

The views of the Office of the Quartermaster General, referred to in your letter of December 31, 1941, with respect to the obligations of the contractor under the above-quoted section of the contract, are set forth in fourth indorsement of November 8, 1941, to the Office, Chief of Finance, as follows:

1. With reference to the proposal of Black & Veatch to subcontract for certain inspection and testing services in connection with the architectural-engineering work at Camp Chaffee, Fort Smith, Arkansas, the architect-engineer is required by Article II-A, section 1a, of contract No. W-7032 qm-12 to perform the following services:

"e. Make such customary field and laboratory tests of concrete and concrete aggregates and all other materials at the site or at any time or place as the contracting officer may require. He shall inspect and report to the contracting officer in writing as to the conformity or nonconformity of the workmanship and materials to specifications; and on the progress of the project."

2. Under the foregoing contract provision, the architect-engineer is expected to perform those tests at the site which are customary and in accordance with general architectural-engineering practice. The customary tests by the architect-engineer at the site include the inspection and design of the concrete mix and the ascertaining that pipe, lumber, and other materials are of good quality, sound and adaptable to the proposed use. Concrete mixed at a nearby central plant and purchased by the Construction Contractor already mixed is usually inspected by the architect-engineer for proportion, time of mixing, etc. Portland cement is generally shipped from Government testing bins and in such cases should not require additional inspection by a testing laboratory. Inasmuch as the above-mentioned testing and inspection services are customarily provided by the architect-engineer at the site, no item of fee should be included in any subcontract therefor.

3. However, in addition to the customary inspection at the site of the work by the architect-engineer, it is usual to engage testing laboratories to make the specialized tests as to the strength of samples of vitrified clay and concrete sewer pipe as well as concrete cylinders which are made at the site of the architect-engineer. Bituminous material and bituminous aggregate for paving are usually tested and inspected by a testing laboratory from samples furnished by the architect-engineer or by maintaining a representative at the mixing plant. Creosoted material may be inspected at the point of manufacture by a representative of the testing laboratory or analyzed from samples sent to the testing laboratory. Paint is usually analyzed by testing laboratories from samples sent by the architect-engineer.

4. Where, as indicated above, the services of a testing laboratory are usually necessary, this office is of the opinion that such services do not comprise those customary tests which are required by the terms of the above-quoted contract provision to be made by the architect-engineer at the site of the work, and that in such instances the architect-engineer is properly entitled to compensation under article III-D of the contract relating to reimbursement.

By indorsement of November 14, 1941, the Chief of Finance concurred in the above indorsement of the Quartermaster General.

Considered in the light of that interpretation of the duties imposed on the prime contractor by the contract requirement that it "Make such customary field and laboratory tests \* \* \*," it appears that the expenditure here involved may have included payment for a portion of the work which it was intended would be performed by the contractor with its own forces. While it is evident that the contract contemplates that some part of the work may be subcontracted and no specific limitation is placed thereon, except that it meet with the approval of the contracting officer, in recognition of the fact that, under this type of contract, the fixed fee is determined and established

after ascertaining, during the initial negotiations, the class or classes of the work to be performed by the contractor and that to be subcontracted by it, and that, as stated in 20 Comp. Gen. 533, 537, " \* \* \* the subcontracting of work, not contemplated to be so performed when the contract was made and the contractor's fee was fixed, will result in an increase in the cost to the Government by reason of an unanticipated pyramiding of profits," the prime contractor is not authorized to procure such services from other sources on other than an actual expense basis, exclusive of any additional fee for overhead and profit, or, unless an equitable deduction be made in the amount of the fixed fee. Since, in the present case, it reasonably may be assumed that the fixed price paid to the Mississippi Testing Laboratories included elements of overhead and profit, I find no legal basis for reimbursing the contractor for the amount claimed in the absence of evidence sufficient to establish that the contractor's fee of \$75,000 was fixed with the understanding that such services would be performed under a subcontract or unless an appropriate adjustment be made in the amount of the fixed fee—that is, by reducing said fee by an amount at least equal to the amount of the subcontractor's profit.

Accordingly, the voucher, together with the accompanying papers, is returned herewith, and you are advised that, on the present record, payment thereon is not authorized.

(B-23607)

#### OFFICERS AND EMPLOYEES—APPOINTMENTS AND COMPENSATION AS AFFECTED BY OATH EXECUTION REQUIREMENT

Under the provision in paragraph 11 of the appropriation for the National Youth Administration, fiscal year 1942, that "no person shall be employed \* \* \* unless such person before engaging in such employment \* \* \* subscribes" to the oath prescribed therein, an appointment or employment may become effective, although no right to compensation will accrue, before the oath is executed, and the oath, when executed, will relate back to the date of entrance on duty so as to entitle the officer or employee to compensation from that date.

Comptroller General Warren to the Federal Security Administrator, February 26, 1942: *with addressee*

I have your letter of February 3, 1942, as follows:

Paragraph 11 of the National Youth Administration Appropriation Act of 1942 provides as follows:

"PAR. 11. No person shall be employed or retained in employment in any administrative position, or in any supervisory position on any project, and no person shall receive assistance in the form of payments or otherwise from the United States for services rendered under the National Youth Administration, under the appropriation in paragraph 1 or paragraph 2 unless such person before engaging in such employment or receiving such assistance subscribes to the following oath:

"I, A. B., do solemnly swear (or affirm) that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely,

*Team Camp Gen*

without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties of the office (or employment) on which I am about to enter (or which I now occupy). So help me God."

Although this Agency is familiar with the rule set forth in *United States v. Flanders*, 112 U. S. 88; *United States v. Eaton*, 169 U. S. 331; 4 Comp. Dec. 496; 8 Comp. Dec. 199; 4 Comp. Gen. 845; and 30 Op. Atty. Gen. No. 79, the National Youth Administration requests a decision, because of the particular wording of paragraph 11, quoted above, as to the availability of funds for the payment of employees who have been properly appointed but who have not executed oaths of allegiance prior to the performance of services but have executed such oaths prior to the time when checks are to be drawn in their favor.

The National Youth Administrator advises that this question has not been raised at an earlier date since the General Accounting Office permitted the practice of pre-auditing pay rolls involving the execution of oaths subsequent to the performance of services, and, as he states, questionable payments were cleared in that manner. However, the National Youth Administrator advises that, since the General Accounting Office has discontinued the practice of pre-auditing such items, a decision on this question seems desirable.

Your decision is therefore respectfully solicited.

Section 1756, Revised Statutes, the statute construed in the case of *United States v. Flanders*, 112 U. S. 88, referred to in your letter, required the taking of a specified oath by persons appointed to any office of honor or profit upon the basis of two factors, namely, (1) "before entering upon the duties of such office," and (2) "before being entitled to any part of the salary or other emoluments thereof." In said decision the Supreme Court of the United States held as follows:

\* \* \* The compensation is given by the statute to the collector, when appointed, and is based wholly on the amount of moneys paid over and accounted for. If he is appointed, and acts, and collects the moneys, and pays them over and accounts for them, and the government accepts his services and receives the moneys, his title to the compensation necessarily accrues, unless there is a restriction growing out of the fact that another statute says that he must take the oath "before being entitled to any of the salary or other emoluments" of the office. But, we are of opinion that the statute is satisfied by holding that his title to receive, or retain, or hold, or appropriate, the commissions as compensation, does not arise until he takes and subscribes the oath or affirmation, but that, when he does so, his compensation is to be computed on moneys collected by him, from the time when, under his appointment, he began to perform services as collector, which the government accepted, provided he has paid over and accounted for such moneys. This was, in substance, the charge given, and it was correct.

Section 1756, Revised Statutes—the statute considered in the court decision, *supra*—was repealed *in toto* by section 2 of the act of May 13, 1884, 23 Stat. 22, but said act required that thereafter the oath taken in such cases should be "as prescribed in section seventeen hundred and fifty-seven of the Revised Statutes." Said section 1757, Revised Statutes, requires the taking of the oath by persons in such cases only upon the basis of one factor, namely, "before entering upon the duties of his office."

Relative to the application of the provisions of section 1757, Revised Statutes, it was stated in 4 Comp. Gen. 845, as follows:

It appears that Mr. Dubois was appointed to the commission on July 3, 1924, but was not notified of his appointment until July 15, 1924, on which date he took the oath of office. Section 1757, Revised Statutes, and the act of May 13, 1884, 23 Stat. 21, require generally that an officer of the United States shall take the

oath of office before entering upon his duties. These provisions have been held to be directory only. *United States v. Eaton*, 169 U. S. 331. The accounting officers have followed the decision cited and held that unless an appointment stipulated taking the oath of office as a condition precedent to make the appointment effective, the officer or employee would be entitled to compensation from the date of acceptance of the appointment, provided the oath had been taken prior to the payment of compensation; that is, the oath must be taken before the officer or employee is entitled to payment, but the oath having been taken the right to compensation may relate back to the date of the acceptance of the appointment in the absence of any restriction in the appointment itself. See 24 Comp. Dec. 547.

There is for noting that paragraph 11 of the National Youth Administration Appropriation Act, 55 Stat. 489, quoted in your letter, not only provides that "no person shall be employed" before taking the oath but also, that "no person \* \* \* shall be retained in employment"; and there is for noting, also, that the parenthetical insertion in the language of the oath itself permits the application of the oath to the "duties of the office or employment \* \* \* which I now occupy," thus making the oath applicable to those already in the service. The basis for the requirement of the oath here would, in effect, seem to be the same as that required by the oath prescribed by section 1757, Revised Statutes, which section relates to "every person elected or appointed." In other words, the rule stated by the Supreme Court of the United States in the *Flanders case, supra*, appears properly for following in the application of the statute quoted in your letter, as both seem to contemplate that the appointment or employment may become effective before the oath is taken but that the right to receive compensation does not spring into being until the oath shall have been executed. Compare decision B-23157, dated January 31, 1942, involving a substantially identical situation.

Answering your question specifically, you are advised that employees of the National Youth Administration should where practicable be required to take the prescribed oath before being permitted to enter upon duty, and even where that is not practicable they may not be paid from the appropriation here involved until they shall have taken the said oath but, in such cases, the oath when taken will relate back to the date they entered upon duty under proper authority and will entitle them to pay from that date.

(B-23260)

COMMISSIONING OF ARMY INDUCTEE IN NAVAL RESERVE; TRAVEL PRIOR TO RECEIPT OF TRAVEL ORDERS

The provision in section 4 of the Naval Reserve Act of 1938, that no officer of the Naval Reserve shall be a member of any other naval or military organization