiation" in an effort to reach "agreement" rather than by adjudication resulting in entry of an order. Finally, consider the impediments created by the provision of the criminal code⁷³ making it a criminal offense for officials in any manner to divulge or otherwise disclose the data and information upon which the Board bases its determinations.

The initial step in evaluating these criticisms was to determine whether the Board reaches its determinations in a principled, conscientious manner. The only feasible way this could be learned was to examine the complete files of a sufficient number of cases that had been through all or most phases of the renegotiation process. The cases that were selected for scrutiny were those in which the Board had entered unilateral orders determining excessive profits and the contractors had taken the matters to the Tax Court for redetermination. This method of selection was chosen principally because it seemed a valid assumption that cases in which an agreement could not be reached and contractors were willing to pursue Tax Court proceedings would most likely reveal any failures that were prevalent in the Board's procedures. In addition, this approach also tied in directly to another question under study: the evaluation of the manner in which the Tax Court has discharged its responsibilities with respect to renegotiation cases.

The total number of files reviewed was eight, involving determinations for contractors' fiscal years during the period 1952 to 1960. The small number of cases studied was the result of the method of selection. Since 1944 the Tax Court has published approximately one hundred opinions involving renegotiation. Only nineteen of these involved cases under the Renegotiation Act of 1951; the remaining cases involved renegotiation dating from

⁷³ 18 U.S.C. § 1905 (1964).

1943 to 1951. In only eleven of the nineteen cases arising under the 1951 Act did the Tax Court determine whether excessive profits existed and, if so, in what amounts.⁷⁴ The decisions in the other eight involved questions such as, claims of exemption, the Board's jurisdiction, discovery, burdens of pleading and proof.⁷⁵ The Board was able to locate the files in only eight⁷⁶ of the eleven cases requested and those were made available to me for my inspection.

Although a study of merely eight out of more than 3,800 cases in which the Board has made determinations of excessive profits may seem an exceptionally slender sampling upon which to base any meaningful conclusions, it should be remembered that about ninety percent of the 3,800 determinations were the result of bilateral agreements.⁷⁷ Of the approximately 400 unilateral orders entered through June 30, 1968, only 152 became the subject of Tax Court proceedings and most of those were disposed of either by agreement or dismissal and, therefore, did not come to our attention through the Tax Court Reports.⁷⁸ The reported opinions of the court identified only eleven cases in which the litigated issue was excessive profits.

The conclusion reached from reviewing the files in these cases is that the Board does approach its task in a conscientious and principled manner. Each of these files is replete with internal memoranda and reports evaluating the critical aspects of each contractor's operations and performance and discussing in varying degrees of detail the manner in which the various statutory factors were being considered and applied. Although the caliber of the analysis and the thoroughness of the reasoning varied from case to case, and from factor to factor in individual cases, all of them exceeded minimal standards of diligence and thought-

⁷⁴ LTV Aerospace Corp. v. Renegotiation Bd., 51 T.C. 369 (1968); Offner Prod. Corp. v. Renegotiation Bd., 50 T.C. 856 (1968); Martin Mfg. Co. v. Renegotiation Bd., 44 T.C. 559 (1965); Baltimore Contractors, Inc. v. Renegotiation Bd., 43 T.C. 611 (1965); North American Aviation, Inc. v. Renegotiation Bd., 39 T.C. 207 (1962); Beets and Yeckel v. Renegotiation Bd., 38 T.C. 677 (1962); Bay Co. v. Renegotiation Bd., 38 T.C. 535 (1962); Boeing Co. v. Renegotiation Bd., 37 T.C. 613 (1962); List & Clark Constr. Co. v. Renegotiation Bd., 36 T.C. 823 (1961); Waltham Screw Co. v. Renegotiation Bd., 31 T.C. 227 (1958); Vaughn Machinery Co. v. Renegotiation Bd., 30 T.C. 949 (1958).

⁷⁵ Grumman Aircraft Engineering Corp. v. Renegotiation Bd., 52 T.C. 152 (1969); Michigan Chemical Corp. v. Renegotiation Bd., (49 T.C. 488 (1968); Hermetic Seal Prod. Co. v. Renegotiation Bd., 41 T.C. 223 (1963); North American Aviation, Inc. v. Renegotiation Bd. 36 T.C. 575 (1961); Litton Indus. v. Renegotiation Bd., 36 T.C. 431 (1961); Hooper Constr. Co. v. Renegotiation Bd., 35 T.C. 837 (1961); Albermarle Paper Mfg. Co. v. Renegotiation Bd., 3 T.C. 438 (1960); Golbert v. Renegotiation Bd., 28 T.C. 728 (1957).

⁷⁶ Files could not be located in the cases of Beets and Yeckel v. Renegotiation Bd., 38 T.C. 677 (1962); List & Clark Constr. Co. v. Renegotiation Bd., 35 T.C. 823 (1961); Vaughn Machinery Co. v. Renegotiation Bd., 30 T.C. 949 (1958).

⁷⁷ See notes 53 and 54 *supra*.

⁷⁸ See text accompanying notes 55 through 57 *supra*.

fulness in preparation and processing. Assuming these cases to be representative, the suggestion that the Board's determinations of excessive profits are arbitrary and akin to pulling numbers out of the air is without warrant.

The critical questions are: whether the manner by which a determination is ultimately reached involves the application of some sort of standards and criteria; and, if so, whether these are susceptible of meaningful publication in the form of opinions, regulations, rulings, or bulletins. My review of these files, together with discussions with various Board personnel, leads to the conclusion that general standards of a variable nature are known and applied by those responsible for formulating decisions. For example, in applying the statutory factor of reasonableness of costs and profits, outer limits of what is deemed to be unexceptional for a particular industry or sub-industry were obviously being applied in these cases. If a particular case involved a ratio of profits to costs that exceeded what was apparently deemed to be the normal range for that industry, further consideration and investigation resulted. This type of variable, quantitative criteria for segregating normal and abnormal situations was found to exist also to some degree in the application of the following statutory factors: net worth (i.e., ratio of profits to net worth employed); extent of subcontracting; and rate of turn-over. There did not appear to be comparable standards in use for application of the remaining statutory factors: efficiency, extent of risk, contribution to defense effort, or character of business.

A major impediment to publishing the types of criteria that apparently are being used by the Board arises from the confidentiality restrictions imposed upon it by statute.⁷⁹ In most of the files studied the Board appraised the contractor's performance with respect to one or more factors by direct comparison with data derived from renegotiation files for other contractors in the same industry. On occasion the data was on an industry basis; just as often, however, the data was specific with respect to particular competitors in the same industry. This type of specific comparison, derived from confidential data in the Board's files or from the renegotiation experience of Board personnel who specialize in particular industries, was used for judging whether the contractor under consideration was within the norms for earnings within an industry, profit to net worth, profit to sales, amounts of government capital (plant facilities) used and

⁷⁹ 18 U.S.C. § 1905 (1964); Int. Rev. Code of 1954, § 7213.

rate of turn-over. In these same cases, the Board also made comparisons with general, aggregate industry performance data in evaluating some of the same factors. Much of this letter data was derived from public sources, such as Census Bureau statistics and Standard and Poors industry reports; other composite data appeared to be derived from the Board's own experience with a particular industry but was sufficiently generalized so as to be publishable without risking violation of the confidentiality restrictions.

Professor Davis⁸⁰ and others have suggested that the Board could, without breaching the confidentiality restrictions, issue opinions explaining its determinations. In effect, they are suggesting a "sanitized" opinion in which all specific data of an identifiable character has been excised from the statement. In my view, such opinions would be of no significant value. The documents most akin to an opinion contained in the file of a typical renegotiation case are the renegotiator's report, the report of the panel of the regional board and the report of the division of the headquarters board. All of these are replete with specific data that could not be published under existing confidentiality restrictions. I can conceive of no way, even with names and other identifying details excised, to publish these reports without the identity of the sources being fairly obvious to those familiar with the particular industry involved; nor can I conceive of any way to delete this data and still have a meaningful opinion that would be of any significant precedential value. Moreover, I know of no way to replace this type of specific data with some form of generalized data that might make the result either comprehensible or useful.

On the other hand, it does not seem either impossible or futile for the Board to publish some form of regulation, bulletin, or guideline that would supply at least a modicum of meaningful guidance to the public for those aspects of its decisions that involve the application of quantitative standards, even though these standards may be of an exceedingly variable and non-permanent nature. Unless the files in the cases that I reviewed were not representative of the Board's usual approach, the disposition of most cases involves some degree of comparative analysis of a quantitative nature. By no means are such quantitative standards determinative, nor was it Congress' intention that they be so.⁸¹ The approach observed in the files under review was to

⁸⁰ See note 71 *supra*.

⁸¹ One of the factors leading to the enactment of renegotiation legislation was dissatisfaction with the effectiveness of the strict, quantitative profit limitations under legislative

use quantitative comparisons solely to determine whether, with respect to a particular statutory factor (such as "net worth"), the contractor was within or without what had previously been deemed to be an average range for the particular industry or other grouping within which the contractor fell. This type of generalized standard, which probably could only be expressed in terms of numerical ranges, could be published in the form of bulletins which would not be vastly different from some of the recently published Renegotiation Rulings and Bulletins which, for example, provide guides for determining when institutional advertising costs may be applied against renegotiable income.⁸²

Of course, not all of the factors that the Board is required to consider in reaching a determination can be qualified. There is no evidence that the Board does or is able to give any sort of quantitative content to factors such as contribution to the defense effort, efficiency, complexity of manufacturing technique, etc. Through its regulations the Board has attempted to supply at least a modicum of guidance concerning the types of matters it will consider in applying those factors that do not lend themselves to quantification.⁸³ In addition, there does not seem to be any way to describe quantitatively or otherwise (short of publishing opinions for all cases) the proper mix to be given to the multivarious factors that are to be considered under the Act. Although a particular factor may weigh in favor of the contractor, the actual effect it will have on the ultimate determination will vary from case to case depending upon the absence or presence as well as the strength of other factors. In some respects the determination of excessive profits is analogous to placing a dollar value on pain and suffering. The trier of fact in the tort case is required to take into account a number of exceedingly variable and amorphous factors, a few of which can be given some degree of quantitative substance. Yet, no satisfactory formula has so far been devised to explain the appropriate mix or weight to be given to all of the factors involved. They are, as in the renegotiation process, principally touchstones which provide guidance in arriving at a largely discretionary judgment.

The Board has taken a negative attitude toward all suggestions that it publish any of the quantitative standards it uses. A number of reasons were given for this position. First, it pre-

such as the Vinson-Trammell Act and the Merchant Marine Act. See note 3 *supra*. Under the Renegotiation Act these rigid profit limitations have been suspended in favor of a flexible approach. See 50 U.S.C. App. § 1212(e) (1964); 32 C.F.R. § 1460.8 (1969).

⁸² 34 Fed. Reg. 7421 (1969).

⁸³ 32 C.F.R. §§ 1460.9 (efficiency), 1460.12 (contribution to defense effort), 1460.14 (character of business).

dicts that the publication of quantitative standards will tend to emphasize a rate-of-return type of approach which is antithetical to the entire notion of the renegotiation process. Second, the Board takes the position that since the proceedings on its level are largely a process of negotiation, and since its determinations are not reviewed for error, it is pointless to publish this type of regulation or guideline, particularly in light of the variable nature of the standards employed. Finally, the Board argues that it presently lacks sufficient personnel who possess the qualifications needed to take on this task.⁸⁴

Except for the shortage of personnel, the Board has not made a convincing case for not publishing these standards and criteria. Contractors are entitled to know how the Board approaches these factors and what quantitative ranges, if any, are being applied. There is no reason to assume that publication of information describing the way the Board functions in this respect will result in overemphasis of a fixed rate of return approach. On the other hand, culling this sort of data out of the Board's files, organizing it in a useful form and keeping it current will require the expenditure of skilled manpower. With the recent, sharp rise in the number of filings,⁸⁵ it may not be practical or worthwhile to undertake this task without an authorization for additional personnel.

A related criticism of the Board involves the statement of facts and reasons the Board is required by the Act to give to a contractor upon request when an agreement cannot be reached and a unilateral order is entered.⁸⁶ Although the Act only requires the statement to issue after an order has been entered, under the Board's regulations a "summary of the facts and reasons" will be given to a contractor where the Board has reached a final determination but has not as yet entered an order and a contractor wishes the statement to assist him in deciding whether to accept the Board's determination.⁸⁷ A summary is also available from a Regional Board when it has reached a final determination and is prepared to enter a unilateral order in a Class B case or to make a final recommendation to the headquarters Board in a Class A case.⁸⁸ Apparently, the summary which issues pursuant to the Board's regulations before entry of a unilateral

⁸⁴ The Board's personnel declined from a high of 742 in 1953 to 178 in 1967, 1968 Annual Report 15. Additional authorizations permitted the total number to rise to 203 employees at the end of fiscal 1969.

⁸⁵ The number of filings rose from 3,737 in fiscal 1967 (1968 Annual Report 6), to 5,037 in fiscal 1969 (unpublished data provided by the Board upon my request).

⁸⁶ 50 U.S.C. App. § 1215(a) (1964).

⁸⁷ 32 C.F.R. § 1477.3 (1969).

⁸⁸ *Id.*

order is essentially identical to the statement of facts and reasons required under the Act.⁸⁹

The criticism often heard is that the summaries and statements are generally of little or no assistance to contractors in understanding how the Board reached its determination. A review of the statements provided in nine cases (the eight files provided to me by the Board plus one other made available by counsel in a proceeding recently concluded) supports the criticism. The requirement of confidentiality which makes it impractical for the Board to publish meaningful opinions, is not a serious impediment to providing a meaningful statement of facts and reasons to the contractor himself. Certainly all relevant data concerning the contractor's own operation can be included; only specific data concerning other contractors which the Board received in confidence and which might have been used for comparative purposes cannot be revealed. Yet, contrary to the Board's own regulation governing the content of statements and summaries,⁹⁰ the statements reviewed lacked any genuinely useful detailed analysis of the facts and, necessarily, provided little if any insight into the Board's decisional process. With one exception the statements reviewed were superficial, pro forma documents, the principal feature of which was a host of broad generalities. Typically the statements contain a section of sparse accounting data and then mechanically list the various statutory factors together with a bare conclusory statement as to each factor's application to the particular case. Not only are these statements largely useless for the purpose they are supposed to serve, but they lead to the unwarranted conclusion that they accurately reflect the Board's decisional processes. As noted earlier, each of the files in the eight cases reviewed contained renegotiators' reports as well as panel and division reports which adequately analyzed the case, discussed the contractor's contentions and recommended a determination with supporting reasons. The statements of facts and reasons issued by the Board bore minimal resemblance to these documents and thereby create the impression that the Board engages in little if any conscientious analysis of the cases. More complete statements of facts and reasons based upon the internal reports contained in the files will accomplish a twofold purpose: they will better assist contractors in deciding whether to agree to the entry of an order; they will help to preclude harsh judgments concerning the manner in which the Board makes its determinations.

⁸⁹ 32 C.F.R. § 1477.4 (1969).

⁹⁰ *Id.*

II. PERFORMANCE REPORTS

In reaching its determination as to the existence and amount of excessive profits, the Board considers the contractor's performance with respect to such things as his contribution to national effort, his cooperation with Government agencies and other contractors, his dependability with respect to delivery schedules and the quality of the product or service provided. This information is acquired principally from two sources—the contractor himself and the procurement agencies he serviced. After a case is assigned for processing the renegotiator will meet with the contractor or his representatives who generally submit written or oral statements regarding the favorable performance rendered. In some instances the contractor will submit elaborate printed materials and testimonials to demonstrate the favorable consideration he is entitled to in the evaluation of his renegotiable profits. The Board independently seeks information about the contractor's performance by soliciting from the procurement agencies for which he worked statements appraising his performance. If the firm being renegotiated was a subcontractor similar inquiries are made of the prime contractor or higher tier subcontractors.

The Board has traditionally resisted all attempts by contractors to inspect performance reports relating to their own cases. The Board takes the position that if these reports become freely discoverable, the procurement officials who write them and who often have a continuing relationship with the contractors will be deterred from providing the Board with candid and complete information. The Board also supports its position on the ground that performance reports frequently contain confidential information about third parties—*e.g.*, comparative pricing data for other contractors—and thus cannot be released.

Although the Board so far has successfully resisted attempts to compel it to produce performance reports on the administrative level, it has not succeeded in avoiding production in the Tax Court when a contractor has petitioned for redetermination. In 1958, the Boeing Airplane Company sought a subpoena duces tecum from the Tax Court ordering the Board to produce all of its files pertaining to Boeing for the fiscal year under consideration. The Tax Court issued the subpoena on the ground that the documents sought were needed for the proper trial of the case. When the Board refused to comply with the subpoena on the claim of executive privilege, Boeing unsuccessfully sought enforcement in the District Court. Subsequently, the District Court modified its position, ordering production only of performance

reports the Board had received from the Air Force.⁹¹ This order was taken on cross-appeals to the Court of Appeals which held that in the Tax Court proceedings the contractor was entitled to performance reports received by the Board from outsiders, as well as factual reports concerning the contractor that were prepared by Board personnel.⁹² However, the Court excluded from production documents which "deal with recommendations as to policies which should be pursued by the Board, or recommendations as to decisions which should be reached by it."⁹³

The most significant limitation of the decision in the *Boeing* case is its application solely to proceedings in the Tax Court. It provides no authority for discovery of performance reports or other records of the Board while the case is on the administrative level. At the time the *Boeing* case was decided there existed no specific authority under which a contractor could compel the Board to produce performance reports. Until the enactment of the Freedom of Information Act,⁹⁴ section three of the Administrative Procedure Act,⁹⁵ the only provision of that law applicable to the Board,⁹⁶ was entirely ineffective for achieving this purpose.

In 1968, the Grumman Aircraft Company brought suit under the Freedom of Information Act seeking to compel the Board to produce for Grumman's inspection: (1) all performance reports and other inter- and intra-agency records of a factual nature contained in the Board's files relating to the renegotiation of Grumman for the year 1965; and (2) the final orders and opinions of the Board in renegotiation proceedings involving fourteen other aircraft manufacturers for the period 1962 through 1965.⁹⁷ In opposition, the Board contended that the documents sought by Grumman are exempt from the general disclosure provisions of section (a) of the Information Act because they are either specifically exempted from disclosure by statute, or contain trade secrets and commercial or financial information obtained from a person and privileged or confidential or are intra-agency memorandums which would not be available by law to a party in litigation with the Board.⁹⁸ On cross-motions for summary judgment, the District Court granted the Board's motion

⁹¹ Petition of Boeing Airplane Co., 23 F.R.D. 264 (D.D.C. 1959).

⁹² Boeing Airplane Co. v. Coggeshall, 280 F.2d 654 (D.C. Cir. 1960).

⁹³ *Id.* at 660.

⁹⁴ 5 U.S.C. § 552 (Supp. III 1965-1967).

⁹⁵ Ch. 234, 60 Stat. 238 (1946).

⁹⁶ 50 U.S.C. App. § 1221 (1964).

⁹⁷ Brief for Appellant at 2-3, Grumman Aircraft Engineering Corp. v. Renegotiation Bd., No. 22,635 (D.C. Cir. 3/12/69).

⁹⁸ Brief for Appellee at 6-10, Grumman Aircraft Engineering Corp. v. Renegotiation Bd., No. 22, 635 (D.C. Cir. 5/19/69).

and entered an order, without opinion, dismissing the suit. Grumman has appealed to the Court of Appeals for the District of Columbia Circuit and that appeal is presently pending. Oral argument is not expected to take place until October or November and a decision is not anticipated before December.

Because the Grumman case is *sub judice* it seems inappropriate either to comment on the merits of the claim under the Freedom of Information Act or attempt to predict the decision of the Court of Appeals. The positions taken by both parties are tenable and the court's decision cannot readily be anticipated.

Even if we assume, however, that the Information Act does not compel the Board to make performance reports available to the public, there still remains the question of whether the Board should, as a matter of policy, make them available to contractors whose cases are pending before the Board. The argument made by those who urge production of performance reports on the administrative level is simply that they are entitled to be apprised of information concerning their performances which is before the Board when it makes its determination. The Board's response is that the contractor is always advised of any derogatory or adverse information the Board has received and is relying upon. It further argues that, since the contractor is advised of these adverse matters, there is no need to give him all reports received. Furthermore, it claims that to do so will clutter up the renegotiation proceeding by placing unwarranted emphasis on matters contained in these reports which the Board intends to ignore because it deems them to be immaterial, unsubstantiated, or irrelevant. Added to these arguments are the assertions, mentioned earlier, that the reports often contain confidential information about other contractors and that procurement agencies and prime contractors will be impeded from giving frank assessments if the reports are made available to contractors.

At my request the Board made available for my inspection representative performance reports in approximately ten cases currently pending before the Eastern Regional Board. In addition, I reviewed the performance reports in the files of the eight concluded cases that were made available to me. In all, I perused approximately twenty-five separate reports received from either procurement agencies or prime contractors. Only three or four contained any sort of direct criticism of or information adverse to the contractor. All of the rest were either wholly uninformative or were complimentary. Only two contained information that was of a privileged or confidential nature: on one occasion, :

contracting officer stated that the firm under consideration was priced well below its competitors and he supplied comparative figures which apparently were derived from sealed bids; in another instance, a performance report dealing with a weapons system had been classified as secret at the time it was submitted to the Board.⁹⁹

I was advised that to the extent these reports were uncritical of contractors they were quite representative of what the Board receives. Whether this is so because contractors generally perform to at least minimally acceptable standards or because such an identity of interest exists between contractors and procurement officials as to result in a non-critical attitude, cannot satisfactorily be determined within the scope of this study, nor is it important for our purposes. It does, however, undercut the Board's assertion that production of these reports would tend to deter procurement officials from being critical, particularly since the Board contends that contractors are apprised of any adverse information the Board has received and is relying on. If the sampling I inspected is representative, then there is little in the way of adverse reports that could be lost; further, if the Board apprises the contractor of critical information received then any contracting officers who might be deterred¹⁰⁰ by such exposure would already be avoiding criticism of their contractors. Thus, it is difficult to accept the claim that production of these reports will result in a deterioration of critical reporting. Moreover, if the reports were made available any confidential or privileged data which they might contain could be excised.

Additionally, procurement officials of the Defense Department and NASA stated that the efficiency of their procurement programs would not be impeded if performance reports prepared by their contracting officers were made available by the Board to contractors. It was pointed out that presently, as part of the procurement policy of Defense and NASA, contracting officers prepare contractor evaluation reports which are disclosed to contractors. These reports are thorough and frank studies of all phases of a contractor's performance and frequently are the basis

⁹⁹ The report had been declassified by the Defense Department prior to the time it was made available to me.

¹⁰⁰ Cf. *Boeing Airplane Co. v. Coggeshall*, 280 F.2d 654, 661 (D.C. Cir. 1960):

The likelihood seems slight that in the future persons outside the Board, be they other public officials or private persons, will avoid providing the Board with all information requested if production of documents is judicially ordered in this case. None of the information is said to come from persons who would be subject to retaliation if their statements were disclosed. . . . And the public officials responsible for material procurement would presumably cooperate with the Board as a part of the discharge of their responsibilities for the efficient operation of their respective departments.

for performance reports sent to the Renegotiation Board. Defense and NASA officials are not aware of any measurable, adverse effect on their procurement activities as a result of the evaluation reports being made available to contractors.

The Board's additional arguments—*viz.* that making these reports available will cause contractors to overemphasize the statutory factors that involve performance and will turn the proceeding into more of an adversary proceeding than an informal negotiation—are not convincing. Even though the Board apprises a contractor of adverse information which the Board "relies" upon, this does not provide assurance that erroneous information received by it may not have affected its judgment even though the Board may not believe, or even realize, it is "relying" upon such. If the contractor is made aware of the existence of such information he can, if he wishes, rebut or explain it. Moreover, even though the renegotiation process emphasizes informal negotiation rather than the features of an adversary proceeding, there is no justification for maintaining a secretive approach to information which might have a material effect upon the outcome of the negotiation. Despite the significant differences between the renegotiation process and a typical administrative proceeding, a convincing argument has not been made for a policy of secretiveness with respect to these reports. Finally, contractors should be entitled to these reports not only to rebut adverse information that the Board may have received in response to its solicitation, but also to be apprised of complimentary information contained in the Board's files which will support their claims for favorable treatment. The inconvenience or delay that might possibly result from making this information available seems minimal, particularly when measured against the sense of foreboding and suspicion that accompanies an important governmental proceeding in which secret information is being used.

III. TAX COURT PROCEEDINGS

Under the Renegotiation Act a contractor who is dissatisfied with the Board's determination of excessive profits is entitled to petition the Tax Court for a redetermination. Under the Act, "a proceeding before the Tax Court 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*."¹⁰¹ Although the court's juris-

¹⁰¹ 50 U.S.C. App. § 1218 (1964).

diction to determine the existence and extent of excessive profits is exclusive, its decisions are subject to limited review by the Courts of Appeals.¹⁰²

The opportunity afforded a contractor to seek a *de novo* re-determination in the Tax Court has been a feature of renegotiation legislation since the Second Renegotiation Act, adopted in 1944. It is doubtful that the renegotiation process would survive constitutional challenge were it not for the availability of some procedure of this type subsequent to the Board's determination. On the few occasions when federal courts have dealt with due process challenges to the manner in which renegotiation is conducted, they have consistently referred to the availability of *de novo* proceeding in the Tax Court as a cure for any infirmities that might otherwise exist on the Board level.¹⁰³ The Supreme Court, in dealing with the claim that administrative proceedings under the 1944 Act were a denial of due process, stated:

As to the effect of the statute and of the course of action taken, we hold that the statute did afford procedural due process to the respective petitioners but that none of them made use of the procedure so provided for them. Consistent with the primary need for speed and definiteness in these matters, the original administrative determinations by the respective Secretaries or by the Board were intended primarily as renegotiations in the course of which the interested parties were to have an opportunity to reach an agreement with the Government or in connection with which the Government, in the absence of such agreement, might announce its unilateral determination of the amount of excessive profit claimed by the United States. This initial proceeding was not required to be a formal proceeding producing a record for review by some other authority. In lieu of such a procedure for review, the Second Renegotiation Act provided an adequate opportunity for a re-determination of the excessive profits, if any, *de novo* by the Tax Court.¹⁰⁴

Despite the unambiguous requirement of the Act that the Tax Court conduct *de novo* proceedings in renegotiation cases, it has been roundly and frequently criticized for not doing so.¹⁰⁵ Critics claim that as a consequence of the court's rules governing renegotiation cases, it merely reviews the Board's determination

¹⁰² See 50 U.S.C. App. § 1218(a) (1964) which provides, *inter alia*, that "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." It further provides that the Courts of Appeals "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. . . ." Although this provision was enacted in 1962, its full implications are not known since there are not as yet any reported cases under it.

¹⁰³ *Lichter v. United States*, 334 U.S. 742, 791-92 (1948); *Pownall v. United States*, 159 F.2d 73, 74 (9th Cir. 1947), *aff'd*, 334 U.S. 742 (1948); *Spaulding v. Douglas Aircraft Co.*, 154 F.2d 419, 426-7 (9th Cir. 1946).

¹⁰⁴ *Lichter v. United States*, 334 U.S. at 791.

¹⁰⁵ See note 62 *supra*.

and fails to make an independent finding of its own. Moreover, it is further asserted that through the operation of its rules governing burdens of proof, the court has unfairly placed the burden upon contractors to prove that the Board's determinations are erroneous. Since records are not available to contractors regarding the Board's proceedings and deliberations, it is argued that a contractor can rarely meet this burden.

Although critics have relied upon statistical data to support their claim that the Tax Court fails to provide a *de novo* proceeding,¹⁰⁶ the statistics available are neither conclusive nor persuasive. For example, the Board's most recent annual report notes that between 1951 and June 30, 1968 the Tax Court had "disposed" of 120 cases. It further states that "the Court upheld the Board's determination in 72 of the 120 cases. . . ."¹⁰⁷ This statement is rather misleading. In a large number of these cases the only issues before the court involved, *e.g.*, the statute of limitations, jurisdiction, exemption, etc. In another large number of cases the contractors were dissatisfied with the Board's refusal to permit certain charges (*e.g.*, advertising costs, officers salaries) to be taken as a cost of renegotiable business; in these cases the contractors typically stipulated to the Board's finding of excessive profits if the court found no error in the Board's disposition of the issue being contested. A review of the eleven cases¹⁰⁸ in which the court was required to redetermine excessive profits leads to quite different results than is suggested by the Board's annual report. In the eleven cases, the Court dealt with determinations for fifteen separate fiscal years. It reached the identical determination as the Board for five of those years;¹⁰⁹ it reached a determination less than the Board's for nine;¹¹⁰ and found a higher amount than the Board in just one instance.¹¹¹ Although these statistics do not support the assertion that the Tax Court fails to provide a *de novo* redetermination, neither do they demon-

¹⁰⁶ *E.g.*, Koehler, *Renegotiation: Evidence and Burden of Proof in Appeal Proceedings*, 45 Va. 1, 19-20 (1959).

¹⁰⁷ 1968 Annual Report 13.

¹⁰⁸ See note 74 *supra*.

¹⁰⁹ LTV Aerospace Corp. v. Renegotiation Bd., 51 T.C. 369 (1969) (fiscal 1952 and 1953); Baltimore Contractors, Inc. v. Renegotiation Bd., 43 T.C. 611 (1965) (fiscal 1952); Beets and Yeckel v. Renegotiation Bd., 38 T.C. 677 (1962) (fiscal 1954); Vaughn Machinery Co. v. Renegotiation Bd., 30 T.C. 949 (1958) (fiscal 1952).

¹¹⁰ Offner Prod. Corp. v. Renegotiation Bd., 50 T.C. 856 (1958) (fiscal 1954); Martin Mfg. Co. v. Renegotiation Bd., 44 T.C. 559 (1965) (fiscal 1959 and 1960); Baltimore Contractors v. Renegotiation Bd., 43 T.C. 611 (1965) (fiscal 1951); North American Aviation, Inc. v. Renegotiation Bd., 39 T.C. 207 (1962) (fiscal 1953 and 1954); Bay Co. v. Renegotiation Bd., 38 T.C. 535 (1962) (fiscal 1952); List & Clark Constr. Co. v. Renegotiation Bd., 35 T.C. 827 (1961) (fiscal 1954); Waltham Screw Co. v. Renegotiation Bd., 30 T.C. 949 (1958) (fiscal 1951).

¹¹¹ Boeing Co. v. Renegotiation Bd., 37 T.C. 613 (1962) (fiscal 1952).

strate that the court exercises the truly independent approach that was intended by Congress.¹¹²

The severest criticisms of the Tax Court proceeding are directed at the allocation of burden of proof and certain pleading requirements which are similar to those ordinarily found in proceedings to review administrative determinations. For example, Rule 64 of the Tax Court Rules of Practice requires an aggrieved contractor's petition to contain:

(b) (2) (iv) Clear and concise assignments of each and every error which the petitioner alleges to have been committed by the Board or the Secretary in the determination of excessive profits. Each assignment of error shall be lettered.

(b) (2) (v) Clear and concise lettered statements of the facts upon which the petitioner relies as sustaining the assignment of error. . . .

In addition, Rule 64(b) (2) (ix) requires the contractor to append to his petition a copy of the Board's order as well as a copy of the statement of facts and reasons, if one was furnished.

Besides these pleading rules, the court has adopted a burden of proof rule which many have argued undercuts the Congressional intent of providing a *de novo* redetermination. In *Cohen v. Secretary of War*,¹¹³ the court held that the burden rested upon the petitioner to prove that he realized an amount of excessive profits less than that determined by the Board. In addition, it held that the Government carried the burden of proving that the petitioner realized excessive profits greater than the amount originally determined by the Board. This allocation of burdens was a straight application of Rule 32 of the Tax Court Rules which governs an ordinary proceeding involving a review of a determination of the Commissioner of Internal Revenue. In *Cohen*, the court explained its application of this rule to renegotiation proceedings as follows:¹¹⁴

The legislation it is true, emphasizes the independence of proceedings for redetermination of excessive profits and refers to them as "*de novo*." There is little doubt that it was intended that the evidence taken and the judgment exercised should to no extent be limited by that of the Renegotiation Board or a Secretary.

. . . There is no reason to assume that Congress intended such problems [allocation of burdens of proof] in renegotiation cases to be incapable

¹¹² The statistics for the Tax Court's performance under the predecessor statutes are equally inconclusive. In thirty-five cases involving determinations of excessive profits for forty-six separate fiscal years, the court reached the identical determination as was reached on the administrative level in twenty instances, found a lower amount of excessive profits in twenty-three, and greater amount in just three.

¹¹³ 7 T.C. 1002 (1946).

¹¹⁴ *Id.* at 1011.

of solution; and there is every justification for the belief that, when jurisdiction in such cases was entrusted to the Tax Court, it was on the assumption that its procedure and practice would be adopted as far as reasonably consistent with renegotiation proceedings.

Apparently the judges of the Tax Court see no inconsistency between the requirements imposed by these rules and the dictates of the statute. In a letter to the Joint Committee on Internal Revenue Taxation, dated May 15, 1961, Chief Judge Murdock stated:¹¹⁵

The trial before the Tax Court in a renegotiation case is a *de novo* proceeding, as the law requires. It is not a review of the action of the Renegotiation Board. The Tax Court decides each case solely on the basis of the evidence introduced in the trial before it. . . .

The Tax Court has explained in its rules and opinions that the contractor must assume the burden of the moving party in the proceeding and if the proof before the Tax Court is inadequate to support an independent determination, then of course the Court has to leave the parties as it found them, that is, it cannot change the determination of the Renegotiation Board. See Rule 32 and *Nathan Cohen*, 7 T.C. 1002.

Despite this statement of the court's attitude, the language found in a number of opinions strongly suggests that the court tends to view these cases as proceedings to review rather than as *de novo* proceedings. The opinions show a penchant by the Judges of the court to require a petitioner to prove that the Board's determination was "erroneous" or that the "Board has failed to give proper consideration and weight in reaching its determination to all evidence favoring petitioner. . . ." ¹¹⁶ If these statements accurately reflect the court's approach to renegotiation cases, then the intent of the Act is being frustrated. Moreover, if the court actually expects a contractor to demonstrate the errors committed by the Board, it will in many cases be placing him under an impossible burden since the records of Board proceedings are not available, nor does the Board issue opinions explaining its decisions. In fact, one of the justifications given by the Board for its refusal to permit discovery of its files or

¹¹⁵ 1962 Jt. Comm. Rep. 12.

¹¹⁶ See, e.g., *Offner Prod. Corp. v. Renegotiation Bd.*, 50 T.C. 856, 859 (1968); *Vaughn Machinery Co. v. Renegotiation Bd.*, 30 T.C. 949, 958-59 (1958). *But see* *Grumman Aircraft Engineering Corp. v. Renegotiation Bd.*, 52 T.C. 152, 154 (1969):

. . . The Renegotiation Act imposes upon the Board the responsibility of determining the reasonableness of a contractor's profits by the exercise of discretion, will, or judgment to which no presumption of correctness attaches when the contractor seeks a *de novo* hearing in this court.

. . . This Court has consistently taken the position that because of the *de novo* character of the renegotiation cases in this Court the proceedings and records of the Renegotiation Board are not relevant or material to this Court's determination of the amount of excess profits.

to publish opinions is the availability of the *de novo* Tax Court proceeding in which the Board's proceedings presumably are immaterial.

The issue we attempted to deal with was the degree to which the court actually treated these proceedings as *de novo* despite the thrust of its rules governing pleading and proof. A review of close to fifty opinions of the Tax Court leads to inconclusive results. As noted above, the court has not slavishly accepted the Board's determinations. On the other hand, the opinions seldom provide a very thorough explanation of the reasoning process engaged in by the court. Despite its rule requiring a contractor to prove that the Board's determination was erroneous, the court has frequently entered an order for a reduced amount with the bare explanation that upon review of the facts it finds no excessive profits or excessive profits in a particular amount.¹¹⁷ Findings of this sort suggest that proceedings are treated as *de novo* and that the court may be disregarding its published rules. On the other hand, in a number of cases the court has reviewed the facts in the case and entered an order identically the same as the Board's with the explanation that the contractor failed to prove that its profits were not excessive or that the Board's determination was erroneous.¹¹⁸

A further difficulty that occurs from a mere reading of these opinions is the impression one receives that the proceedings were perfunctory. To a considerable degree this is the result of the format the Tax Court uses for its opinions. Typically, they start with a section entitled "Findings of Facts" which is a description of varying length and detail usually concerned with the nature of the contractors' business, the contracts performed for the government during the years under consideration and various financial data for the same period. The next portion is entitled "Opinion" and varies greatly from opinion to opinion with respect to the degree of explanation and detailed analysis provided. A careful reading of these opinions left me with the overall impression that the evidentiary hearings conducted by the Tax Court were generally perfunctory and that the cases were principally presented on stipulated facts. Apparently this is an erroneous impression. I have been advised that in almost all of the cases in which the specific issue being litigated is the excessiveness of the

¹¹⁷ See, e.g., *Offner Prod. Corp. v. Renegotiation Bd.*, 50 T.C. 856 (1968); *Martin Mfg. Co. v. Renegotiation Board*, 44 T.C. 559 (1965); *List & Clark Constr. Co. v. Renegotiation Bd.*, 35 T.C. 823 (1961).

¹¹⁸ See, e.g., *Beets and Yeckel v. Renegotiation Bd.*, 38 T.C. 677 (1962); *Vaughn Machinery Co. v. Renegotiation Board*, 30 T.C. 949 (1958).

contractor's profits, the records are quite extensive and are the product of full trial proceedings. This was confirmed by perusing the transcript of a case which seemed from the opinion to have had a sparse trial and to have been before the Court largely on a stipulated record.¹¹⁹ In fact, the trial of this particular case took over forty full days and resulted in thousands of pages of trial transcript and exhibits. The problem, apparently, was the failure of the opinion to reflect the extent of the proceedings.

A more serious failing in the Tax Court opinions is the lack of any extensive consideration of the statutory factors or detailed explanation of their appropriate application. Seventeen years ago it was noted that "decisions of the Tax Court are of doubtful value as precedents [for determining the proper application of the statutory factors] since it is often impossible to determine the relative weight given to the various factors considered."¹²⁰ There has been little, if any, discernible improvement in the opinions published since that view was expressed. With few exceptions, the typical Tax Court opinion contains a formalistic statement of the statutory factors together with a conclusionary statement as to whether each factor weighed favorably or unfavorably for the contractor, followed by an unexplained finding of the amount of excessive profits. Occasionally, the end result is justified on the ground that the contractor failed to sustain his burden that his profits were reasonable or that the Board erred. In a number of cases, particularly those decided in the forties and early fifties, the Court merely stated it had considered all the statutory factors.¹²¹

Even in those few instances where the court has published a rather detailed and relatively well-reasoned opinion, the explanation of the weight given to each of the factors or the criteria that it uses in arriving at a favorable or unfavorable determination as to each factor is of little, if any, precedential value.¹²² Rarely, if ever, does the Court rely upon prior decisions to support its application or construction of the statutory criteria, nor are there any strong indications of the type of evidentiary approach that the Court finds most persuasive. The short answer may simply be that determining excessive profits through the application of the statutory criteria is of such an ephemeral nature as to make it virtually

¹¹⁹ *Boeing Co. v. Renegotiation Bd.*, 37 T.C. 613 (1962).

¹²⁰ Braucher, *The Renegotiation Act of 1951*, 66 Harv. L. Rev. 270, 299 (1952).

¹²¹ See, e.g., *Pechtel, Pechtel and Chester v. United States*, 18 T.C. 851 (1952); *Rosner v. WCPAB*, 17 T.C. 445 (1951); *Armstrong v. WCPAB*, 15 T.C. 625 (1950); *W. Tip Davis Co. v. Patterson*, 12 T.C. 335 (1949); *Supply Division, Inc. v. WCPAB*, 9 T.C. 1103 (1947).

¹²² See, e.g., *LTV Aerospace Corp. v. Renegotiation Bd.*, 51 T.C. 369 (1968); *North American Aviation Co. v. Renegotiation Bd.*, 39 T.C. 207 (1962); *Boeing Airplane Co. v. Renegotiation Bd.*, 37 T.C. 613 (1962).

impossible to give greater description or content to the analytical process being used. Clearly, the opinions from case to case do not appear to be of great assistance to the judges of the court since it is rare that prior opinions are cited as precedent to support the application of the statutory factors or the ultimate finding. The loss incurred because of the court's failure to articulate more fully its mode of analysis affects the Renegotiation Board as well as contractors. Presumably, the Board would treat as at least persuasive the standards applied by the court if they were more precisely articulated.

ADDENDUM

On March 10, 1970 the Court of Appeals for the District of Columbia rendered its decision in *Grumman Aircraft Engineering Corp. v. The Renegotiation Board*, discussed at pp. 31-32 of the report. The Court of Appeals reversed the district court's order dismissing the suit on the Board's motion for summary judgment. The opinion by Chief Judge Bazelon rejected the Board's claim that under the Information Act the documents requested by Grumman (opinions and orders involving fourteen other aircraft manufacturers and performance reports pertaining to Grumman) were exempt from disclosure because they contained privileged or confidential financial information.

With respect to orders or opinions of the Board concerning third parties, the Court held that Grumman was entitled to receive such documents "after appellee [the Board] has made suitable deletions." (Slip opinion at p. 5). The Court further suggested to the Board that in the future it might delete identifying detail from all of its orders and opinions and then make them "available to public inspection as a matter of course." In the Court's view "this procedure will fulfill the statutory mandate by exposing to public scrutiny the agency's discharge of its functions while protecting the privacy of the persons involved in the disposition of individual cases." (*Id.*)

With respect to performance reports relating to Grumman, the Court held that they were subject to disclosure after *in camera* inspection by the district court to determine whether they contain confidential commercial or financial information concerning third parties. Any such information contained in a report is to be deleted prior to disclosure; if deletion is not feasible, a report containing such data apparently would not be subject to disclosure.