

APPENDIX 3

SECRETARY NITZE'S MEMO OF SEPTEMBER 29, 1967, AND VIEWS THEREON BY THE COMPTROLLER GENERAL

THE SECRETARY OF DEFENSE,
Washington, September 29, 1967.

Memorandum for: Secretaries of the Military Departments.
Assistant Secretary of Defense (Comptroller).
Assistant Secretary of Defense (I. & L.).
Directors of Defense Agencies.

Subject: Access to cost performance records on noncompetitive firm fixed price contracts.

I have given careful consideration to the arguments for and against access to contractor post-award cost performance records on noncompetitive firm fixed price contracts, for the purpose of determining the degree of contractor compliance with PL 87-653. Clearly, it has been and remains our policy that in firm fixed price contracts the cost and profit consequences are the full responsibility of the contractor since he assumes all the risk of performing in accordance with the contract. Likewise, it is our policy that such contracts be used only where there exists a reliable basis for judging reasonableness of contractor cost estimates. Where such a basis does not exist, other contract forms should be used.

The Department of Defense is required to conduct a program of review and audit sufficient to ascertain that the cost or pricing data submitted by contractors in connection with the negotiation of noncompetitive firm fixed price contracts were current, accurate and complete as required by PL 87-653. It is our policy to make such audits, as fully as possible, prior to completing the negotiation of the contract. However, when it is necessary to provide assurance that defective cost or pricing data were not submitted, audits should also be conducted of actual costs incurred after contracts are consummated. To assure that such post-award audits may be conducted when deemed appropriate, action shall be taken to include in all noncompetitive firm fixed price contracts involving certified costs or pricing data, a contractual right to have access to the contractor's actual performance records.

Circumstances which may dictate the use of a post-award cost performance audit include such cases as those where: (1) factors of urgency in placing the initial procurement were clearly present; (2) material costs are a significant portion of the contractor's total cost estimate; (3) a substantial portion of the contract is proposed for subcontracting; or (4) there was a substantial interval between completion of the pre-contract cost evaluation and agreement on price.

In directing this action, I wish to make it clear that the purpose of any post-award cost performance audit, as provided herein, is limited to the single purpose of determining whether or not defective cost or pricing data were submitted. Access to a contractor's records shall not be for the purpose of evaluating profit-cost relationships, nor shall any repricing of such contracts be made because the realized profit was greater than was forecast, or because some contingency cited by the contractor in his submission failed to materialize—unless the audit reveals that the cost and pricing data certified by the contractor were, in fact, defective.

I desire that the Assistant Secretary of Defense (Installations and Logistics) and the Assistant Secretary of Defense (Comptroller) issue implementing instructions to place the above policies into effect.

PAUL H. NITZE.