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The Chairman,

Atomic Energy Commission.

My dear Mr. Lillenthal:

Reference is made to your letter of December 23, 1947, requesting a decision as to whether this Office would be required to object to payments under the payment provisions of a cost-reimbursement contract, a draft of which was forwarded therewith, proposed to be entered into by the Atomic Energy Commission with Associated Universities, Inc.

It is stated in your letter that it is proposed to enter into the contract for the operation of the Brookhaven National Laboratory, a major atomic installation of the Atomic Energy Commission now under construction on Long Island, New York; that the said Associated Universities, Inc., is an educational corporation organized under the laws of the State of New York whose participating members are nine eastern universities; that the contractor has carried on operations of the Brookhaven National Laboratory under a letter contract from the Commission, pending the execution of a definitive contract; that "The contract is to be administered by the Commission through its Office of New York Directed Operations"; and that "an Area Manager employed by that Office is stationed at the laboratory site in order to assure adequate protection for the interests of the Government."

It is stated further that it is the intention of the parties that the contract be a no-profit arrangement under which the contractor will be reimbursed for all actual costs and expenses, direct or indirect, actually incurred in good faith, arising out of, or connected with, the work covered by the contract; and that during the negotiations for the contract the contractor assumed the position that a provision for the payment of a fee by the Government was necessary in order to provide adequate protection against certain contingencies arising under the contract but that the contractor now is prepared to perform the required work on an actual cost basis if it can be assured by the Commission that this Office will not object to payments provided under paragraph 3 of Article IV of the contract. Also, it is stated that the Commission proposes to use a provision similar to the said paragraph 3 in certain other no-profit contracts for research and development work where reimbursement on an actual cost basis appears advisable.

The draft of contract proposed to be entered into with Associated Universities, Inc., "on an actual cost basis" contemplates that, in the interest of accomplishing the purposes of the Atomic Energy Act of 1946, approved August 1, 1946, 60 Stat. 755, ⁷⁵⁸ the contractor shall organize, operate, and maintain the Brookhaven National Laboratory for conduct of studies, experimental investigations, and tests in certain fields of science during the term commencing on January 1, 1947, and continuing until December 31, 1950, subject to extension for further periods upon mutual agreement. It is indicated in the eighth

"whereas" clause of the proposed contract that the contract is authorized by and will be executed under the "Atomic Energy Act of 1946" and Executive Order No. 9816, dated December 31, 1946, in the interest of the common defense and security.

Section 3(a) of the said act directs the Commission to exercise its powers in such manner as to insure the continued conduct of research and development activities in the fields of science specified therein by private or public institutions or persons and to assist in the acquisition of an ever-expanding fund of theoretical and practical knowledge in such fields. It is provided in said section that the Commission is authorized and directed to make arrangements (including contracts, agreements, and loans) for the conduct of research and development activities relating to the fields of science specified therein, and that—

"* * * The Commission may make such arrangements without regard to the provisions of section 3709 of the Revised Statutes (U.S.C., title 41, sec. 5) upon certification by the Commission that such action is necessary in the interest of the common defense and security, or upon a showing that advertising is not reasonably practicable, and may make partial and advance payments under such arrangements, and may make available for use in connection therewith such of its equipment and facilities as it may deem desirable. Such arrangements shall contain such provisions to protect health, to minimize danger from explosion and other hazards to life or property, and to require the reporting and to permit the inspection of work performed thereunder, as the Commission may determine; but shall not contain any provisions or conditions which prevent the dissemination of scientific or technical information, except to the extent such dissemination is prohibited by law."

Paragraphs 1 and 2 of the referred-to Article IV of the proposed contract would provide as follows:

"1. The Commission agrees to reimburse the Contractor for all costs incurred by it in carrying out this contract in accordance with

its terms. Such costs are to include direct, indirect and overhead costs and are to be determined in accordance with generally accepted accounting principles applicable to operations of the type performed under the contract and consistently applied. The books of account and supporting documents and records of the Contractor which relate to the performance of the work shall be available for examination by the Commission to the extent that it may require in substantiation of reported costs and revenues.

"2. In approving reimbursement of all costs and expenses of the Contractor under this contract, the Commission shall be governed by the provisions of Article II. This shall include, without limitation (but without duplication of items reimbursed under paragraph 3 of this Article), the following costs and expenses: * * *

There follows then subparagraphs (a) to (r) in which are set forth descriptions, in more or less detail, of the various items of actual expenditures for which reimbursement would be made to the contractor by the Commission.

Paragraph 3 of the said Article IV of the proposed contract, quoted in your letter above, would provide as follows:

"3. The Commission shall reimburse the Contractor at the rate of One Hundred Seventy-five Thousand Dollars (\$175,000.00) per annum, payable monthly in equal installments, for the following costs and expenses:

(a) Overhead computed in accordance with generally accepted accounting principles consistently applied, and

(b) All costs and expenses, not otherwise reimbursed, which are actually incurred by the Contractor in good faith arising out of or connected with the work under this contract.

"Any cost or expense actually incurred and claimed by the Contractor under paragraph 3(b), above, shall be reimbursed by the Government unless the Commission shall establish that such cost or expense resulted from willful misconduct or bad faith on the part of some corporate officer or officers of the Contractor or on the part of the Director, Assistant Director or Business Manager of the Laboratory. Any dispute

as to whether such an item is reimbursable shall be determined pursuant to Article XXIII, Disputes, which determination shall be binding on the Contractor and the Government.

"At such intervals as may be mutually agreed upon, but not less often than once each year, the Commission, in consultation with the Contractor, shall review the amount of the overhead computed under paragraph 3(a), above, and the amount of any costs or expenses computed under paragraph 3(b), above. Any excess in payments to the Contractor, for the period under review, shall be applied by the Contractor in reduction of the cost of the work under this contract, or if the Commission so directs, refunded promptly to the Government. Any deficit in payments to the Contractor, for the period under review, shall be paid promptly to the Contractor by the Government."

It is understood that negotiations have been carried on for some time in an effort to arrive at terms acceptable to both the contractor and the Commission, the object of the contractor being to make certain that it will come out whole on the contract and that it will be protected against loss in the event of termination of the contract in whole, or in part, by the Commission. Also, it is understood that the purpose of including paragraph 3 of Article IV in the proposed contract is to authorize the Commission to make payments on account, subject to adjustment at later dates on the basis of the actual cost upon review by the Commission.

While it appears that the said paragraph 3 would contemplate the reimbursement of expenditures which properly might be reimbursed under other provisions of paragraphs 1 and 2 of Article IV of the contract the said paragraph 2 also would provide for reimbursement of the many items of cost set forth therein "without duplication of items reimbursed under paragraph 3 of this Article." Consequently, the fact that lump-sum payments would be provided for under paragraph 3 is not objectionable from a legal standpoint, since such payments would be subject to

adjustments at later dates on an actual cost basis.

The contract would expressly provide in Article V that the Government will currently reimburse the contractor for expenditures made in accordance with the provisions of the contract upon certification to and verification by the Commission of the original signed pay rolls for labor, the receipted invoices for materials, or such other necessary documents as the Commission may require. Also, the contract would stipulate in paragraph 1 of Article VII that the contractor agrees to keep records and books of account, showing the actual cost to it for all labor, materials, equipment, supplies, and services, and other expenditures of whatever nature for which reimbursement or payment is authorized under the contract, and paragraph 2 of that Article would provide that the Commission shall at all reasonable times be afforded proper facilities for inspection of, and have access to, all books, records, correspondence, instructions, plans, drawings, receipts, vouchers, and other memoranda having record value, of the contractor which relate to the work performed under the contract and that the contractor shall preserve, at Government expense, such papers after completion or termination of the contract, for a period of 5 years, or in lieu of such preservation of records, the contractor may, at any time, be required by the Commission to deliver them to it.

In administering a contract of the character here involved, it is, of course, a matter of administrative duty to make every reasonable

effort to assure that the items of cost reimbursable under one provision will not also be reimbursed under other provisions of the contract and that there be furnished the best evidence available showing that the amounts for which reimbursement is claimed actually were expended by the contractor and that such expenditures were made in connection with the work covered by the contract.

Hence, it is assumed that the determinations made by the Commission as a result of the review of the amount of the overhead computed under paragraph 3(a) and of the amount of any costs or expenses computed under paragraph 3(b) of Article IV of the contract will be made a matter of record and that a break-down of the items making up the amounts ultimately allowed under such paragraph will be furnished this Office for consideration in the audit of the payments thereunder.

Accordingly, and in view of the nature of the work involved, the broad powers granted by the "Atomic Energy Act of 1946," and since the purpose and intent of the proposed contract are to limit the amounts to be reimbursed thereunder to the actual cost of the contract work, without profit, this Office will not be required to object to otherwise proper payments under the contract. However, it is to be understood that the Commission will require that the contractor's books and records will be kept in such manner that inspection thereof by representatives of this Office may be made at

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any time, if such inspection is deemed necessary for the protection of the interests of the United States.

Respectfully,

(Signed, Frank J. ...)

Acting Comptroller General
of the United States.