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Honorable Overton Brooks, Chairman
Committee on Science and Astronautics
House of Representatives

Dear Mr. Chairman:

Further reference is made to your letter of February 19, 1960, requesting a report on H.R. 9675, 86th Congress, 2d Session, "A BILL To amend the National Aeronautics and Space Act of 1958, as amended, and for other purposes."

A number of comprehensive amendments and incidental technical modifications are proposed by the bill with respect to the responsibility and administration of the National Aeronautics and Space Administration (NASA), and the procurement authority of the administration. The proposed administrative amendments involve policy determinations by the Congress and have received considerable study by your Committee. We have no comments on these proposals.

The procurement amendments proposed are designed primarily to extend to NASA authority similar to that exercised by the several military departments under existing statutes and regulations but not presently available to NASA under the Space Act of 1958. The proposed provisions would permit uniformity of action as between the Department of Defense and NASA in the areas which would be affected. The proposals seem consistent with the general purpose and intent of Congress as evidenced by the National Aeronautics and Space Act of 1958 establishing NASA, section 302(b) of which provided for the administration's utilization of the authorization and procedural requirements governing "Procurement Generally" by the armed forces set out in chapter 137, Title 10, U. S. Code, and NASA has implemented the authority thus provided by adopting the pertinent provisions of the Armed Services Procurement Regulation (ASPR) to the extent practicable. The procurement amendments proposed deal with--

1. The leasing of Government-owned property for other than a monetary consideration;

2. The acquisition of releases for past infringements of patents;

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3. The disposition of patent rights under research and development contracts;

4. The indemnification of contractors under research and development contracts for liabilities arising out of unusually hazardous risks; and

5. The waiver of the performance and payment bond requirements of the Miller Act.

We will consider these matters in the order in which they appear in the bill.

1. Leasing Authority

Subsection 6(D) of section 1 of the bill would amend the clause following the first semicolon in section 203(b)(3) to permit provisions in leases of real or personal property whereby the maintenance, repair or restoration of the property leased may be accepted as part or all of the consideration for the lease, notwithstanding the provisions of 40 U. S. C. 303b requiring money consideration, or any other provision of law. Similar authority has been granted to the military departments under 10 U. S. C. 2667(b)(5). We see no objection to this amendment.

2. Past Infringements of Patents

Subsection 6(F) of section 1 of the bill would add to section 203(b) a new paragraph (14) authorizing the administration "to acquire releases, before suit is brought, for past infringement of patents." Similar authority has been granted the military departments under 10 U. S. C. 2386(4). This authority will permit the administrative settlement of claims for infringement of patents prior to suit where such action is found to be in the interest of the United States, and should result in the realization of savings in the cost of settling claims of this type.

3. Patent Rights

Subsection (11) of section 1 of the bill sets out new provisions which would supersede and liberalize the existing provisions of section 305 of the 1958 act governing "Property Rights in Inventions" arising from the performance of work for NASA.

— The present section 305 of the act of 1958 provides, in general, that any invention made in the performance of any work under any contract of the administration becomes the exclusive property of the

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United States unless the administrator waives all or any part of such rights in conformance with the provisions of the section. Subsection (a) of section 305 proposed by the bill would require each contract or other arrangement, and all tier subcontracts thereunder, having as one of its purposes the performance of experimental, developmental, or research work, to contain such provisions as may be prescribed by the administrator governing the disposition of the rights to inventions conceived or first actually reduced to practice thereunder in a manner calculated to protect the public interest and the equities of the contractor. Subsections (b) and (c) of the proposed section 305 would provide for the waiver of the rights of the United States to such inventions under contracts providing for the vesting of title in the United States and where such rights have heretofore vested in the United States, subject to the reservation of an irrevocable, non-exclusive, non-transferable, royalty-free license for the practice of such invention throughout the world by or on behalf of the United States or any foreign government pursuant to any treaty or agreement with the United States. This would permit NASA in dealing with contractors of the Department of Defense on similar types of research and development work or on projects jointly sponsored to agree to provisions mutually acceptable to the military departments. The present policies and practices of the military departments are not prescribed by specific statutory provisions but are governed by Section IX of the Armed Services Procurement Regulation which provide that, as a general rule, the contractor retains patent rights with the Government receiving a royalty-free, non-exclusive license to use any invention conceived or first actually reduced to practice in the course of performing the contract work.

We recognize there are many divergent views on the subject of the ownership of patents developed by private concerns under research and development contracts with the Government. Yet, we believe there can be little disagreement as to the need for uniformity where contracts are being performed in the same or similar research and development areas. Whether the policies should provide generally for retention by the Government of patent rights, or for the granting of these rights to contractors with licenses for Government use, or other alternatives, is a matter for determination by the Congress.

In a report of March 10, 1960, to the Chairman of the House Committee on the Judiciary (copy of report enclosed) on H.R. 5148, 86th Congress, which would establish one uniform Government policy with respect to patent rights under research and development contracts, the various problems and aspects of the matter were discussed. We suggested in that report that in lieu of establishing one uniform policy, consideration might be given to legislation which would give

recognition to the functions and problems peculiar to the activities of individual agencies, as well as the differences in the types of research and development being contracted for by the Government. Such legislation might appropriately set forth broad general policies, including basic principles, guidelines, and criteria, permitting a measure of flexibility in administration where circumstances so dictate, and might subsume some features of the present administrative practices and methods. We stated that we believed such legislation could give full regard to all considerations designed to serve and protect the national interest, the Government, and contractors. Also, that legislation along these lines would facilitate improved methods and practices for administering and carrying out the extensive research and development programs of the Government, and bring about a degree of standardization in the handling of patent rights.

We have studied the Committee Print of the Report of the Subcommittee on Patents and Scientific Inventions of this Committee on the proposed revisions of section 305 and it is noted that the Subcommittee has concluded that the present provision of section 305 is tending to complicate and retard the conduct of the American space program. The question as to the need for amendment to section 305 at this time and that of the basic policies to be incorporated in such amendment are for determination by the Congress. However, if such an amendment is enacted, we believe it should be considered as an interim measure and in the event Congress should later enact over-all legislation setting forth basic general policies governing patent rights on research and development contracts for all Government agencies, the patent provisions of the 1958 act, including any amendments which may have been enacted should be brought along with these policies.

4. Indemnification of Liabilities

Subsection (13) of section 1 of the bill would add a new section 308 captioned "Indemnification" to Title III of the 1958 act using language almost identical with that of 10 U. S. C. 2354 granting such authority to the military departments. We understand the purpose of this proposal is to give NASA the same authority as that now enjoyed by the military departments to indemnify contractors for unusually hazardous risks; that the proposal has been made as an interim measure pending further consideration of more comprehensive legislation (H.R. 4148) requested by NASA at the beginning of this session of Congress. However, we believe there are a number of deficiencies in the provisions of 10 U. S. C. 2354 which should be considered in connection with the provisions for granting the authority requested by NASA.

Under the proposed section the administrator would be authorized to approve provisions in research and development contracts for indemnifying the contractor, "but only to the extent that they arise out of the direct performance of the contract and to the extent not compensated by insurance or otherwise" for (1) claims (including reasonable expenses of litigation or settlement) of third persons, including the contractor's employees, for death, bodily injury or loss of or damage to property; and (2) for loss of or damage to the contractor's property, "from a risk that the contract defines as unusually hazardous." (Emphasis supplied). Subsection (b) would require that a contract providing for indemnification must also provide for notice to the United States of any claim or suit against the contractor by third persons and for control of or assistance in the defense thereof by the United States, at its election. Subsection (c) would require certification by the administrator as to the reasonableness of all payments under subsection (a), and subsection (d) would authorize payments of approved claims from funds obligated for performance of the contract, funds available for research and development not otherwise obligated, and "funds appropriated for those payments." (Emphasis supplied).

The legislative history of the provisions of 10 U. S. C. 2354 which are derived from Public Law 82-557 approved July 16, 1952, 66 Stat. 726 (5 U. S. C. 1952 ed., 2354, 4753, and 6612), discloses a congressional intention and purpose to unify the procedures of all components of the Department of Defense in the handling of indemnification under research and development contracts. The legislation grew out of representations by the military departments that considerable difficulty had been experienced in obtaining responsible contractors in cases where the work involved unusually hazardous risks and the possibility that disastrous incidents might occur resulting in huge liability claims and possible bankruptcy; that in some instances there had been no insurance coverage available and, in others, the exorbitant premiums charged had made the securing of insurance prohibitive. See Report No. 1397, May 26, 1948, of the Senate Committee on Armed Services, 80th Congress, 2d Session, "Facilitating the Performance of Research and Development Work by and On Behalf of the War and Navy Departments," to accompany S. 1560, a predecessor to H.R. 1180 which was ultimately enacted; Report of Hearings Before a Subcommittee of the Committee on Armed Forces of the Senate, 82d Congress, 1st Session, on H.R. 1180, September 25, 1951, pp. 13-14; House Report No. 28, June 6, 1951, Hearings on H.R. 1180, 82d Congress, 2d Session, pages 618-635; House Report No. 518, June 12, 1951, of the Committee on Armed Services, 82d Congress, 1st Session, pp. 3-4; and Senate Report No. 936, October 11, 1951, of the Committee on Armed Services, pp. 4-5.

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We have received advice from the Office of the Secretary, Department of Defense, that uniform procedures prescribing the policies and criteria and the contract provisions for utilization of the authority granted by 10 U. S. C. 2354 have not been adopted by the Department of Defense. This authority has not been implemented in ASPR, and apparently the only directive issued thereon by the military departments is Navy Procurement Directive No. 10-351. Furthermore, the statutory provisions are not as clear as they might be, which has given rise to a number of problems involving uncertainty as to the coverage and the extent of obligation intended, including the following which are suggested for consideration and possible clarification should such authority be extended to NASA as proposed by the bill:

Coverage

Under the bill, as under 10 U. S. C. 2354, the phrase "research and development" is not defined; the definition of "unusually hazardous" is left to the contract; and the clause "but only to the extent they arise out of the direct performance of the contract" indicates that a limitation on the coverage authorized apparently was intended. A question is presented as to whether the language providing for indemnification of liabilities arising out of the direct performance of research and development contracts is intended to include "product liability" arising after completion of a contract covering the initial research or development of an item, and to what extent. It seems clear the language does not include subsequent production contracts of the item although the same or similar "unusually hazardous" risks might be involved. On the other hand, this language might reasonably be construed as authorizing indemnification for a liability which may arise long after the research and development contract has ended, that is, where the liability is attributed to an act or omission which may have occurred during the direct performance of the contract, such as a latent defect in an item delivered thereunder. No limitations are specified in the bill as to the time for the filing of claims, giving rise to the further question of whether such claims barred by state statutes of limitations may be administratively considered for settlement thereafter. In the interest of uniformity in construction and application it is suggested that "research and development" should be defined; that "contractor" should be defined, expressly stating whether major subcontractors and their various tier subcontractors may be covered; and that specific criteria for determining "unusually hazardous" risks should be included in the bill. It is also suggested that consideration be given to clarification of the proposed provisions to show whether the indemnification authority granted is exclusive.

The provisions of 10 U. S. C. 2354 apparently do not authorize indemnity against damages or losses resulting from the negligent acts of the contractor and its employees. However, the indemnification provisions which have been utilized by the military departments expressly exclude liabilities which result from willful misconduct or lack of good faith on the part of the contractor's directors, officers, managers, superintendents, or other equivalent representatives, thereby implying that liabilities resulting from the negligent acts or omissions of the contractor and its employees are covered.

The rule is well settled that a contract of indemnity will not be construed to indemnify the indemnitee against losses resulting to him through his own negligent acts where such intention is not expressed in clear and unequivocal terms. See Griffiths v. Frederick (Wash Sup. Ct., June 4, 1947), 182 P. 2d 18, and the cases collected in the annotation 175 A.L.R. 8, at p. 30. Cf. Booth-Kelly Lumber Co. v. Southern P. Co. (9th C.C.A., June 20, 1950), 183 F. 2d 902, 25 A.L.R. 2d 695, at 715. Clarification of the provisions proposed by the bill to show expressly whether coverage of negligence is intended is suggested.

The extent of the liability apparently intended to be covered might reasonably be clarified by changing the pertinent language to read "to the extent that they arise out of an incident or disaster occurring during the direct performance of the contract and to the extent not compensated by insurance or otherwise." This would serve to make the provisions of indemnification more definite and would preclude the consideration of claims for "product liability" arising after the research or development contract has been terminated by performance or cancellation. Cf. MacPherson v. Buick (Ct. App. N.Y., 1916), 111 N.E. 1050, and Lalelite v. United States (1953), 346 U. S. 15.

We also feel that definite limits should be fixed within which such claims might be filed for administrative consideration and settlement under the contract. Also, a requirement that settlement of such claims be supported by administrative findings seems desirable.

Extent of Obligations

In addition to the uncertainties indicated whereby the indemnity provisions proposed to be authorized might be unlimited in time as to when a liability might occur and be claimed, the language of the bill, as in 10 U. S. C. 2354, is vague and ambiguous as to whether the indemnification provisions authorized permit the incurrence of obligations for payments prior to the appropriation of funds therefor, and no limitation as to the amount which the United States might be obligated to pay is provided.

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The general rule is that, in the absence of express statutory provisions therefor, obligations of such indefinite and unlimited character are contrary to the provisions of existing law, sections 3679 and 3732 R.S. (31 U. S. C. 665 and 41 U. S. C. 11), which prohibit the entering into of contracts beyond the extent and availability of appropriations. See, also, section 1311, Act of August 26, 1950, 64 Stat. 830, 31 U. S. C. 200, prescribing requirements for documentary evidence of obligations. See, in this connection, 42 U. S. C. 2210(j) expressly authorizing AEC in the administration of the indemnification authority granted the Commission to make contracts in advance of appropriations and without regard to 31 U. S. C. 665. A limitation on the aggregate liability was also prescribed for AEC. See 42 U. S. C. 2210(e)(d)(e). Cf. 36 Comp. Gen. 85, 87, and our report to you on H.R. 4148, 86th Congress, 1st Session, April 27, 1959, B-136770. However in considering the problems inherent in the language used in this subsection, the Senate Committee on Armed Services stated in its report of May 26, 1948, supra, at page 4—

> "* * * This provision would apply only where the loss was not compensated by insurance or otherwise. This provision is designed to cover contracts for the performance of hazardous work, in which the cost of insurance would be prohibitive. The net effect of the subsection is to make unobligated research and development funds available for payments due thereunder. In the absence of such funds, this subsection would give the contractor a cause of action against the Government, and would also give the service concerned a basis for recommending the appropriation of the necessary funds to make payments due under the contract."

The indemnification provisions currently in use by at least two of the military departments expressly provide that the rights of the contractor shall not be limited by the clause of the contract entitled "Limitation of Cost" which in effect imposes a contractual ceiling on the obligation of the Government to reimburse the contractor for incurred costs. This would seem to indicate an agreement to pay claims under the indemnification provisions without limit as to amount or availability of appropriations.

It is suggested that the Committee may desire to clarify the proposed section by the use of language similar to that used in granting the AEC its authority, both as to making contractual commitments for indemnification in advance of appropriations and as to limitation of liability.

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Waiver of the Miller Act Bond Requirements

Section 3 of the bill would amend 40 U. S. C. 270e so as to extend to NASA the authority granted the military departments to waive the performance and payment bond requirements of the Miller Act, with respect to cost-plus-a-fixed fee and other cost-type construction contracts and with respect to certain other contracts regardless of the cost of such contracts as to payment or title. There appears to be no compelling reason for requiring performance and payment bonds under cost reimbursable contracts as the prime contractor must show payment to secure reimbursement. Furthermore, the proposed provisions would permit action by NASA consistent with that followed by the military departments in dealing with the same contractors. We see no objection to granting NASA this authority.

We trust that you will find our comments helpful to your Committee and we will be glad to cooperate with you and your staff in the consideration of the bill.

Sincerely yours,

JOSEPH CAMPBELL

Comptroller General
of the United States

Enclosure