FEDERAL ACQUISITION ACT

HEARINGS

BEFORE THE

COMMITTEE ON ARMED SERVICES

UNITED STATES SENATE

NINETY-FIFTH CONGRESS

SECOND SESSION

ON

S. 1264

TO PROVIDE POLICIES, METHODS, AND CRITERIA FOR THE ACQUISITION OF PROPERTY AND SERVICES BY EXECUTIVE AGENCIES

SEPTEMBER 22, OCTOBER 5, 1978

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FEDERAL ACQUISITION ACT

COMMITTEE ON ARMED SERVICES

U.S. SENATE,
COMMITTEE ON ARMED SERVICES,
Washington, D.C.

The committee met, pursuant to notice, at 9:30 a.m., in room 212, Russell Senate Office Building, Senator Robert Morgan presiding.

Present: Senators Morgan and Goldwater.

Also present: John C. Roberts, general counsel; John T. Ticer, chief clerk; Phyllis A. Bacon, assistant chief clerk; Rhett B. Dawson, counsel; George H. Foster, Jr., professional staff member; Doris E. Connor, clerical assistant; John Stirk, assistant to Senator Morgan; David M. Fitzgerald, assistant to Senator Garn; Jeffrey Record, assistant to Senator Nunn; and Brian Walsh, assistant to Senator Chiles.

Senator MORGAN. We will call the meeting to order.

The committee, this morning, will consider two matters. First, S. 1264, the Federal Acquisition Act of 1977, and later, Senator Goldwater, with your permission, we will consider some routine unobjected-to nominations.

[The bill S. 1264 follows:]

[S. 1264, 95th Cong., 2d sess.]

A BILL To provide policies, methods, and criteria for the acquisition of property and services by executive agencies

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SHORT TITLE; TABLE OF CONTENTS

SECTION 1. (a) SHORT TITLE.—This Act may be cited as the "Federal Acquisition Act of 1977".

(b) TABLE OF CONTENTS.—

DECLARATION OF POLICY

Findings

SEC. 2. (a) The Congress hereby finds that—

(1) the laws controlling Federal purchasing have become outdated, fragmented, and needlessly inconsistent;

(2) these deficiencies have contributed to significant inefficiency, ineffectiveness, and waste in Federal spending;

(3) a new consolidated statutory base is needed, as recommended by the Commission on Government Procurement;

(4) further, existing statutes need to be modernized to focus on effectve competition and new technology in that—

(A) national productivity rests on a base of competitive industry applying new technology in its goods and services; and

(B) Federal spending practices can encourage the Nation's business community by stimulating effective competition and the application of new technology.

Policy

(b) It is the policy of the United States that when acquiring property and services for the use of the Federal Government, the Government shall, whenever practicable rely on the private sector, and shall act so as to—

(1) best meet public needs at the lowest total cost;

(2) maintain the independent character of private enterprise by substituting the incentives and constraints of effective competition for regulatory controls;

(3) encourage innovation and the application of new technology as a primary consideration by stating agency needs so that prospective suppliers will have maximum latitude to exercise independent business and technical judgments in offering a range of competing alternatives;

(4) maintain and expand the available Federal supply base by judicious acquisition practices designed to assure Government contracting with new and small business concerns to the maximum practicable extent;

(5) make available for review and examination those pertinent Federal laws and regulations applicable to the awards of contracts and those which may impact the performance of contracts, including, for example, Federal laws and agency rules relating to air and water cleanliness requirements, and to occupational safety requirements;

(6) provide opportunities to minority business firms to grow through Government contracts;

(7) initiate large scale productions only after the item or equipment to be acquired has been proven adequate by operational testing;

(8) provide contractors with the opportunity to earn a profit on Government contracts commensurate with the contribution made to meeting public needs and comparable to the profit opportunities available in other markets requiring similar investments, technical and financial risks and skills;

(9) minimize Government surveillance of contractor operations and contractor performance, and to waive any controls and surveillance not necessary to insure satisfactory performance of contracts;

(10) pay contractors promptly any moneys due them under contracts awarded by the United States;

(11) rely on and promote effective competition; to insure the availabiilty to the Government of alternative offers that provide a range of concept, design, performance, price, total cost, service, and delivery; and to facilitate the competitive entry of new and small sellers. Effective competition is generally characterized by—

(A) timely availability to prospective sellers of information required to respond to agency needs;

(B) independence of action by buyer and seller;

(C) efforts of two or more sellers, acting independently of each other, to respond to an agency need by creating, developing, demonstrating, or offering products or services which best meet that need, whether that need is expressed as an agency mission need, as a desired function to be performed, performance or physical requirements to be met, or as some combination of these; and

(D) absence of bias or favoritism in the solicitation, evaluation, and award of contracts.

DEFINITIONS

SEC. 3. For purpose of this Act—

(a) The term "acquisition" means the acquiring by contract with appropriated funds of property or services by and for the use of the Federal Government through purchase, lease, or barter, whether the property or services are already in existence or must be created, developed, demonstrated, and evaluated. Acquisition includes such related functions as determinations of the particular agency need; solicitation; selection of sources; award of contracts; contract financing; contract performance; and contract administration.

(b) The term "executive agency" means an executive department as defined by section 101 of title 5, United States Code; an independent establishment as defined by section 104 of title 5, United States Code (except that it shall not include the General Accounting Office); a military department as defined by section 102 of title 5 United States Code; the United States Postal Service; and a wholly owned Government Corporation as defined by section 846 of title 31,

United States Code (but does not include the Tennessee Valley Authority or the Bonneville Power Administration).

(c) The term "agency head" means the head of an executive agency as defined in subsection (b).

(d) The term "contracting officer" means any person who, either by virtue of his position or by appointment in accordance with applicable regulations, has the authority to enter into and administer contracts and make determinations and findings with respect thereto. The term also includes the authorized representative of the contracting officer, acting within the limits of his authority.

(e) Te term "property" includes personal property and leaseholds and other interests therein, but excludes real property in being and leaseholds and other interests therein.

(f) The term "total cost" means all resources consumed or to be consumed in the acquisition and use of property or services. It may include all direct, indirect, recurring, nonrecurring, and other related costs incurred, or estimated to be incurred in design, development, test, evaluation, production, operation, maintenance, disposal, training, and support of an acquisition over its useful life span, wherever each factor is applicable.

(g) The term "functional specification" means a description of the intended use of a product required by the Government. A functional specification may include a statement of the qualitative nature of the product required and, when necessary, may set forth those minimum essential characteristics and standards to which such product must conform if it is to satisfy its intended use.

(h) The term "unsolicited proposal" means a written offer to perform a proposed effort, submitted to an agency by an individual or organization soley on its own initiative with the objective of obtaining a contract, and not in response to an agency request or communication.

TITLE I—ACQUISITION METHODS AND REGULATORY COMPLIANCE

ACQUISITION METHODS

SEC. 101. (a) Except as otherwise authorized by law, an executive agency shall acquire property or services in accordance with this Act by utilizing—

(1) the competitive sealed bids method as provided in title II of this Act; or

(2) the competitive negotiation method, as provided in title III of this Act; or

(3) the simplified small purchase method as provided in title IV of this Act.

(b) These methods of acquiring property or services are equally valid alternatives when selected on the basis of the nature of the product or service being acquired, the circumstances of the acquisition, and other criteria set forth in this Act as implemented by the Administrator for Federal Procurement Policy.

REGULATORY COMPLIANCE

SEC. 102. (a) The Administrator for Federal Procurement Policy is authorized and directed, pursuant to the authority conferred by Public Law 93-400 and subject to the procedures set forth in such public law—

(1) to promulgate a single, simplified uniform Federal regulation implementing this Act and to establish procedures for insuring compliance with the Act and such regulation by all executive agencies within two years after the date of enactment of this Act;

(2) to review such regulation on a regular basis and issue revisions as necessary;

(3) to make periodic studies in order to determine whether agency compliance with this Act has been efficient and effective; and

(4) to establish and oversee a program to reduce agency use of detailed product specifications.

(b) The Administrator for Federal Procurement Policy shall include in his annual report required under section 8 of Public Law 93-400 a report of his activities under this section, including his assessment of agency implementation of and compliance with the requirements of this Act (including, for example, specific reductions in the use of detailed specifications pursuant to this Act), and recommendations for revisions in this Act or any other provision of law.

TITLE II—ACQUISITION BY COMPETITIVE SEALED BIDS

CRITERIA FOR USE

SEC. 201. The competitive sealed bids method shall be used in the acquisition of property and services when all of the following conditions are present—

(1) the anticipated total contract price exceeds the amount specified in title IV of this Act for use of the simplified small purchase method;

(2) the agency need can be practicably defined in terms not restricted by security or proprietary design;

(3) the private sector will provide a sufficient number of qualified suppliers willing to compete for and able to perform the contract;

(4) suitable products or services capable of meeting the agency need are available so as to warrant the award of a fixed price contract to a successful bidder selected primarily on the basis of price;

(5) the time available for acquisition is sufficient to prepare the purchase description and to carry out the requisite administrative procedures;

(6) the property or service is to be acquired within the limits of the United States and its possessions; and

(7) the price for the property or service has not been established by or pursuant to law or regulation.

INVITATION FOR SEALED BIDS

SEC. 202. (a) The invitation for sealed bids shall be publicized in accordance with section 512 of this Act and shall be issued in such a way that—

(1) the time prior to opening the bids will be sufficient to permit effective competition; and

(2) the invitation will be accessible to all interested or potential bidders, however, eligibility to participate in the bidding may be restricted to concerns eligible to participate in small business set-asides or other such authorized programs.

(b) The invitation shall include a description of any factors in addition to price that will be considered in evaluating bids.

(c) To the maximum extent possible and consistent with needs of the agency, functional specifications shall be used to permit a variety of distinct products or services to qualify and to encourage effective competition.

(d) The preparation and use of detailed product specifications in a purchase description shall be subject to prior approval by the agency head. Such approval shall include written justification, to be made a part of the official contract file, delineating the circumstances which preclude the use of functional specifications and which require the use of detailed product specifications in the purchase descriptions.

(e) Where it is impracticable to plan for award primarily on the basis of price, the contracting officer may request the submission of unpriced technical proposals and subsequently issue an invitation for sealed bids limited to those offerors whose technical proposals meet the standards set forth in the original invitation.

EVALUATION, AWARD, AND NOTIFICATIONS

SEC. 203. (a) All bids shall be opened publicly at the time and place stated in the invitation.

(b) Award shall be made to the responsible bidder whose bid conforms to the invitation and is most advantageous to the Government, price and other factors considered; *Provided*, That all bids may be rejected when the agency head determines that, for cogent and compelling reasons, it is in the Government's interest to do so.

(c) Notice of award shall be made in writing by the contracting officer with reasonable promptness and all other bidders shall be appropriately notified.

TITLE III—ACQUISITION BY COMPETITIVE NEGOTIATION

CRITERIA FOR USE

SEC. 301. The competitive negotiation method shall be used in the acquisition of property and services when—

(1) the anticipated total contract price exceeds the amount specified in title IV of this Act for use of the simplified small purchase method; and

(2) the acquisition does not meet the criteria established pursuant to section 101(b) or as set forth in section 201 of this Act for use of competitive sealed bids.

SOLICITATIONS

SEC. 302. (a) Solicitations for offers shall be issued to a sufficient number of qualified sources so as to obtain effective competition and shall be publicized in accordance with section 512 of this Act, with copies of the solicitation to be provided or made accessible to other interested or potential sources upon request; however, eligibility to respond to the solicitation may be restricted to concerns eligible to participate in small business set-asides or other such authorized programs.

(b)(1) Each solicitation shall include both the evaluation methodology and the relative importance of all significant factors to be used during competitive evaluation and for final selection. In any case, if price is included as a primary or significant factor, the Government's evaluation shall be based where appropriate on the total cost to meet the agency need.

(2) Any changes in the evaluation factors or their relative importance shall be communicated promptly in writing to all competitors.

(c) To the maximum extent practicable and consistent with agency needs, solicitations shall encourage affective competition by—

(1) setting forth the agency needs in functional terms so as to encourage the application of a variety of technological approaches and elicit the most promising competing alternatives.

(2) not prescribing performance characteristics based on a single approach, and

(3) not prescribing technical approaches or innovations obtained from any potential competitor.

(d) If either the Government or an offeror identifies inadequacies in the solicitation which cause misunderstandings of the agency's needs or requirements, clarification of intent shall be made to all offerors in a timely fashion and on an equal basis.

(e) The preparation and use of detailed specifications in a solicitation shall be subject to prior approval by the agency head. Such approval shall include written justification to be made a part of the official contract file, delineating the circumstances which preclude the use of functional specifications and which require the use of detailed product specifications.

EVALUATIONS, AWARD, AND NOTIFICATIONS

SEC. 303. (a) Written or oral discussions shall be conducted with all responsible offerors in a competitive range. Such discussions shall generally be limited to obtaining any needed clarification, substantiation, or extension of offers. An initial offer may be accepted without discussion when it is clear that the agency need would be satisfied on fair and reasonable terms without such discussions, and the solicitation has advised all offerors that award may be made without discussions. If discussions are conducted with any offeror, discussions shall be conducted with all offerors in a competitive range. Discussions shall not disclose the strengths or weaknesses of competing offerors, or disclose any information from an offeror's proposal which would enable another offeror to improve his proposal as a result thereof. Auction techniques are strictly prohibited. Auction techniques include, but are not limited to, indicating to an offeror a price which must be met to obtain further consideration, or informing him that his price is not low in relation to another offeror, or making multiple requests for best and final offers. Detailed negotiations of price and technical factors shall generally be limited to the successful offerors(s).

(b) When wards are made for alternative approaches selected on the basis of the factors contained in the solicitation, whether for design, development, demonstration, or delivery, the contractors shall be sustained in competition to the maximum extent practicable until sufficient test or evaluation information becomes available to narrow the choice to a particular product or service.

(c) Until selection is made, information concerning the award shall not be disclosed to any person not having source selection responsibilities, expect that offerors who are eliminated from the competition may be informed prior to awards.

(d) Award shall be made to one or more responsible offerors whose proposal(s), as evaluated in accordance with the terms of the solicitation are most advantage-

ous to the Government. Notification of award to all unsuccessful offerors shall be made with reasonable promptness.

(e) Notwithstanding any other provision of this Act, the continued use of multiple award schedules is authorized.

NONCOMPETITIVE EXCEPTIONS

SEC. 304. (a) Compliance with the procedures prescribed in sections 302 and 303 is not required if the contract to be awarded stems from acceptance of an unsolicited proposal, or if the agency head determines that it is in the best interest of the Government to enter into noncompetitive contract: Provided,

(1) That such determination, together with the reasons therefor, is in writing, and conforms with regulations issued by the Administrator for Federal Procurement Policy, pursuant to section 102(a)(1); and

(2)(A) for all contracts except those stemming from the acceptance of an unsolicited proposal, notice of intent to award such a contract shall be publicized pursuant to section 512 at least thirty days in advance of solicitation of a proposal from the prospective contractor; or, at least thirty days in advance of the proposed award date, when earlier notice is impracticable. Such notice shall include a description of the property or services to be acquired, the name of the prospective source, the time for accomplishment of the work, and the reason for selection of the source. If, after such notice, other sources demonstrate an ability to meet the requirements for the work to be performed, a solicitation shall be issued to all such prospective offerors;

(B) in the case of those contracts stemming from the acceptance of an unsolicited proposal, notice of intent to award such a contract shall be publicized prior to award, pursuant to section 512 of this Act. Such notice shall include a description of the property or service to be acquired, the name of the prospective source, and the time for accomplishment of the work.

(b) Where there is no commercial usage of the product or service to be acquired under this section, and the agency head determines that substantial follow-on provision of such product or service will be required by the Government, the agency head shall, when he deems appropriate, take action through contractual provision, or otherwise, to provide the Government with a capability to establish one or more other competitive sources.

PRICE AND COST DATA AND ANALYSIS

SEC. 305. (a)(1) The term "price data" means actual prices previously paid, contracted, quoted, or proposed, for materials or services identical or comparable to those being acquired, and the related dates, quantities, and item descriptions which prudent buyers and sellers would reasonably expect to have a significant effect on the negotiation of a contract price or payment provisions.

(2) The term "cost data" means all facts which prudent buyers and sellers would reasonably expect to have a significant effect on the negotiation of a contract price or payment provisions. Such data are of a type that can be verified as as being factual, and are to be distinguished from judgmental factors. The term does, however, include the facts upon which a contractor's judgment is based.

(3) The term "price analysis" means the process of examining and evaluating a price without evaluation of the individual cost and profit elements of the price being evaluated.

(4) The term "cost analysis" means the element-by-element examination and evaluation of the estimated or actual costs of contract performance, and involves analysis of cost data furnished by an offeror or contractor and the judgmental factors applied in projecting from such data to the offered price.

(b) The contracting officer shall obtain price data and shall use price analysis techniques to analyze and evaluate the reasonableness of a negotiated prime contract price or of a price adjustment pursuant to a modification thereto where—

(1) the price is expected to be $500,000 or less;

(2) the price is based on an established catalog or market price of a commercial item sold in substantial quantities to the general public; or

(3) there has been a recent comparable competitive acquisition.

(c) In the case of subcontracts, when any of the conditions in subsection (b) applies, price data shall be obtained and price analysis techniques shall be used to analyze and evaluate the reasonableness of—

(1) a subcontract price—where evaluation of a subcontract price is necessary to insure the reasonableness of the prime contract price, or

(2) a subcontract price adjustment pursuant to a prime contract modification.

(d) Except as provided in subsection (b) (2) and (3), cost data shall be obtained and cost analysis techniques shall be used to analyze and evaluate the reasonableness of prices—

(1) whenever the price of a negotiated prime contract or a price adjustment pursuant to a contract modification is expected to exceed $500,000; or

(2) for any subcontract price or price adjustment pursuant to a modification thereto in excess of $500,000 which forms part of a negotiated prime contract price or higher tier subcontract price.

(e) Notwithstanding subsection (b) hereof, the contracting officer may obtain cost data and use cost analysis techniques when authorized under circumstances set forth in regulations issued by the Administrator for Federal Procurement Policy pursuant to this Act.

(f) Contractors and subcontractors shall submit in writing such price data or cost data as are required to be obtained pursuant to this section. Regulations issued by the Administrator for Federal Procurement Policy may authorize identification in writing of price data and cost data, in lieu of actual submission, under specified circumstances.

(g) Any prime contract or subcontract or modification thereto for which price data or cost data are required shall contain a provision that the price to the Government, including profit or fee, shall be adjusted to exclude any significant sums by which it may be determined by the contracting officer that such price was increased because of reliance on data which were inaccurate, incomplete, or noncurrent as of the date of submission or other date agreed upon between the parties (which date shall be as close to the date of agreement on the negotiated price or payment provisions as is practicable).

(h) The requirements of this section do not apply to contracts or subcontracts where the price negotiated is based on adequate price competition, prices set by law or reglation, or, in exceptional cases, where the head of the agency determines that the requirements of this section may be waived and states in writing his reasons for such determination.

ACCESS TO RECORDS

SEC. 306. (a) Until expiration of three years after final payment under a contract or a subcontract negotiated or amended under this title, an executive agency is entitled to inspect the plants and examine any books, documents, papers, records, or other data of the contractor and his subcontractors that involve transactions relating to the contract or subcontract or to the amendment thereof, including all such books, records, and other data relating to the negotiation, pricing, or performance of the contract or subcontract.

(b) Until expiration of three years after final payment under a contract or a subcontract negotiated or amended under this title, the Comptroller General of the United States or his authorized representatives is entitled to inspect the plants and examine any books, documents, papers, records, or other data of the contractor and his subcontractors that directly pertain to, and involve transactions relating to the contract or subcontract or to the amendment hereof, including all such books, records, and other data relating to the negotiation, pricing, or performance of the contract or subcontract. This provision may be waived for any contract or subcontract with a foreign contractor or subcontractor, if the Agency head determines, with concurrence of the Comptroller General, that waiver would be in the public interest. However, the concurrence of the Comptroller General or his designee is not required—

(1) where the contractor or subcontractor is a foreign government or agency thereof or is precluded by the laws of the country involved from making its books, documents, papers, or records available for examination; and

(2) where the head of the agency determines, after taking into account the price and availability of the property or services from United States sources, that the public interest would be best served by not applying subsection (b).

If subsection (b) is not applied to a contract or subcontract based on a determination under clause (2), a written report shall be furnished to the Congress.

(c) Inspections and examinations by executive agencies under subsection (a) shall be conducted only when necessary to insure efficient and economical con-

tract performance and/or to evaluate the accuracy, completeness, and currency of data submitted or identified pursuant to section 305. Multiple inspections and examinations of a contractor or subcontractor by more than one executive agency shall be eliminated to the maximum extent practicable by coordinating inspection and examination responsibilities in accordance with regulations to be issued or authorized by the Administrator for Federal Procurement Policy pursuant to this Act.

TITLE IV—ACQUISITION BY SIMPLIFIED SMALL PURCHASE METHOD

CRITERION FOR USE

SEC. 401. The simplified small purchase method may be used in the acquisition of property and services when the anticipated total contract price does not exceed $10,000. In lieu of this method, the contracting officer may use either of the competitive methods prescribed in title II or III of this Act when such use would be more advantageous to the Government.

SOLICITATIONS AND AWARDS

SEC. 402. The contracting officer shall use simplified small purchase methods to obtain competition to the maximum extent practicable in making small purchases and thereupon may make award to the source whose offer is most advantageous to the Government. No provisions of this section are intended to eliminate effective screening of proposed acquisitions for appropriate application of small business set-aside or other procedures designed to assist small businesses. Simplified procedures for small purchases shall be issued by the Administrator for Federal Procurement Policy pursuant to this Act.

TITLE V—GENERAL PROVISIONS

CONTRACT TYPES

SEC. 501. (a) Contracts may be of any type or combination of types, consistent with the degree of technical and financial risk to be undertaken by the contractor, which will promote the best interests of the Government except that the cost-plus a percentage-of-cost system of contracting shall not be used under any circumstances.

(b) The preferred contract type shall be fixed price consistent with the nature of the work to be performed and the risk to be shared by the Government and the contractor.

WARRANTY AGAINST CONTINGENT FEES

SEC. 502. Each contract negotiated under title III of this Act or an award to be made as a result of the submission of a technical proposal under section 202(e) of this Act shall contain a warranty by the contractor that no person or selling agency has been employed or retained to solicit or secure the contract upon an agreement or understanding of a commission, percentage, brokerage, or contingent fee, excepting bona fide employees or bona fide established commercial or selling agencies maintained by the contractor for the purpose of securing business; and that for any breach or violation of the warranty, the Government may annul the contract without liability or deduct from the contract price or consideration the full amount of the commission, percentage, brokerage, or contingent fee.

CANCELLATIONS AND REJECTIONS

SEC. 503. (a) Where the contracting officer determines for cogent and compelling reasons, that it is in the best interest of the Government, he may—

(1) withdraw or cancel a small purchase order which has not been accepted in writing by the contractor, prior to the contractor's initiation of performance;

(2) cancel an invitation for sealed bids before bid opening or after bid opening but before award; or

(3) cancel a request for proposal and reject all offers.

(b) When requested, the contracting officer shall fully inform any unsuccessful offeror or bidder of the reasons for the rejection of his offer or bid.

MULTIYEAR CONTRACTS

SEC. 504. (a) Except as otherwise provided by law, an agency may make contracts for acquisition of property or services for periods not in excess of five years, when—

(1) appropriations are available and adequate for payment for the first fiscal year; and

(2) the Agency head determines that—

(A) the Government need for the property or services being acquired over the period of the contract is reasonably firm and continuing; and

(B) such a contract will serve the best interests of the United States by encouraging effective competition or promoting economics in performance and operation; and

(C) such a method of contracting will not inhibit small business participation.

(b) The Administrator for Federal Procurement Policy may grant exceptions to the five-year limitation imposed by subsection (a) upon the certification, in such form and of such content as the Administrator may require, by the Agency head that such exception is in the best interests of the Government. A copy of each such certification and each exception granted shall be delivered to the chairman of the House Committee on Government Operations, the Senate Committee on Governmental Affairs, and the Committees on Appropriations of the House of Representatives and the Senate, respectively.

(c) Any cancellation costs incurred must be paid from appropriated funds originally available for performance of the contract, or currently available for acquisition of similar property or services, and not otherwise obligated, or appropriations made available for such payments.

ADVANCE, PARTIAL, AND PROGRESS PAYMENTS

SEC. 505. (a) Any executive agency may make advance, progress, partial, or other payments under contracts.

(b) Advance and progress payments under contracts with small business concerns shall be granted where possible and to the extent practicable under the circumstances existing for each acquisition; and provisions limiting advance and progress payments to small business concerns may be inserted into solicitations.

(c) Payments under subsections (a) and (b) shall not exceed the unpaid contract price.

(d) When progress payments are made, the Government shall have title to the property acquired or produced by the contractor and allocable or properly chargeable to the contract. Notwithstanding any other provisions of law, that title may not be divested by any action of the contractor, or proceeding in bankruptcy, or encumbered by any lien or security interest.

(e) Advance payments under subsection (a) or (b) shall not be made in excess of the amount required for contract performance, and may be made only upon adequate security and a determination by the Agency head that to do so would be in the public interest. Such security may be in the form of a lien in favor of the Government on the property contracted for, on the balance in an account in which such payments are deposited, and on such property acquired for performance of the contract as the parties may agree. This lien is paramount to any other liens.

REMISSION OF LIQUIDATED DAMAGES

SEC. 506. Upon the recommendation of the Agency head the Comptroller General of the United States may remit all or part, as he considers just and equitable, of any liquidated damages provided by the contract for delay in performing the contract.

DETERMINATIONS AND FINDINGS

SEC. 507. (a) Determinations, findings, approvals, and decisions provided for by this Act may be made with respect to contracts individually or with respect to classes of contracts and shall be final.

(b) Each determination, approval, or decision shall be based upon written findings of the officer making the determination, approval, or decision, and shall be retained in the official contract file.

COLLUSIVE BIDDING INFORMATION

SEC. 508. (a) If the contracting officer or any other agency employee has reason to to believe that any bid, proposal or offer evidences a violation of the antitrust laws or provisions of this Act, the matter shall be referred, in accordance with agency procedures, to the Attorney General of the United States for appropriate action.

(b) Upon the request of the Attorney General of the United States, the Agency head shall make available to the Attorney General information which the Attorney General considers necessary and relevant to any investigation, prosecution or other action by the United States under the antitrust laws or other statute enforced by the Attorney General.

(c) The Agency head shall render needed assistance to the Attorney General in any investigation and prosecution flowing from the information provided in subsection (a) or (b) or from other investigation and prosecution in other antitrust matters.

GOVERNMENT SURVEILLANCE REQUIREMENTS

SEC. 509. (a) Notwithstanding any other provisions of law, an agency shall, upon applicantion by a contractor, waive the requirements listed in 509(c) for that part of a contractor's operation which is separately managed and accounted for if, for the contractor's most recent fiscal year, more than 75 per centum of the business of the activity, as measured by total revenues is conducted under commercial and/or competitive Government contracts. To be competitive for purposes of this section, the Government contracts must be firm fixed-price or fixed-price with escalation with price the deciding factor in the award.

(b) The waiver provided in 509(a) shall not be granted if the contractor's activity for the most recent fiscal year, had costs incurred of over $10,000,000, under Government contracts where the contract prices were based on estimated or actual costs. This category would include such contracts as cost reimbursement type contracts, firm fixed-price contracts negotiated without price competition, fixed-price incentive contracts, and time and material contracts.

(c) The waiver provided in 509(a) shall apply to any or all of the following:

(1) reviews of contractor management and procurement systems;

(2) determinations of reasonableness of indirect overhead costs;

(3) provisions of the Cost Accounting Standards Act (Public Law 91-379);

(4) advance agreements for independent research and development and bid and proposal activities; and

(5) provisions of the Renegotiation Act.

(d) The waiver period shall not exceed two years without reconsideration by the Agency. The waiver may be canceled at any time or may be withheld altogether if the Agency head makes a written determination that the waiver should not apply.

(e) The waiver provided for in 509(a) shall not affect the General Accounting Office access-to-records authority as set forth in section 306 of this Act.

MAINTENANCE OF REGULATIONS

SEC. 510. Notwithstanding the provisions of title IX of this Act or any other provisions of law, regulations relating to Federal procurement promulgated or in effect before the date of enactment of this Act shall remain in effect until repealed by order of the Administrator for Federal Procurement Policy or until the lapse of two years after the date of enactment of this Act, whichever is earlier. No regulation preserved by operation of this section may be amended without the prior approval of the Administrator for Federal Procurement Policy.

PAYMENTS OF FUNDS DUE

SEC. 511. A clause shall be included in every contract awarded by the United States pursuant to this Act which shall provide for interest to be paid by the Federal Government to the contractor on any amount due to the contractor for more than thirty days. No amount shall be considered due until receipt by the Government of a proper invoice and any substantiating documentation required. Interest payable by the Government shall be the interest in effect which has been established by the Secretary of the Treasury pursuant to Public Law 92-41 (85 Stat. 97) for the Renegotiation Board, as of a date thirty days after the date the amount becomes due.

PUBLICATION OF INTENT

SEC. 512. It shall be the duty of the Secretary of Commerce, and he is empowered, to obtain notice of all proposed acquisition of above $10,000, from any executive agency engaged in acquisitions in the United States; and to publicize such notices in the daily publication "United States Department of Commerce Synopsis of the United States Government Proposed Procurements, Sales, and Contract Awards", immediately after the necessity for the acquisition is established; except that nothing herein shall require publication of such notices with respect to those acquisitions—

(1) which for security reasons are of a classified nature; or

(2) which involve perishable subsistence supplies; or

(3) which are of such unusual and compelling emergency that the Government would be seriously injured if notice were required to be publicized thirty days in advance of the proposed contract award date. In all such cases, notice shall be published at the earlies practicable opportunity; or

(4) which are made by an order placed under an existing contract; or

(5) which are made from another Government department or agency, or a mandatory source of supply; or

(6) for which it is determined in writing by the procuring agency, with the concurrence of the Administrator, Small Business Administration, that advance publicity is not appropriate or reasonable.

REVISIONS OF THRESHOLDS

SEC. 513. At least every three years, beginning with the third year after enactment of this Act, the Administrator for Federal Procurement Policy shall review the prevailing costs of labor and materials and may revise the amounts stated in sections 305, 401, 509, and 512 or any prior revisions thereof, notwithstanding any other provision of law, to reflect an increase or decrease by at least 10 per centum in the costs of labor and materials. At least sixty days in advance of its effective date, the Administrator shall report to Congress any such revision which by itself, or cumulatively with earlier increases, represents 50 per centum or more increase.

SUNSET FOR SPECIFICATIONS

SEC. 514. All specifications shall be reviewed at least every five years, and shall be canceled, modified, revised, or reissued as determined by such review.

MINORITY BUSINESS PARTICIPATION

SEC. 515. The Administrator for Federal Procurement Policy is authorized and directed to initiate, in consultation with the Small Business Administration, periodic reviews of acquisition programs within the executive branch with the objective of making minority business participation in government contracting more effective and assuring that minority businesses have full opportunity to compete for Government contracts. Targets should be set which reflect the Government's commitment to increasing minority business participation in Federal contracting.

LIMITATION ON CONTRACT CLAIMS

SEC. 516. Any claim by an executive agency against a contractor under a provision of a contract awarded by the agency pursuant to this Act shall be made within six years from the date of final payment under the contract.

TITLE VI—DELEGATION OF AUTHORITY

DELEGATION WITHIN AN EXECUTIVE AGENCY

SEC. 601. Each agency head may delegate any authority under this Act, provided that such delegation is made in accordance with regulations established by the Administrator for Federal Procurement Policy. Delegation of authority to make determinations under sections 202, 302(e), 304, 305, 306, and 509 shall be maintained at the highest organizational level practicable in order to protect the integrity of the acquisition process consistent with the nature and the size of the acquisition decision. The authority in section 702(b) to authorize the award of a contract notwithstanding a protest pending before the Comptroller General may not be delegated below the level of Assistant Secretary or comparable level.

JOINT ACQUISITIONS

SEC. 602. (a) To facilitate acquisition of property or services by one executive agency for another executive agency, and to facilitate joint acquisition by those agencies—

(1) the Agency head may, within his agency, delegate functions and assign responsibilities relating to the acquisition;

(2) the heads of two or more executive agencies may by agreement delegate acquisition functions and assign acquisition responsibilities from one agency to another of those agencies or to an officer or employee of another of those agencies; and

(3) the heads of two or more executive agencies may create joint or combined offices to exercise acquisition functions and responsibilities.

(b) Subject to the provisions of section 686 of title 31, United States Code—

(1) appropriations available for acquisition of property and services by an executive agency may be made available for obligation for acquisition of property and services for its use by any other agency in amounts authorized by the head of the ordering agency and without transfer of funds on the books of the Department of the Treasury;

(2) a disbursing officer of the ordering agency may make disbursement for any obligation chargeable under subsection (a) of this section, upon a voucher certified by an officer or employee of the acquisition agency.

TITLE VII—PROTESTS

PURPOSE

SEC. 701. Under the authority contained in the Budget and Accounting Act, 1921, as amended, protests shall be decided in the General Accounting Office if filed with that Office in accordance with this title. For purposes of this title, the term "protest" means a challenge to a solicitation, or to the award or proposed award of any contract to be financed by appropriated funds for the acquisition of property or services or for any sale or lease by the Government and the term "agency" means an executive department as defined by section 101 of title 5, United States Code; an independent establishment as defined by section 104 of title 5, United States Code (except that it shall not include the General Accounting Office); a military department as defined by section 102 of title 5, United States Code; the United States Postal Service; a wholly owned Government corporation as defined by section 846 of title 31, United States Code (but does not include the Tennessee Valley Authority or the Bonneville Power Administration); and any department or agency or other activity of the Federal Government whose accounts are subject to settlement by the Comptroller General of the United States pursuant to the Budget and Accounting Act, 1921, as amended.

JURISDICTION

SEC. 702. (a) In accordance with the procedures issued pursuant to section 704. the Comptroller General shall have authority to decide any protest submitted by an interested party or referred by any agency or Federal instrumentality. An interested party is a firm or an individual whose direct economic interest would be affected as contractor or subcontractor by the award or nonaward of the contract.

(b) No contract shall be awarded after the contracting activity has received notice of a protest to the Comptroller General while the matter is pending before him: *Provided, however.* That the head of an executive agency may authorize the award of a contract notwithstanding such protest, upon a written finding that the interest of the United States will not permit awaiting the decision of the Comptroller General: *And provided further.* That the Comptroller is advised of such finding prior to the award of the contract.

(c) With respect to any solicitation, proposed award, or award of contract protested to him in accordance with this title, the Comptroller General is authorized to declare whether such solicitation, proposed award, or award comports with law and regulation.

PROCEEDINGS

SEC. 703. (a) To the maximum extent practicable, the Comptroller General shall provide for the inexpensive, informal, and expeditious resolution of protests.

(b) Each decision of the Comptroller General shall be signed by him or his delegee and shall be issued under the authority of the Comptroller General to settle the accounts of the Government under the Budget and Accounting Act, 1921, as amended. A copy of the decision shall be furnished to the interested parties and the executive agency or agencies involved.

(c) There shall be no ex parte proceeding in protests before the Comptroller General or his representative, except that this subsection shall not be deemed to preclude informal contacts with the parties for procedural purposes.

(d) The Comptroller General is authorized to dismiss any protest he determines to be frivolous or which, on its face, does not state valid basis for protest.

(e) Where the Comptroller General has declared that a solicitation, proposed award, or award of a contract does not comport with law or regulation, he may further declare the entitlement of an appropriate party to bid and proposal preparation costs. In such cases the Comptroller General may remand the matter to the executive agency involved for an initial determination as to the amount of such costs. Declarations of entitlement to monetary awards shall be paid promptly by the executive agency concerned out of funds available for the purpose.

GENERAL PROVISIONS

SEC. 704. The Comptroller General shall issue such procedures, not inconsistent with this title, as may be necessary in the execution of the protest decision function. He may delegate his authority to other officers or employees of the General Accounting Office.

JUDICIAL REVIEW

SEC. 705. Any person adversely affected or aggrieved by the action, or the failure to act, of an executive agency, or of the Comptroller General, in respect of a solicitation or award hereunder may obtain judicial review thereof to the extent provided by sections 702 through 706 of title 5, United States Code, including determinations necessary to resolve disputed material facts or when otherwise appropriate.

TITLE VIII—APPLICABILITY OF SUBSEQUENT LAWS

SEC. 801. No law enacted after the date of enactment of this Act, including any limitation in any appropriation bill or any limitation of any provision authorizing the appropriation of funds, may be held, considered, or construed as amending any provision of this Act, unless such law does so by specifically and explicitly amending or superseding a specific and separately referenced provision of this Act.

SEPARABILITY

SEC. 802. If any provision of this Act or the application thereof to any person or circumstance is held invalid, neither the remainder of this Act nor the application of such provision to other persons or circumstances shall be affected thereby.

TITLE IX—AMENDMENTS AND REPEALS

AMENDMENTS

SEC. 901. (a) The Agriculture Department Appropriation Act, 1923, is amended by striking out ", after due advertisement and on competitive bids," in the first proviso on the page at forty-second Statutes at Large, page 517 (7 U.S.C. 416).

(b) Section 101(d) and 104 of the Department of Agriculture Organic Act of 1944 (58 Stat. 734, 736; 7 U.S.C. 430, 432) are amended by striking out "in the open market".

(c) Section 2356(b) of title 10, United States Code, is amended by striking out the last sentence.

(d) Sections 4504 and 9504 of title 10, United States Code, are each amended by striking out everything after "United States" and inserting in lieu thereof a period.

(e) Sections 4505 and 9505 of title 10, United States Code, are each amended by striking out the second sentence.

(f) Clause (2) of section 502(c) of the Act of August 10, 1948 (62 Stat. 1283; 12 U.S.C. 1701c(b)(2)), is amended by striking out ", without regard to section 3709 of the Revised Statutes".

(g) Section 502(e) of the Act of December 31, 1970 (84 Stat. 1784; 12 U.S.C. 1701z–2(e)), is amended by striking out ", without regard to section 3709 of the Revised Statutes,".

(h) Section 708(h) of the Act of June 27, 1934, as amended August 10, 1948 (62 Stat. 1279; 12 U.S.C. 1747g(h)), is amended by striking out the proviso at the end.

(i) Section 712 of the Act of June 27, 1934, as amended August 10, 1948 (62 Stat. 1281; 12 U.S.C. 1747k) is amended by striking out "and without regard to section 3709 of the Revised Statutes".

(j) Section 208(b) of the Act of June 26, 1934, as amended October 19, 1970 (84 Stat. 1014; 12 U.S.C. 1788(b)), is amended by striking out the last sentence.

(k) Clause (4) of section 2(b) of the Act of July 18, 1958 (72 Stat. 386; 15 U.S.C. 634(b)(4)), is amended by striking out: "Section 3709 of the Revised Statutes, as amended (41 U.S.C., section 5), shall not be construed to apply to any contract of hazard insurance or to any purchase or contract for services or supplies on account of property obtained by the Administrator or as a result of loans made under this Act if the premium therefor or the amount thereof does not exceed $1,000.".

(l) Section 3 of the Act of April 24, 1950 (64 Stat. 83; 16 U.S.C. 580c) is amended to read as follows:

"SEC. 3. The Forest Service is authorized to make purchases of (1) materials to be tested or upon which experiments are to be made or (2) special devices, test models, or parts thereof, to be used (a) for experimentation to determine their suitability for or adaptability to accomplishment of the work for which designed or (b) in the designing or developing of new equipment: *Provided*, That not to exceed $50,000 may be expended in any one fiscal year pursuant to this authority and not to exceed $10,000 on any one item or purchase.".

(m) Section 2(b)(1) of the Act entitled "An Act to authorize the construction of a National Fisheries Center and Aquarium in the District of Columbia and to provide for its operation", approved October 9, 1962 (76 Stat. 753; 16 U.S.C. 1052), is amended by striking out ", without regard to the provisions of section 3709 of the Revised Statutes of the United States (41 U.S.C. 5),".

(n) Section 224(a) of the Act of November 8, 1965 (79 Stat. 1228; 20 U.S.C. 1034(a)), is amended by striking out ", and, without regard to section 3709 of the Revised Statutes (41 U.S.C. 5),".

(o) Section 7 of the Act of December 20, 1945, as amended October 10, 1949 (59 Stat. 621; 22 U.S.C. 287e), is amended by striking out ", all without regard to section 3709 of the Revised Statutes, as amended (41 U.S.C. 5)".

(p) Section 707 of the Act of August 13, 1946 (60 Stat 1019; 22 U.S.C. 1047), is amended by striking out ", without regard to section 3709 of the Revised Statutes".

(q) Section 22(e)(7) of the Act of December 29, 1970 (84 Stat. 1613, 29 U.S.C. 671(e)(7)), is amended by striking out ", and without regard to section 3709 of the Revised Statutes, as amended (41 U.S.C. 5), or any other provision of law relating to competitive bidding."

(r) Section 6(b) of the Act of August 31, 1954 (68 Stat. 1010; 30 U.S.C. 556(b)), is amended by striking out "and without regard to the provisions of section 3709, Revised Statutes (41 U.S.C. 5)".

(s) Section 1820(b) of title 38, United States Code, is amended by striking out "section 5 of title 41" and inserting in lieu thereof the "Federal Acquisition Act of 1977" and by deleting "if the amount of such contract exceeds $1,000.".

(t) Section 5002 of title 38, United States Code, is amended by substituting a period for the comma after "work" and striking out the remainder of the section.

(u) The Act of October 10, 1940, as amended (54 Stat. 1109; 41 U.S.C. 6a, b(a), is amended by striking out section 2, and by striking out "without regard to the provisions of section 3709 of the Revised Statutes, as amended," in subsection (a). The Act of July 27, 1965 (79 Stat. 276; 41 U.S.C. 6a–1) is amended by striking out any and all references to section 3709 of the Revised Statutes in the sections relating to Architect of the Capitol.

(v) Section 11 of the Act of June 30, 1936 (49 Stat. 2039, renumbered section 12 in 66 Stat. 308; 41 U.S.C. 45), is amended to read as follows:

"SEC. 12. The provisions of this Act requiring the inclusion of representations with respect to minimum wages shall apply only to purchases or contracts relating to such industries as have been the subject matter of a determination by the Secretary of Labor.".

(w) Section 356(b) of the Act of July 1, 1944, as added October 18, 1968 (82 Stat. 1175; 42 U.S.C. 263d(b)), is amended by striking out the references to

section 3709 of the Revised Statutes and 41 U.S.C. 5 in clause (3), and by striking out the parenthetical phrase "(by negotiation or otherwise)" in clause (4).

(x) Section 1(b) of the Act of October 14, 1940 (54 Stat. 1126; 42 U.S.C. 1521 (b)), is amended by striking out the reference to section 3709 of the Revised Statutes in the first parenthetical phrase, and by striking out the first proviso and inserting in lieu thereof: "Provided, That the cost plus a percentage of cost system shall not be used.".

(y) Section 202(b) of the Act of October 14, 1940 (55 Stat. 362; 42 U.S.C. 1532(b)), is amended by striking out the reference to section 3709 of the Revised Statutes, and by adding the following proviso at the end of paragraph 1532(b); "Provided, That the cost plus a percentage of cost system shall not be used.".

(z) Section 309 of the Act of September 1, 1951 (65 Stat. 307; 42 U.S.C. 1592h), is amended by striking out clause (a), and amending clause (b) to read as follows:

"(b) the fixed-fee under a contract on a cost-plus-a-fixed-fee basis shall not exceed 6 per centum of the estimated cost;".

(aa) Section 103(b)(4) and 104(a)(2) of the Act of July 14, 1955, as amended November 21, 1967 (81 Stat. 486, 487; 42 U.S.C. 1857b (b)(4), b–1(a)(2)), is amended by striking out the references to section 3709 of the Revised Statutes and to section 5 of title 41, United States Code.

(bb) Section 31(b) of the Atomic Energy Act of 1954 (68 Stat. 927; 42 U.S.C. 2051 (c)) is amended to read as follows:

"(c) The Commission may make available for use in connection with arrangements made under this section such of its equipment and facilities as it may deem desirable.".

(cc) Section 41(b) of the Atomic Energy Act of 1954 (68 Stat. 928; 42 U.S.C. 2061(b)) is amended by striking out the last three sentences in this section.

(dd) Section 43 of the Atomic Energy Act of 1954 (68 Stat. 929; 42 U.S.C. 2063) is amended by striking out the following: "without regard to the provisions of section 3709 of the Revised Statutes, as amended, upon certification by the Commission that such action is necessary in the interest of the common defense and security, or upon a showing by the Commission that advertising is not reasonably practicable. Partial and advance payments may be made under contracts for such purposes.".

(ee) Section 55 of the Atomic Energy Act of 1954 (68 Stat. 931; 42 U.S.C. 2075) is amended by striking out the second and third sentences in this section.

(ff) Section 6 of the Atomic Energy Act of 1954 (68 Stat. 933; 42 U.S.C. 2096) is amended by striking out the following: "Any purchase made under this section may be made without regard to the provisions of section 3709 of the Revised Statutes, as amended, upon certification by the Commission that such action is necessary in the interest of the common defense and security, or upon a showing by the Commission that advertising is not reasonably practicable. Partial and advance payments may be made under contracts for such purposes.".

(gg) Section 203(e) of the Act of April 3, 1970 (84 Stat. 115; 42 U.S.C. 4372 (e)), is amended by striking out the references to section 3709 of the Revised Statutes and to section 5 of title 41, United States Code.

(hh) Section 703 of the Act of June 29, 1936 (49 Stat. 2008; 46 U.S.C. 1193), is amended by striking out subsection (a), by striking out "For the construction, reconstruction, or reconditioning of vessels, and" in subsection (c), and by renumbering subsections (b) and (c) as (a) and (b), respectively.

(ii) Section 8(a) of the Act of September 30, 1965 (79 Stat. 894; 49 U.S.C. 1638(a)), is amended by striking out the references to section 3709 of the Revised Statutes and to section 5 of title 41, United States Code, in paragraph (1), and by striking out paragraphs (3) and (4).

(jj) Section 5012 of title 38, United States Code, is amended by striking out the second sentence in subsection (a) and all of subsection (c).

(kk) Section 832(g) of title 16, United States Code, is amended by striking out "$500" and inserting in lieu thereof "$10,000".

(ll) Section 2075 of title 42, United States Code, is amended by striking out the second sentence and the third sentence in this section.

(mm) Section 6009(d) of title 42, United States Code, is amended by striking out the last sentence.

(nn) Section 286d(a)(7) of title 42, United States Code, is amended by striking out "without regard to section 529 of title 31 and section 5 of title 41".

(oo) Section 287b(c)(3) of title 42, United States Code is amended by striking out "without regard to section 529 of title 31 and section 5 of title 41".

REPEALS

SEC. 902. The following statutes or provisions of statutes are repealed.

Chapters 135 and 137 and sections 4535, 7522, and 9535 of title 10, United States Code; section 637(e) of title 15, United States Code; section 7 of the Act of May 18, 1938 (52 Stat. 406; 16 U.S.C. 833f); section 7 of the Act of March 3, 1875, as amended (18 Stat. 450; 25 U.S.C. 96); section 3 of the Act of August 15, 1876, as amended (19 Stat. 199; 25 U.S.C. 97); sections 602(d)(3) and 602(d)(10) of the Federal Property and Administrative Services Act as amended (40 U.S.C. 474 (3), (8), (10), and (19); sections 10(a) and 10(b) of the Act of September 9, 1959 (73 Stat. 481; 40 U.S.C. 609 (a), (b)); section 3735 of the Revised Statutes (41 U.S.C. 13); section 3653 of the Revised Statutes, as amended by the Act of July 7, 1884 (23 Stat. 204; 41 U.S.C. 24); title III of the Federal Property and Administrative Services Act of 1949 as amended (41 U.S.C. 251 et seq.); 41 U.S.C. 254(b); section 10(a) of the Act of September 5, 1950 (64 Stat. 591; 41 U.S.C. 256a); section 242m(f) of title 42, United States Code; section 292f of title 42, United States Code; section 300c-11(b)(4) of title 42, United States Code; section 300c-22(d) of title 42, United States Code; section 300d-5(d) of title 42, United States Code; section 300e-2(g) of title 42, United States Code; section 300e-3(h) of title 42, United States Code; section 510(a) of the Act of July 15, 1949 (63 Stat. 437; 42 U.S.C. 1480(a)); section 6(e) of the EURATOM Cooperation Act of 1958 (72 Stat. 1005; 42 U.S.C. 2295(e)); section 1345(b) of the Act of August 1, 1968 (82 Stat. 585; 42 U.S.C. 4081(b)); section 404 of the Act entitled "An Act to authorize appropriations during the fiscal year 1969 for procurement of aircraft, missiles, naval vessels, and tracked combat vehicles, research, development, test, and evaluation for the Armed Forces, and to prescribe the authorized personnel strength of the Selected Reserve of each Reserve component of the Armed Forces, and for other purposes, approved September 20, 1968 (82 Stat. 849); section 403c of title 50, United States Code.

Senator MORGAN. The subject of today's hearing is the Federal Acquisition Act of 1977, S. 1264. This legislation is of vital importance to the work of the Armed Services Committee, since it would replace the existing Armed Services Procurement Act under which military weapons systems and supplies are acquired. It represents an effort to revise and update in a comprehensive way the acquisition policy of the Federal Government and, for the first time, establish a uniform system for all agencies and departments. In addition, it embodies some important new initiatives in procurement policy.

This bill represents an enormous amount of effort by Senator Chiles' Subcommittee on Federal Spending Practices and Open Government, and by the full Governmental Affairs Committee. I want to take this opportunity to compliment Senator Chiles and his staff for the job that they have done in developing this very complex legislation.

Earlier this year, Senator Stennis asked Senator Goldwater and me to take on for the full committee the special responsibility of looking into a number of related pieces of pending legislation affecting procurement, among them S. 1264. It was the chairman's feeling, shared by the other members of the committee, that the changes proposed in this bill needed to be fully analyzed by this committee in light of our long experience in defense procurement.

We need to be certain that in replacing the Armed Services Procurement Act we are actually improving the system, particularly as regards the acquisition of large and expensive weapons systems. In addition, we want to consider a small number of related questions, such as special provisions for procurement from foreign governments and special

statutory reporting requirements, that fall peculiarly within the expertise of this committee. It is my hope that we can contribute constructively to this bill.

At today's session we seek to frame in general terms the issues relating to S. 1264 that are of concern to the Armed Services Committee. We are pleased to have with us Senator Chiles, the principal sponsor of the bill and formerly a member of the Commission on Government Procurement, to give us an overview of the legislation and its purposes. We had also expected to hear from Senator Proxmire—it may be that he cannot come—who has some specific reservations about the bill as it relates to defense procurement, based on his long and active role in overseeing these matters.

Later in this series of hearings we hope to hear from the Defense Department and perhaps from other witnesses, though it is not our intention to redo the extensive hearings held by Senator Chiles' subcommittee.

Senator GOLDWATER. Thank you, Senator Morgan.

I welcome the opportunity to hold hearings along with Senator Morgan on S. 1264, the Federal Acquisition Act. Senator Chiles, who is before the committee today, in fact, he just walked in—is the author of this bill and he has devoted many hours in mastering the difficult subject of Federal procurement practices.

I might inject, Mr. Chairman, and Senator Chiles and interested witnesses, that I have been interested in procurement deficiencies as long as I have been here. I have been requesting of the chairman of this full committee to establish a subcommittee on procurement practices, and to allow us to do some really in-depth study. I have many volunteers in the field who would be most anxious to help, and I hope next year the chairman will understand the need for this, particularly in light of Senator Chiles' work.

This bill is far ranging in its reform—repealing many existing laws and changing many practices. For this reason, along with Senator Morgan, I intend to give the bill the fullest consideration.

After years of watching the award of contracts, I have feelings about several acquisition practices of the Department of Defense. Among these practices, though, is one that stands out in my mind, and that is the procedures for noncompetitive or sole source procurement. Most recently, I have had an experience with the Department of Defense about the acquisition for the Navy of light utility aircraft called the CTX. This was a multimillion-dollar award to Beech Aircraft Corp. which was not competed.

I have no argument with the Beech aircraft that was procured. In fact, I think I have flown every aircraft that Beech has ever made, and I have to add that they are superb. However, there are other companies which make aircraft just as well that should have had the opportunity to compete for this CTX contract.

I questioned this procurement at the time it was made and in February of this year Senator Metzenbaum and I brought suit in the district court seeking to inject competition into the decision to award the contract to Beech. That lawsuit demonstrated to me the difficulty in succeeding in overturning the decision by an executive agency to award a sole source contract. From my information, this was not unusual. I have been informed that there is not a single successful case,

except in the initial stages, of a disappointed bidder prevailing in court.

As we review this legislation, it is my recommendation that we bring before us industry witnesses. I would like to suggest that among those witnesses be Mr. Russ Meyers, president of Cessna Aircraft Co., so we can have before us a real example of a sole source procurement where a ready, willing, and capable contractor was precluded from competition.

DOD's reliance on sole source procurement is illustrated by the fact that of over 200,000 procurement actions in fiscal year 1976 in amounts exceeding $10,000, 117,000 were sole source with a total dollar value of $26 billion.

I understand that an executive agency needs discretion to award contracts and to make noncompetitive procurements. However, in cases of abuse of this discretionary power, I believe that the Department of Defense should be held to account. This morning I look forward to reviewing this legislation and to hearing from our two colleagues, Senators Chiles and Proxmire.

Senator MORGAN. Thank you, Senator. With your permission, I am going to ask counsel to come join us at the table.

Senator GOLDWATER. I would like to do the same with the minority side. Not being a lawyer, it is kind of difficult for me to ask questions because I never know when to shut up.

Senator MORGAN. You know it is difficult for me and these people are getting paid to do the job.

Senator GOLDWATER. You are a southerner and I am a westerner and that is one thing we have in common.

Senator MORGAN. Exactly.

Senator Chiles, you missed all the nice things we had to say about you before you got here. They may be the last nice things I have to say, but they are in the record anyway.

Senator CHILES. I will read the record, Mr. Chairman.

Senator MORGAN. Good. We are delighted to have you here, we welcome you and will be glad to hear from you at this time.

STATEMENT OF HON. LAWTON CHILES, U.S. SENATOR FROM THE STATE OF FLORIDA

Senator CHILES. Thank you very much. I want to say to you, Mr. Chairman, and to you, Senator Goldwater, I appreciate the fact that you have called these hearings. Procurement is something that I have been concerned with for a long time, and I know, Senator Goldwater, of your longstanding interest in it.

We all know that procurement is not the most interesting issue on the Hill. It is not the hottest issue, but it certainly is one of the most important.

Last year the Federal Government spent over $84 billion to buy everything from safety pins to submarines. If improved purchasing practices could cut costs by just 5 percent, we are talking about a $4 billion savings annually, and that certainly is something worth talking about. My feeling is that improved purchasing practices could do much more than that, we could be talking about as much as a 20-percent saving.

In addition to cutting the cost, I think improved purchasing practices will give us a much better product, and that is just as important as cutting costs.

Before outlining the ways in which S. 1264 would change current purchasing practices, and laying out the essential features of S. 1264, it is worth taking a minute to review what the purposes and characteristics of any Government purchasing system should be.

The first question we need to ask is: What are the features of a good Government purchasing system? Any system should be efficient and economical. The Government should strive to get the best product or service available at the lowest cost. That is the fundamental objective of any purchasing system.

There is one important feature which distinguishes Government purchasing systems from ones in the private sector: The Government is not spending its own money, it is spending the taxpayers' money. Thus it seems fair and equitable that the Government should operate openly in its purchasing practices, and insure that all businesses have a chance to do business with the Government. The United States is unique in this regard. Many other countries have no requirement that governing purchasing be conducted openly. Since the Revolutionary War, however, the concept of public advertising has been a central feature of this country's Government purchasing system.

It would seem, at first, that these two objectives—the need to run both an efficient and an equitable purchasing system—would conflict. How can we buy the best product if we have to take all these equity considerations into account?

The dilemma is easily resolved by relying on a phenomenon which accommodates both of these objectives: Open competition. Open competition gives each potential bidder the opportunity to compete for Government contracts. It also allows the Government to rely on the forces of competition among bidders to get the best product at the lowest price.

I would like to say that this idea of relying on competition is a new concept I developed. It is not, however. From the time the Second Continental Congress established the Commissary General in 1775, this requirement for open competition has been the fundamental feature of the Federal procurement system. Competition is not something which a procurement system can create; competition is a phenomenon of the marketplace. A good procurement system is one which is able to go into the marketplace and draw out the competitive forces which are there.

The purpose of S. 1264 is to establish such a system. These objectives are not different from the objectives which Congress has always set for the Government purchasing system. S. 1264 recognizes that the size of Federal purchasing has mushroomed and the nature of Federal purchasing requirements has become complex since the laws which govern the Federal purchasing system were enacted over 30 years ago. It further recognizes that many of the features of the current system which were designed to stimulate competition now hinder it.

S. 1264 would do two things to overcome the problems in today's system. First, it eliminates many barriers to entry into the Federal procurement system by simplifying and streamlining the system. Second, it requires the Government to focus on activities prior to

contract award. This emphasis on prepurchasing activities is designed to make the Government do what any prudent consumer does: to carefully check out what it is buying before it actually buys it. It is a feature which is sadly lacking in today's system.

S. 1264 was not drafted overnight. In the late sixties, Congress was confronted with cost overruns on major weapons systems, and with examples of waste and inefficiency in Federal purchasing practices. These revelations spurred the Congress to mandate a high level review of the entire scope of Federal purchasing practices by establishing the Commission on Government Procurement. The Commission, composed of Members of Congress, the executive branch, and the private sector, worked for 2½ years, and in 1973 issued a six-volume final report which contained 149 recommendations for changes.

I served on that Commission, as did Senator Jackson, who sponsored the Senate bill establishing the Procurement Commission. I have tried to make the implementation of the key recommendations of that Commission one of my top legislative priorities.

I might say, just digressing, I was a freshman with little else to do, and I got put on that Commission when Senator Jackson wanted to run for President the first time. Again having little else to do, I decided that rather than see six volumes sit on the shelf and gather dust, we ought to try to take those volumes and see if we could implement them into law.

S. 1264 builds on the recommendations of the Procurement Commission. The bill was introduced in the 94th Congress, revised and reintroduced in this Congress. The Governmental Affairs Committee held 5 days of hearings on the bill last summer and passed the bill out of committee last fall. Because of the size and importance of military procurement, the committee agreed to refer S. 1264 to the Armed Services Committee in order to benefit from the experience and expertise this committee has in procurement matters.

Now, I would like to discuss some of the important features of S. 1264.

SINGLE STATUTORY BASE

S. 1264 establishes one statute to govern all executive branch purchasing activities. Currently, military procurement practices are governed by the Armed Services Procurement Act of 1947, and civilian procurement by the Federal Property Act of 1949. Each statute has its own set of implementing regulations, and each statute has been amended at separate times without regard to the other one. The reason for this disjointed development of the law stems from the fact that Congress has not tried to focus on purchasing as a Government-wide activity. Past laws were usually patchwork solutions designed to cure specific abuses.

The result has been a number of inconsistences between the two laws, inconsistencies which have been magnified in the flowdown from statute to regulation to actual practice. This characteristic cripples the Government by creating confusion and paperwork which acts to inhibit many businesses, especially small ones, from competing for Government contracts. S. 1264 would establish a single, simple regulation for procurement, applicable to the activities of all the executive agencies.

S. 1264 puts the responsibility for issuing and revising the single procurement regulation in the Office of Federal Procurement Policy of the Office of Management and Budget. That Office was established by Congress to provide a top-level executive branch focal point for the development of procurement policies. Again, as you know, many times we never really have a key focal point for an important activity set for the executive branch. We have tried to overcome that problem with the Office of Federal Procurement Policy.

Its enabling statute stresses the need for openess in developing policies, including notification of Congress prior to issuing any important regulations. These important provisions, coupled with similar provisions in S. 1264, will facilitate effective congressional oversight of the procurement process.

The benefits of a single, simple procurement regulation for all Government agencies are many:

(1) Efficiency is enhanced by eliminating inconsistent practices;

(2) Redtape and regulations literally are cut in half;

(3) Competition is increased by reducing barriers to entry for businesses; this is especially helpful for small businesses.

FUNCTIONAL PURCHASE DESCRIPTIONS

S. 1264 requires the Government to state its purchase requirements in functional terms; that is, to describe the problem to be solved rather than deciding in advance what specific product will best solve it. A purchase description sets the ground rules which will govern the competition for the contract. A restrictive, detailed purchase description will restrict competition; it can lead to favoritism in awarding contracts. Look at it this way: If you let me write the purchase description, as detailed as I would like to, I guarantee that I could award the contract to anyone I wanted to. The extensive use of detailed purchase descriptions, which is so prevalent in today's system, not only confuses businesses but restricts competition.

Detailed product descriptions have many other detrimental effects. Probably the worst thing is the ban on innovation. With detailed specifications, new products with improved design and performance and lower cost, cannot even be considered by the Government. Detailed specs often run thousands of pages in length, are difficult to understand, and expensive to update and maintain. Functional specifications, on the other hand, are short, simple and easy to understand. They allow different approaches to a problem to be considered, encourage innovation, and broaden competition.

I brought with me today a stack of some detailed specifications. This stack right here contains the detailed specifications that GSA uses to purchase a file drawer. Both of you, I am sure, at some time have had an opportunity to go down and purchase a file cabinet. I purchased them for my law firm. I went to a business supply store.

Before you pick one out, you look at the drawers, you look at the rollers. You find that one file drawer will extend all the way out, and another will stop short. You can lean on them and tell how strong they are. If you line up four or five file cabinets and do these sorts of simple things, you can pick out the quality cabinets. Then you can determine whether you want to go on price or just what you want to do. That's a pretty good way to buy a file drawer.

When the Government bought file cabinets, it ended up that one company got all of the Government's business. Then the company started making change orders, and now we find that the files that the Government bought don't work. The locks fall off, the cabinets are dented, and all sorts of other defects. The irony is that we used sealed bid procurement to award the contract. But the specifications had all kinds of requirements which had little to do with commercial file drawers, so we didn't get all of the furniture manufacturers to bid on the contract.

That is the way that detailed specifications operate and prevent competition, prevent innovation.

Senator GOLDWATER. Would you yield?

Senator CHILES. Yes, sir.

Senator GOLDWATER. I think anyone who has ever served on a city council knows full well what you are talking about. I remember my introduction in the purchase of fire trucks and the specifications required a chrome-plated faucet on one side of the truck. Only one company put a chrome-plated faucet on one side of the truck.

Senator CHILES. You knew what that purchasing agent was up to, didn't you?

Senator GOLDWATER. Yes.

Senator CHILES. Well, we now have GSA in this tremendous scandal. Part of it, I am sure, is because, over the years, they have used this practice of having the detailed specifications in the bid packages.

Senator MORGAN. Senator, you mentioned that all these specifications were for one file cabinet and that only one company got it. What company was that, do you know?

Senator CHILES. Yes, sir, Art Metal.

Senator MORGAN. Is that the one we have been reading about?

Senator CHILES. Yes, sir.

S. 1264 does recognize that there will be times when the Government will have to use detailed purchase descriptions, and provides for their use. In spare parts or standardization cases, for instance, S. 1264 allows the agency to use detailed purchase descriptions.

TYPES OF PURCHASING METHODS

A major consideration in any purchase decision is what type of purchasing method will bring out competition and allow the Government to buy the best product at the lowest price. The current system states a preference for sealed bidding, but allows negotiations to be used if a proposed purchase falls into one of 17 specific categories. The exception has become the rule in current practice, with the Defense Department using sealed bidding for less than 10 percent of its purchases.

S. 1264 changes the current law by eliminating the 17 exceptions which allow for negotiations and replacing them with a description of those purchase considerations which need to be present for sealed bidding to generate competition. Under the current system, many products which could be purchased through sealed bidding are not; they fall into one of the 17 exceptions. The essence of sealed bidding is that it calls for pure price competition to determine who wins the contract. Thus, S. 1264 makes it mandatory that sealed bidding be used whenever the nature of the product to be purchased allows for competition based on purchase price.

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Right now—I didn't bring it in—but the detailed description for grits is about this high.

[Indicating about 7 inches.]

Chocolate is the same way. Coffee, the same way. These are for the military purchases of these products. Each one is a voluminous matter of detailed description for a product that your wife and mine competitively shops for every day. They can tell you all about the differences and nuances, price, and flavor and everything else, but the Government goes for all these detailed specifications.

S. 1264 should increase the use of sealed bidding for two reasons: First, it does not give a blanket exception from sealed bidding to classes of products; second, the use of functional specifications makes it easier to consider different types of the same product under sealed bidding procedures. In my opinion, sealed bidding remains the best method to buy those products which can be competed on the basis of price. S. 1264 makes the use of sealed bidding the first consideration in any purchase situation.

Sealed bidding is not the cure to all the problems in procurement, however. In many cases, sealed bidding simply won't generate competition or won't bring about the most effective purchase. A prudent consumer considers more than the sticker price when he buys a car; he looks at gas mileage, frequency of repair records, safety features, the like. My wife determines whether she likes the color or not.

In the same way, the Government needs to look at design features and total ownership costs as well as the sticker price when it buys a major system, or contracts for advanced research and development. It would be imprudent to expect the Government to buy F–15 fighters through sealed bidding; much more than the sticker price needs to be considered. Competitive negotiations allow the Government to compete other factors in a purchase, such as quality of design and total ownership costs.

Current law says very little about negotiations. It gives little guidance as to how negotiations should be conducted, and barely distinguishes competitive negotiations from noncompetitive negotiations. As a result, under today's system, once you decide not to use sealed bidding, it is almost as easy to make a sole source contract as it is to use competitive negotiations. So, once you find one of those 17 exceptions you can say exception 14 applies, so we will just go sole source, even though you still could have and should have competitive negotiations.

S. 1264, on the other hand, makes a clear distinction between competitive and noncompetitive negotiations. It states that competitive negotiations, when used in the appropriate circumstances, is a valid way to obtain competition. On the other hand, S. 1264 makes noncompetitive negotiations, or sole source contracting extremely difficult to use.

For competitive negotiations, S. 1264 sets out some such needed ground rules to insure that each competitor will be treated fairly. It requires the Government to indicate the relative importance it plans to attach to each evaluation factor at the outset of each competition. It also sets up a definite start and finish to the negotiation process, and prohibits practices such as auctioneering, which have led to buy-ins and cost overruns in the past. Generally, S. 1264 calls for a limitation on detailed negotiations early in the negotiation process. The limita-

tion does not prevent the Government from talking price issues with each competitor, nor does it force the Government to commit itself to a single contractor prematurely. This limitation is intended to eliminate the current practice of drawing up definitive contracts with each competitor before selection, a costly and time-consuming process. It also is designed to encourage each competitor to come forward with his best offer right away, rather than starting the protracted gaming process that is so prevalent in the procurement process today. The gaming is all this jockeying before you put your best offer on the table, and many times the Government fails to get that best offer because it gets cut off somewhere in between.

Finally, S. 1264 is intended to prevent the Government from combining aspects of each competitor's proposal with every other proposal. That practice, in the past, has led to the purchase of unproven products which only exist on paper, and which combine characteristics taken from every competitor's proposal.

For noncompetitive, or sole source negotiations, S. 1264 takes an entirely different approach. I believe that there is too much unjustified sole source procurement today, and S. 1264 is designed to make it much more difficult to award contracts without the benefit of competition.

Before making a sole source award, agencies would have to meet two requirements. First, the agency must make a detailed justification for going sole source. The determination does not ask: "What exemption are you using this time?" but rather, "What efforts did you make to find other firms? Why are these delivery schedules so short? What are you doing to increase competition the next time around?" That detailed determination then must be approved at a high level in the agency, a tightening of current procedures. We are not going to allow a low level official or contract officer to be making that determination. We are escalating that decision to someone who has to be fully aware of what he is doing.

In addition to the determination requirement, S. 1264 forces the agency to subject its intention to award sole source contract to an actual market test. It requires that notice of any noncompetitive award be published for 30 days in Commerce Business Daily.

If any company comes forward in response to the notice and has the capability to meet the job requirements, then the agency must award the contract competitively. This approach recognizes that internal determinations, no matter how detailed, represent the agency's opinion as to how much competition exists. S. 1264 calls for the marketplace to determine if competition exists, not the agency.

AUDITS AND SURVEILLANCE

After a contract is awarded, the Government must have the ability to assure itself that a contract price is reasonable, and that the quality of the product meets the standards called for in the contract. Effective contract auditing and cost controls are an absolute necessity if we are serious about spending the taxpayer's dollar prudently.

Because there are two procurement statutes and a multitude of differing audit systems, however, Government audit requirements have become confusing, inconsistent, and overlapping. The absence of

standard audit procedures causes agencies to duplicate and diffuse Government surveillance efforts, and imposes a heavy regulatory and paperwork burden on businesses.

S. 1264 establishes uniform, consolidated audit procedures which we hope will reduce paperwork for businesses, while strengthening and focusing Government audit efforts. The Truth in Negotiations Act is retained and extended by statute to all executive agencies. The Truth in Negotiations Act allows the Government to adjust contract prices downward if a contractor submitted inaccurate cost data or pricing data.

Section 306 of S. 1264 provides the contracting agency and the General Accounting Office with the authority to examine the contractor's books and records. This section is based on the access-to-records authority currently contained in the Armed Services Procurement Act, with two changes. First, it requires agencies to coordinate their inspection and audit responsibilities, thereby eliminating duplicative audits conducted by different agencies. This will save paperwork for the contractor and allow the Government to use its auditors more effectively. Second, it gives the agencies the authority to conduct "should cost" audits to determine if a contract work is being performed efficiently and economically.

The most effective way to insure efficient contract performance is to make sure that contracts are awarded competitively, and that the contractor, not the Government, bears the risk in performing the contract. The erosion of competition in today's system has led to the creation of a system of elaborate supplemental controls to assure prices equivalent to those obtained through competition. Those controls are necessary for large contractors, and for contractors who do little competitive business. However, smaller businesses, businesses operating in a competitive atmosphere, and businesses willing to bear all the risk for their contracts, must have strict internal cost controls if they are to stay in business. So, in this bill, we try to recognize that. While we give the Government broad access to a contractor's records, we allow companies whose business is predominantly competitive, and who have limited cost-type contracts with the Government, to apply for—this is important—apply for a 2-year waiver from certain management efficiency requirements.

This waiver is designed to focus those requirements where they are needed most—on large contractors and on contractors who operate in a noncompetitive environment. It does not touch controls over individual contracts. On the contrary, these controls are broadened and strengthened by S. 1264. All costs must be legal and necessary for performance.

Any company which does more than $10 million in noncompetitive Government contracts could not apply for this waiver. Any company which has more than 25 percent of its revenues in noncompetitive contracts could not apply for this waiver. This waiver lasts for 2 years and may be canceled by the agency at any time. The waiver exempts eligible contractors from reviews of the reasonableness of elements of a contractor's indirect or overhead costs. The premise behind the review is that companies which operate in a competitive environment will be forced to control their management costs, and will do so far more effectively than extensive surveillance would. This waiver provision is

similar to the CWAS concept the Defense Department uses, but is far stricter in its eligibility requirements and applies only to smaller contractors.

Basically, what we are trying to do is to bring more small contractors into the process. We are trying to say to them, if 75 percent of your business is going to be competitive, we are going to take away some of the paperwork requirements that would burden you or we are going to allow you to apply for the waiver of them. Then we will allow the Government at its convenience to determine whether it wants to grant the waiver or not.

Section 509 provides a waiver from the requirements of the Cost Accounting Standards Board under the same eligibility rules. This waiver is similar but not identical to one which the Cost Accounting Standards Board itself put in effect earlier this year.

This question is: Should the Government have one standard for all of these waivers or should the Cost Accounting Standards Board be allowed to use a different standard from everybody else? To me, it only makes sense that you have one standard for a waiver. To do otherwise goes against one of the basic goals of this bill—to eliminate unnecessary inconsistencies in the procurement system.

I can appreciate the Cost Accounting Standards Board's desire to be able to make its own exemptions without regard to all the other agencies in the Government. But I think the needs of the entire Government must override the concerns of one agency.

In closing, I would like to raise an issue which I hope the committee will give careful consideration to: The question of U.S. purchases from foreign governments and international organizations. The Department of Defense suggested that S. 1264 be amended to enable the Government to make such purchases without regard to the procurement laws. The Governmental Affairs Committee was sympathetic to the concerns raised, but felt that the Armed Services Committee should consider the impact of any such proposal.

Furthermore, I was puzzled that the Defense Department did not set forth specific examples of problems which have arisen from the lack of such authority today. In any case, I think that if such an authority is granted, it should be carefully limited, and Congress should play an active role in its operation.

What I have tried to do today is set out the basic purposes of S. 1264, and discuss some of the major changes it makes in the current procurement system. I know that other matters will need to be worked out, and I stand ready to work closely with this committee in working out any such questions.

Again, I want to thank each of you, the committee and the staff, for the interest that you have shown in this legislation and in the whole subject of procurement reform. I appreciate again your commitment to move this legislation forward expeditiously.

Senator MORGAN. Thank you, Senator Chiles, for a very informative and interesting presentation.

Senator Goldwater?

Senator GOLDWATER. I just want to compliment the Senator on his basic approach to the problem that, in my opinion, is one of the most serious that we face on Capitol Hill. Abuse in procurement has been

going on not just for a few years but probably ever since we have been a Republic.

I would like to ask the staff to do something and do it within the next 10 days. I have to keep getting back to my basic expressed interest in this so-called CTX contract. This may be just an example the staff can turn up, but I have a feeling that in many of these noncompetitive purchases the Government is paying as much or more than the item can be purchased for by a private citizen in a retail sale.

Senator CHILES. We certainly found that out in the GSA. We found that a private citizen can get a better deal on a calculator or adding machine than the Government could by going down to any one of the discount stores. He could buy the identical product at a price of say $64 that the Government, buying in tremendous quantities, was paying $80 for.

Senator GOLDWATER. That would be the point of this investigation and I am going to insist on it being made. If it is not made, I will at my own expense have an outside investigation made.

It is my understanding, and I can't prove it, that the Government is paying as much or more for these aircraft as I could go to a dealer and buy them for. I may be wrong, but if I am right, I think it ought to be spread out on the record to show what it has cost us.

Again, I am not questioning the quality of the aircraft, I am questioning the wisdom in throwing out four or five other possible competitors who can provide just as good an airplane at probably much lower prices. When the total buy of this aircraft is finished it will be close to $70 million. I would hate to think I could go out and buy that many aircraft on the open market cheaper than the Federal Government could.

I am going to ask the staff to do that. I would like to have the results within 10 days, and if anybody objects to having it done, let me know because I have a staff downtown that will do the job for me.

Senator MORGAN. I think it is something that should be done and I doubt there is a Member of the Senate that does not know of specific cases that have been brought to his attention, primarily by his own constituents, because those are the ones who normally come to us. We have had examples in North Carolina where sole source suppliers were selected without apparent justification, yet very little could be done about it. We will pursue that.

Senator CHILES. I might just say to Senator Goldwater that I would appreciate it if you would have your staff even check this out. I know your concern with the CTX problem. I know of the lawsuit that you filed. S. 1264, would give a disappointed bidder standing to sue in court. Section 705 gives an aggrieved bidder standing to sue in the Federal district court. First, of course, he was to get a bid protest decision from the Comptroller General, but I think you had that in your case.

Second, I think that S. 1264 says that an abuse of discretion not to award a contract would upset the award.

Senator GOLDWATER. I might say that this feature of your bill is one of the best liked features that my contractors who have contacted me have expressed, the fact that you no longer have to go through an agency or put up with being stopped by an agency, as Senator Metzenbaum and I were stopped by the Navy Department. The company can sue direct. I think that is very important to have in there.

Senator CHILES. Yes, sir. The bill takes the approach that it is not up to the agency to have the sole discretion as to how much competition is needed. The marketplace must be tested. S. 1264 requires agencies to advertise potential sole source contracts for 30 days. Capable companies which come forward during that period must be allowed to compete for the contract. In the CTX case, other companies would have seen the sole source notice and said, wait a minute, we can build that plane, we are ready to build that plane. Then I think Government would be put on notice that competition was mandated. On that basis, I think the court would say that a disappointed bidder had a rational basis for a cause of action.

In the CTX case the court said that the agency had a rational basis for its action. Would the agency have such a basis under S. 1264? S. 1264 provides for the 30-day notification procedure that I mentioned before, the committee report expands on that by saying the following, and I quote:

> Where there is a doubt as to whether a firm has the capability to meet the requirements of the contract, that doubt is to be resolved by initiating competitive procedures.

In the CTX case there was doubt; so S. 1264 would call for initiating of competitive procedures.

Senator GOLDWATER. Let me make sure in this case about the statements you have just made, because the word commonality was the word that the Secretary of the Navy hung his hat on, and the word commonality was inserted in, I think, the House Appropriations Committee report. Commonality was interpreted to mean that inasmuch as the Army and the Air Force had purchased this aircraft, that it should also be purchased by any other Government agency requiring a lightweight personnel carrier. That is what they hung their hat on and I would like to see your bill make it perfectly clear that such legerdemain, if I might use that word, as exercised by the Appropriations Committee, not be allowed to have a bearing on this.

Senator CHILES. I think we can try to do that. I think one of the ways we try to avoid sole source contracts is to use functional specifications and to have a simple system.

Again, OMB Circular A–109 is going to help a lot now, because agencies now have to go off and compete alternative functional approaches at the front end of a major acquisition. That in itself will provide some help in the future.

Senator MORGAN. Senator Chiles, Mr. Roberts would like to pursue a line of questioning for the committee.

Senator CHILES. I just say if you are going to use your brains I may use some of mine, too.

Senator MORGAN. Feel free.

Mr. ROBERTS. Thank you, Mr. Chairman.

Senator, I wonder if I could ask a couple of questions related to the DOD proposal on purchases from foreign governments. We have done some work on this and I gather that your subcommittee's view was that, in effect, DOD had not made the case for a complete waiver authority, is that right?

Senator CHILES. DOD raised the concern and emphasized that it wanted an exemption for these situations. But they wouldn't tell us exactly how broad the exemption should be, and they couldn't give us

any specific examples. I can understand their problem and I guess it is a sensitive question for them. I think that they are worried about any exemption because they are going to draw some heat from those Members of Congress and others who want to strictly buy American.

We recognize the problems DOD has and the efforts that the Congress, especially this committee, is making to try to provide some commonality of products in NATO. We all recognize that they all can't be American products. In any case, I didn't want to make an overall exemption without looking to the Armed Services Committee for some guidance.

Mr. ROBERTS. If some waiver authority were given, would you favor a system that required the Department to obtain by contract as much equivalent protection as it possibly could in relation to each of the waived requirements?

We have heard, for example, some of the foreign governments object to a particular standard contract provision, and it has been clear to us that they might be able to get something slightly less but still along the same line.

Senator CHILES. I think that would be a good approach especially since most of the foreign laws are nowhere near as strict as ours. Many times there is close cooperation between a foreign government and their companies; they are almost one and the same. Many times one of their companies is used as an instrument of foreign policy of that country.

When you are dealing with Krupp for instance, you could just as well be dealing with the government.

Mr. ROBERTS. Do you see a possibility for abuse there?

Senator CHILES. I think——

Mr. ROBERTS. If we have what is in effect a purchase from a foreign company but through a foreign government or if we have a quasi-public company, might not our American corporations be concerned about these waivers for competitive reasons?

Senator CHILES. Very much so, because foreign governments offer much different incentives. In many instances, foreign businesses are given tax incentives and other subsidies which make it impossible to have meaningful price competition. You cannot have equal price competition between one of our companies which is completely unsubsidized and say, a Japanese, German, or French company which benefits from government subsidies.

Senator GOLDWATER. Would you yield at that point?

I wish your staff would consider something that this full committee is faced with every year. I will try to give quickly two examples. This relates to foreign purchasing. We want to sell the F–16 aircraft to as many countries as we can but they make a little deal: If you don't buy my machinegun we are not going to buy your F–16, so, we wind up buying a machinegun. It is a good machinegun, but it has not been bought with the recognition of the fact that the American manufacturer could probably have made it cheaper.

We have the same situation prevailing to some extent on the main battle tank which we have been working on for years, in cooperation with the Germans, where they want us to buy their cannon or else. I don't know how to approach that. We might be able to build a better cannon—I doubt it—and if we did, we might be able to build it cheaper, which I doubt.

I would like to have your staff thinking about how this committee has to react to a situation where they sort of shove it in your face and say if you don't buy this simple little thing, we are not going to buy that expensive big thing.

Senator CHILES. We will be glad to look at that. There again we are talking about policy questions more than does staff opinions on the mechanics of a system. We are not going to have our cake and eat it too. We are not going to be able to sell them all the F–16s unless they participate in the contract, either through manufacturing the plane over there, or having them supply a subsystem like a machinegun. These are policy decisions that are traded off at some level.

Senator GOLDWATER. Thank you.

Mr. ROBERTS. Senator, as you know, the Defense Department has expressed some concern that the structure of S. 1264 might restrict them too. We are not going to be able to sell them all the F–16s unless they are interested in.

Senator CHILES. Yes, sir.

Mr. ROBERTS. I wonder if you would elaborate for just a moment for the committee on the question of maintaining a mobilization base. It is your view, as I understand it, that mobilization base procurement—for example, the production of ammunition—would be allowed under this bill?

Senator CHILES. We tried to recognize that the Department has a special need to keep vital facilities and skills available because of the event of a national emergency. Things like ammunition factories. The Armed Services Procurement Act of 1947 recognizes that need by giving the Defense Department the authority to limit competition to maintain the defense mobilization base. That authority was not specifically set out in S. 1264 but it was recognized and authorized in the committee report. We think it is important to maintain that authority.

If your committee feels that it should be specifically set out in the statute itself, we wouldn't have any problems with that.

Mr. ROBERTS. Let me turn to a related question about another noncompetitive area in Defense Department purchasing, and that is the problem of follow-on procurement. There you often have problems concerning proprietary technology, and Defense complains that it needs tremendous flexibility to go noncompetitive where it is dealing with large follow-on systems. I know there is potential for abuse there and I wonder how you feel S. 1264 is going to affect this area?

Senator CHILES. What we did in the bill was lift the language of an earlier procurement act, a defense authorization bill. In section 304(b), the bottom of page 58 of the bill, we provided where there is no commercial usage of the product or service to be acquired under this section, and the agency head determined that substantial follow-on provisions of such product or service will be required by the Government, the agency head shall, when he deems fit, take appropriate action through contractual provisions, or otherwise, to provide the Government with a capacity to establish one or more other competitive sources.

That is really the law now. I don't think we really are disturbing the body of case law that says if you have proprietary data and the Government wants to establish a new source, they have to buy your proprietary data, that you are entitled to something for it.

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We didn't want to disturb that but we did think that we should keep the same authority that the Government now has, for example, let's say the Government has a contract for a cluster bomb and they now decide they are ready to go into a larger production. They know that the company that developed it won't be able to supply all of their needs, or that they could generate lower prices with more firms bidding on the contract. That's the type of situation where they may want to set up other sources. They could do that under this bill. I do think, however, that same fellow who developed the bomb, if he has his proprietary data, would still have all of his rights. So I don't think we will disturb that.

Senator MORGAN. Lawton, I wonder if we could interrupt a minute and let you bring your specifications up here and get a picture. Our thought is we might get some people who would be interested in coming in and talking with us.

[Discussion off the record.]

Senator MORGAN. I apologize for the interruption but it was so illustrative I thought it would help.

Mr. ROBERTS. I wonder if I could turn for a moment to section 509 of the bill relating to the waivers of surveillance authority in certain instances.

You described in your statement the way this operates and I wonder if you could tell us in a little more detail about the 75 percent competitive test. You know that some have criticized this test, as not necessarily leading to the conclusion that the 25 percent of the business that is noncompetitive has the kind of cost and price control that you are looking for.

What was the background on the 75-percent test?

Senator CHILES. Well, I keep repeating this but I think it is important to repeat. First, these requirements are necessary before you can apply for a waiver. The Government itself is the one who decides whether to grant the waiver. So there is nothing automatic about it. There is nothing that says if you meet the 75-percent test and if you meet under $10 million test you get the waiver. It just allows you to apply for a waiver which is granted strictly at the convenience of the Government. The Government decides when it feels that there is enough competition present so that it would be better off sending its inspectors to look at the big contracts, the sole source contracts. We have to stay on top of those, and not be down nitpicking at the little people who operate competitively all the time.

It was our thinking that if a company does 75 percent of its business is in the pure competitive sector, they are root hogging or dying. They have no reason to not hold their costs down. In fact, they wouldn't be in business very long if their costs aren't held down.

The reason we put in these supplementary inspections and these procedures to start with, these standards, was because we had people who did all their business with the Government. All that business, or most of it, was sole source, and there is no reason for them to try to keep their overhead down, no reason for them to keep track of what they are paying out because a lot of it was on a cost-plus basis. They were not being penalized for being inefficient. I think you have to put in the cost accounting standards; you have to have extra inspection procedures. We are all for them. But to impose all of these require-

ments on the smaller guy doing less than $10 million, who is 75 percent competitive, is a waste of the Government's effort. It is just adding the kind of paperwork requirements that makes that small businessman say, "I don't want to do business with the Government. I have to add additional bookkeepers, I have to add additional records, and I have to have people around here all the time. Hell, I am going out and compete on other things and won't fool around with the Government." This is depriving the Government.

Mr. ROBERTS. I gather from your description, and in talking with the staff, that this would be a significantly different system than the one Defense had tried out and had been roundly criticized for years ago?

Senator CHILES. That's right. Again, all during the Procurement Commission hearings we held, the private sector kept talking about these controls. They kept saying that the Government is putting their effort in the wrong place.

Instead of doing the job and doing it thoroughly on the sole source companies, the Government inspectors end up spending all of their time inspecting the people who are competing. That isn't necessary. Furthermore, we also felt that it was worthwhile to hold something out to the fellow who is going to operate at his own risk, to relieve him of a little of the burden of redtape.

This is the hardest thing to get across to people. For this waiver, we have to recognize that the Government has the option to grant it, the Government can terminate it any time, and they still have the right to go in and charge the contractor, if he has overpriced any items.

Now, you run this waiver by the Cost Accounting Standards Board, and you will find that they hate it like the Devil hates holy water. That's because it is getting in on their territory, and could cut down their budget a bit. After all they might not need all of those inspectors, if they can't nitpick all of the little people that are in the block.

Mr. ROBERTS. I wonder if I could turn for a moment to the sole source exception procedure that exists in the bill.

As I understand it, the sole source decision would always have to be accompanied by the notice and a 30-day delay period?

Senator CHILES. Yes, sir.

Mr. ROBERTS. Is there any concern on your part that the 30-day delay might, in some instances, create needless delay in an important procurement? It is your intention that there be circumstances under which that would not be required, is that not correct?

Senator CHILES. We do provide for a waiver of that requirement in emergency circumstances. It is our feeling that in most cases, 30 days in the front is 30 days very well spent. It should help to keep cost overruns down, it should reduce the number of claims and change orders, and it could keep bid protests down. In addition, quite frankly, we want to discourage sole-source procurements when there is competition that is out there.

Mr. ROBERTS. Has this sort of system been tried, to your knowledge, in a state procurement system or elsewhere—this kind of sole source market test?

Senator CHILES. I don't think it has. In fact, we wrestled for a long time with the problems of how to prevent the Government from going sole source, while recognizing that there are some products you are

still going to buy noncompetitively. We kept thinking about having someone in the agency above the contracting officer make that determination, that checkoff. We realized though that if you escalate that decision up to the top of the agency, you would end up with a rubber stamp determination. No one benefits from that.

We concluded that there had to be some outside check, and the thing we came up with was a market place notification. Such a notification would put companies on notice so that they could come forward and say, look, we can do that job.

How many times, Senator Goldwater, have you had a company notify you and say, "I am horrified, I just found that such-and-such gave a contract to this company. We could have built that product, or we have a product just like that one, and we never heard a word about this contract."

Senator GOLDWATER. We get it quite often.

Senator CHILES. I do, too. In fact, I had somebody in my office yesterday.

Senator GOLDWATER. Or even notice that.

Senator CHILES. I will tell you what it was about. It was about the Enforcer, and what the Enforcer can or can't do, and whether the Enforcer would meet the Air Force's needs. Well, the fellow that designed the Enforcer has found out that the Air Force had a meeting. The Air Force said that they think they are going to need a plane that is lighter, faster, and cheaper than the A–10 to destroy tanks. They are inviting some companies to use their advanced R. & D. money to design such a plane but they didn't notify the fellow who had the Enforcer. For years he has been trying to say the Air Force will need a plane just like his.

Senator GOLDWATER. I didn't know that.

Senator CHILES. He is not going to be out of your hair. Because now the Air Force is talking about wanting a plane like his but they are not talking to him. They are talking to some other people.

Senator GOLDWATER. I would like to look into that because I hadn't heard about needing a lighter attack plane.

Senator CHILES. Well they are talking about a tank killer.

Senator GOLDWATER. I know the airplane.

Senator CHILES. The Air Force is now talking about a tank killer.

Senator MORGAN. With your permission, we will now shift over to Mr. Dawson and we have other questions. We don't want to encroach forever on your time.

Mr. DAWSON. Senator Chiles, I would like to follow up on some of the sole source questions that have been raised. Title VII of the bill provides a statutory base for GAO's longstanding bid protest responsibilities. However, there have been constitutional objections by the Department of Defense to that statutory grant to GAO. Why couldn't binding authority on bid protests be given to an independent agency in the executive branch rather than GAO?

Senator CHILES. Well, the very simple answer is it could be, but I am not sure that the Congress would like that. I am not sure as a policy question that Congress would want to opt for that because GAO happens to be a creature that is an arm of the Congress, and has loyalties and responsibilities to Congress.

I am not completely satisfied with the language that we now have on bid protests. It doesn't seem to satisfy many people, either. The executive branch opposes it because it gives GAO more authority than they have today, at least that's how the executive sees it.

Contractors oppose it because it isn't strong enough to suit them. Yet every time we start making it stronger, GAO opposes it because they want it left a little bit vague, because of the potential constitutional questions.

GAO is in favor of the language we now have.

I think that we do have a mechanism for resolving bid protests and that it should have the authority to make some binding decisions. Perhaps it should be in the executive branch. I opted toward GAO because it runs on a different and more even keel than an executive agency or the Congress might run.

Mr. WALSH. If I could add something. I think there are two concerns an executive agency would have over the placement of the protests. One would be the constitutional separation of powers question. Should an agency of Congress be reviewing and making decisions on the spending of appropriated funds?

The other question is more fundamental. I think their is a reluctance on behalf of procuring agencies to have anyone review their decisions, whether it is the executive branch, or the legislative branch, or anywhere else. That is a separate question that the Defense Department would have to address itself to.

Mr. DAWSON. Now I would like to invite your attention back to section 304(A)(2)(a), Senator Chiles, and go through just a little bit of the detail on that provision which requires the Government to publicize the contract award which it intends to go sole source for 30 days.

Now, the provision that I would like to specifically ask you to talk to is the final sentence of section 304(A)(2)(a) which reads, "If after such notice," this is the 30-day notice—"other sources demonstrate an ability to meet the requirements for the work to be performed, a solicitation shall be issued to all such prospective offerors."

Your report on page 15 also discussed this and stated that during that time, that is the 30-day period, if another firm conformed and demonstrates an ability to meet the requirements of the work, then the contract must be awarded competitively.

First of all, is there any distinction between what your report says, giving a greater weight to the competitive award, over what your bill states?

Senator CHILES. We weren't really trying to do that. We were trying to carry out in the report what we had set forth in the statute.

Mr. DAWSON. And then the phrase "demonstrates an ability to meet the requirements for the work." What do you envision would be adequate for that demonstration? I know that is a rather difficult question in the abstract.

Senator CHILES. Well, it could boil down to a legal question. What we were trying to do is deal with this type of situation. What if a fellow says, "I can build this in my backyard, or in my workshop." Under S. 1264, that person would have to make a reasonable demonstration to the agency that he has the capacity and the capability and the resources to comply with the contract requirements. I would ven-

ture to say if it was another aircraft company, Piper saying I can do what Beech can do, that would be a demonstration.

Mr. DAWSON. And then in section 304(b), where you state that there may be a product for which there is no commercial usage under that section. Do you see a potential problem in allowing the Government to specify, in such a general way, that its military requirement overrides whatever off-the-shelf equipment might exist in the market? Do you have any uneasiness about that question?

Mr. WALSH. This provision actually was taken from the Defense Authorization Act of 1976 and the purpose is to give the executive agencies the ability, when it is cost feasible, in the production of a major system, to be able to go out and set up another factory.

The purpose is not restrictive, as you imply, but rather is to broaden the competitive base for future procurements.

Mr. DAWSON. Two more questions. Do you have any suggestion as to how we might tighten up even further beyond your bill, the requirements that sole source contracts are to be greatly discouraged in the competitive marketplace?

Senator CHILES. We considered a number of things. We went through a lot of exercises and everytime we did, we would think, well, we have got to be careful. We can't prohibit sole source, because we have situations where an agency goes into some area of technology where only one company is active. In those situations, you have to deal with one company. Some of our ideas looked nice on paper, but they all involved exceptions and checkoffs within the procuring agency. When we thought this through, we were fearful that on the one hand, a contracting officer determination would not provide adequate protection against abuse, and on the other hand, a high level checkoff would become automatic. We settled on escalating the sole source review authority up to a level between the agency head and the contracting officer. We also decided that you have to have an outside check on the agency's determination, because if an agency wants to go sole source, they will do it no matter how complicated the internal requirements are. The 30-day notice to the marketplace gives that outside check, because it relies on the people who care, the competitors, to monitor the system.

No matter what kind of requirements you put on the agency, if they want sole source they will go through those requirements. So we were trying to find some device, devices that allow the ones who do care, the competitors, to get their oar into the process.

Mr. DAWSON. Thank you.

This is really not a question but a request to you, Senator Chiles, that you have your staff provide for the record a brief step-by-step presentation of how you perceive this bill being implemented for the Department of Defense to purchase (1) an aircraft carrier, (2) a fighter aircraft, (3) a tank or tracked vehicle, and (4) an administrative vehicle. And I would like to ask you to consider in step-by-step presentation——

Senator CHILES. We will give you something on that this afternoon.

Mr. DAWSON [continuing]. The process prior to deciding on each of these steps, assuming these systems have been assessed for the mission, some contracting process, follow-on procurement, personnel training, and long-term operating costs.

Senator CHILES. It may take until tomorrow to get all of that.

Mr. DAWSON. Thank you.

Senator MORGAN. Senator, why don't we go to Mr. Stirk for some more specific questions? We are afraid your time will run out.

Senator CHILES. My time is running out. We will answer any questions for the record. My problem is that I was due somewhere 10 minutes ago.

Senator MORGAN. Could we ask just one question, then we will set up a meeting and come back, because it is very helpful and I think we have some more. We can work that out later.

Senator CHILES. It may well be—my staff can answer them as well as I can.

Mr. ROBERTS. I just wanted to inquire about the Vinson-Trammell Act. I thought it might be something the committee would really benefit from your views on.

As you know, the Renegotiation Act may be a dead letter, and that brings back into operation the profit limitation process of the Vinson-Trammell Act, which is a very old act that has not been in effect for many years.

Some have suggested that that question ought to be tackled as part of this bill. I am wondering if you could give the committee your view as to whether you think we need a profit limitation statute or whether you think we should repeal the Vinson-Trammell Act. How should that problem be approached?

Senator CHILES. Well, as long as we have an imperfect procurement system, I think the Government has to be concerned about excessive profit. In my opinion, based on my membership on the Procurement Commission and my past experience, the best place to attack that problem is at the front end of the procurement process. If we could do the proper job at the front end, it would be a lot better than trying to recapture something at the tail end of the process.

If contracts could be awarded in such a way as to maximize competition, there would be fewer opportunities for excessive profits on the part of contractors. Since a contractor takes that risk all the time under S. 1264 you balance that off by recognizing that sometimes he is going to make a little more than it looked like at the outset.

If you buy our free enterprise system, I think you have to recognize that there are times when you get windfalls because there will be many other times that you go in the tank when you take risks.

I think this bill takes some important steps to provide the contracting officer with the tools and guidance to bring more competition into Government procurement. As to whether there needs to be a ceiling on the profits for military ships or aircraft, it would seem that would be a judgment that your committee could much better make than we could. As for the Vinson-Trammell Act, I think it might be outdated.

Mr. ROBERTS. Thank you.

Senator MORGAN. Off the record.

[Discussion off the record.]

Senator MORGAN. We will adjourn now. It has been very helpful to me, and I want to say to counsel on both sides that it has been very helpful to me for them to carry the burden because they have been

spending a lot of time on this matter, and they know more about it than I do.

Senator CHILES. Because I have this opportunity, I would like to raise one other question. We and the staff of the Armed Services Committee have had weeks to review our Contract Disputes Act. Even though it hasn't been actually assigned to this committee, there is a hold on it. I have been patiently waiting, but we are getting closer and closer to our adjournment date. The House had got a Contracts Dispute Act which is going on special order next week, so its something that could ripen this year. S. 1264, on the other hand, doesn't have that kind of momentum in the House side now, and there is not any movement on a bill over there. We are simply trying to get S. 1264 in the best possible shape this year. I wonder when we might expect that hold to be lifted on S. 3178?

Senator MORGAN. I understand that our staff and your staff have narrowed the differences down to maybe a couple of major ones, and if you and I could get together the first of the week, it may be we could work out some area where we can take the hold off. I don't think we are so far apart on the Senate side. I am a little bit afraid of what I see coming from the House.

Will you be available next week? I will be available, we will try to get together.

Senator CHILES. Thank you.

Senator MORGAN. Thank you, Senator.

[Whereupon, at 11:17 a.m., the committee was adjourned, subject to the call of the Chair.]

FEDERAL ACQUISITION ACT

THURSDAY, OCTOBER 5, 1978

U.S. SENATE,
COMMITTEE ON ARMED SERVICES,
Washington, D.C.

The committee met, pursuant to notice, at 9:30 a.m. in room 212, Russell Senate Office Building, Senator Robert Morgan presiding.

Present: Senator Morgan.

Also present: John C. Roberts, general counsel; Rhett B. Dawson, counsel; Phyllis A. Bacon, assistant chief clerk; George H. Foster, Jr., professional staff member; and Doris E. Connor, clerical assistant. Also, John Stirk, assistant to Senator Morgan; and Brian Walsh, assistant to Senator Chiles.

Senator MORGAN. Gentlemen, we will call the meeting to order momentarily, so that you know what we are doing. We had reconvened the committee this morning for the purpose of hearing further from Senator Chiles, who I expect will be here any minute, and also Senator Proxmire. Senator Proxmire will not be able to be here because he is chairing a meeting of the Banking Committee, where I am also supposed to be. However, he has sent a 20-page statement which I am going to make a matter of record. We have copies of it for those of you who would like a copy and have a reason to know what is in it. We will make this part of the record and ask that copies be distributed to those of you who want one so you can be looking at it.

All of you understand, I am sure, that these last few days of the Senate are pretty hectic, and we have to run from place to place. We will wait a little while longer for Senator Chiles.

[Senator Proxmire's prepared statement follows:]

STATEMENT OF SENATOR WILLIAM PROXMIRE

Mr. Chairman, I appreciate the opportunity to present my views on S. 1264, the Federal Acquisitions Act. This legislation would establish new rules for the acquisition of materials and services by the Federal Government. In many ways, I am in agreement with the intent of the bill. As I discuss more fully later in this statement, there are many areas where competition will increase as a result of provisions of this bill. The stronger requirements for notification of pending contract awards in the Commerce Business Daily, and the requirements for notification and delay in issuance of sole source contracts should help. The requirement for government payment of interest on its obligations that are due for more than 30 days is a fair requirement, which has been endorsed by the Committee on Banking, Housing and Urban Affairs. Increased use of functional specifications can be beneficial, and should be pursued.

However, I am concerned about many provisions of this bill, and I do not believe that it should be approved in its current form. The recent scandals at the General Services Administration have shown the need for strong controls over government procurement. We have seen that GSA officials have wasted millions

of dollars of taxpayers' funds by paying for services that were not rendered, by accepting substandard contract performance, and by over-paying for common commercial items.

In at least three sections, S. 1264 either would allow current practices to continue or fails to deal with the problems identified in the current scandal. Two of these sections, which provide for continued use of multiple award schedules and establish a "simplified small purchase method," are dealt with later in this statement.

More important, though, is the lack of any provision which would ensure that government officials adhere to government laws and wise purchasing practices. In the current GSA scandals, bribery may be found to be at the bottom of some of the problems, but, in many cases, it may be found that the unwise purchasing practices were not motivated by bribery. They may have been motivated by laziness or inattention on the part of government purchasing and auditing officials, the desire to do a favor for a friend, or any of a number of other causes. Strong provisions which would force government officials to adhere to sound purchasing practices might help to prevent the next government purchasing scandal.

BANKING COMMITTEE REVIEWS OF CONTRACTING PRACTICES

The Federal Acquisitions Act will completely re-write current laws guiding the acquisition of supplies and services by the government, and will have an important effect on many matters that are of concern to the Committee on Banking, Housing and Urban Affairs. In 1975, the Joint Committee on Defense Production, which I chaired, undertook a review of defense procurement policy and the defense industrial base. Since the Senate reorganization, the Joint Committee was combined with the Senate Banking Committee, and this review has continued.

In the course of this review, the committee studied defense profit policy, Cost Accounting Standards, defense contract auditing policy, the relationship between prime contractors and subcontractors, the unique problems of small businesses, the assignment of claims against the government, and the effect of DoD acquisitions policy on defense costs and on the defense industrial base. We have drawn certain conclusions about the direction in which government acquisitions policy should be directed. In many ways, our conclusions are at variance with the conclusions of the authors of the Federal Acquisitions Act.

GOVERNMENT CONTRACT COMPETITION

On the need for more competition, I am in absolute agreement with S. 1264. However, an arguable corollary to this principle is that government acquisitions policy should be focused so as to attract the largest number of potential competitors. According to this reasoning, government policies intended to regulate contractors can backfire if they have the effect of making the government so difficult to do business with that contractors are unwilling to take on government contract work.

I agree with the statement of the sponsors of S. 1264 that more competition is necessary for government contracts. Every year, the portion of defense contracting dollars awarded through true competition is less than 10 percent of the total procurement budget. Available evidence suggests that most other federal agencies do no better. The GAO has identified numerous devices by which agencies frustrate the law and initiate unnecessary or undesirable noncompetitive contracting. According to the GAO, federal procuring agencies routinely conclude that only one firm is qualified without seeking additional sources; award noncompetitive contracts solely for the purpose of obligating funds before the end of the fiscal year; initiate contracts based on contracting officers' preference for a specific firm, rather than objective factors; and place unjustified time constraints on procurement offices which mandate noncompetitive contracting. I do not see how any of these abuses would be corrected by S. 1264, with the possible exception of the end-of-year spending syndrome.

Furthermore, the bill as written does not mandate the type of effective contract competition that could assure efficient contracting practices. It is true that the bill does eliminate some of the more flagrant across-the-board exemptions from the requirement for competition. However, for major systems acquisition, it simply states that the Department of Defense and other government agencies should conduct competitions in more or less the same way they are presently conducted. This is through the device known as "competitive negotiation," a form of contract-

ing which has no present legal standing but which would be regarded under S. 1264 as a preferred form of competitive contracting procedure.

S. 1264 does provide some new guidelines for the use of this procedure, but I do not see how "competitive negotiation" can in any sense be considered a type of effective competition that would justify relaxation of regulatory controls. It will not provide the government with absolute assurance of efficient contractor operations. Competition can, and does, tend to reduce initial prices, but it cannot, in and of itself, control what happens after the contract is awarded. I see nothing in the bill that would mandate fixed-price contracting or effective quality control. I see nothing in the bill that would provide for recompetition of major systems contracts after the initial quantities had been provided for, and I see none of the other "free enterprise" characteristics that would guarantee efficient contracting and justify relaxation of government contracting controls.

As contracting is currently performed at the Department of Defense, once the contract has been awarded, there is nothing but government restraint to protect the interests of the taxpayers and to assure high quality production. The degree of competition with which the contractor had to contend in order to get the contract has almost nothing to do with the contractor's performance after the contract is let.

ATTRACTING POTENTIAL CONTRACTORS

A point on which I disagree completely with the authors of S. 1264 is the notion that the government must not go too far to protect its interests lest contractors abandon government contracting altogether. I agree that harsh treatment of contractors for its own sake is unwise, but the government must also protect the interests of the taxpayers. In the review of the defense industrial base, the Joint Committee on Defense Production and the Banking Committee have analyzed the stated concern of DoD that excessive regulations might chase firms away from the business. We searched for any evidence of an unwillingness of contractors to do business with the government. We analyzed the benefits that are provided to government contractors. We talked to representatives of industry, trade associations, the Department of Defense, and the General Accounting Office. What we found is that there is absolutely no evidence to support the assumption that tough government contracting regulations are causing firms to shun government business.

What we have found is that some factors separate and apart from DoD policies have had a limited effect on the availability of suppliers. In some industries, such as metal forgings, environmental and safety restrictions have forced some suppliers to close their doors. Foreign competition, and the flight of U.S. manufacturing firms to other countries can cause suppliers shortfalls. But with respect to DoD policies, we have found exactly the opposite of what S. 1264 contends to be true. That is, many firms who are very anxious to do business with the Department of Defense are kept out of the business, not by overly-restrictive regulatory and profit policies, but by DoD favoritism toward large firms.

This notion was supported by the former DoD official most responsible for analyzing the defense industrial base. His office found that small firm and subcontractor problems are caused by factors external to DoD, such as bankruptcy of firms; by overly-restrictive policies of prime contractors; and by DoD policies which support major prime contractors at the expense of component suppliers and subcontractors.

Simply easing government contracting restrictions and increasing the benefits might not help the constituency that is most in need of assistance. The DoD official testified: "An example of the more harsh treatment (for subcontractors) would be on a program where the contract was awarded cost-plus to the prime and the major high-technology, high-risk subcontract is awarded fixed-price for the subcontractor development; and that is a typical situation that happens today." In other words, benefits intended to make defense business more attractive do not necessarily trickle down to where they are needed.

Any analysis of defense contracting policy would show that defense contracting is attractive business indeed. It is certainly true that contractors must accept certain restrictions, such as Cost Accounting Standards, profit limitations, audit clauses, and other government review and disclosure requirements. However, contractors also reap many benefits. The bulk of major contracts are on a cost-plus basis; contractors obtain progress payment on the basis of costs expended rather than on the basis of actual progress; contractors are protected from inflation and their own mistakes through redetermination clauses, escalation clauses, and

contract changes; they are protected from competition in many ways, through follow-on contracts, certification requirements for potential competitors, restrictive coding of parts for sole source production, and other government policies; their commercial work can be subsidized through government patent policy and payment of independent research and development expenses; and, according to DoD studies, they can be reimbursed through overhead for the costs of bloated, unnecessary marketing and engineering staffs. I don't believe anyone should contend that the government is chasing away firms because it is too difficult to do business with.

Yet S. 1264 ignores this fundamental problem, and instead assumes that if the government relaxes its surveillance and disclosure requirements, contractors will come rushing out of the woods to compete for government business, resulting in such a degree of competition that more will be saved through competition than will be lost through relaxed vigilance.

Ignored is the fact that there are plenty of competent firms trying desperately to compete for government business, and the fact that S. 1264 will allow the government to continue doing business in more or less the same way that it does business now.

Attached to this statement is a section-by-section analysis in which I discuss some more detailed concerns and recommendations.

SECTION-BY-SECTION ANALYSIS

Subsection 2(b)(7) states that it is the policy of the Congress that large scale productions be initiated only after full and complete testing has been completed on the product. I agree with this sentiment wholeheartedly. Many mistakes could be avoided if quality and reliability testing were completed before the production go ahead. However, it would be better if this problem were addressed in the body of the bill.

In Section 2(b)(10) or in Section 505, which both discuss payments or progress payments to contractors, I would recommend adding a stipulation that progress payments should be keyed to actual progress on a government project. As matters currently stand, progress payments are generally based on funds expended. This violates every commercial principle that I am familiar with. In the commercial situation that may be, financially at least, most comparable, homebuilding contractors must show definite progress and must pass specified milestones before progress payments are made. Enactment of this provision would provide encouragement for contractor cost controls.

Section 201 establishes criteria for the use of sealed bids. This section reverses current federal policy, which establishes sealed bids as the preferred method of contracting, and then allows 17 specific exemptions to the general requirement. S. 1264 instead makes sealed bids one of four alternative methods, and defines preconditions for the use of each.

The 17 exemptions in current Armed Services Procurement law definitely are too broad. For instance, all contracts with educational institutions are exempt from the requirement for competition, as are all contracts for "personal and professional services," all contracts for drugs and medicine, and all contracts where, in the opinion of the government official, it would be "impracticable" to obtain competition. There is no justification for these broad across-the-board exemptions. I agree with the conceptual point of the authors of S. 1264, that the characteristics of the marketplace should determine whether competition is possible. In addition, I have no conceptual objection to the types of preconditions which must be satisfied. Certainly, it would be ridiculous to pretend there were actual competition if there were not a sufficient number of suppliers to guarantee good competition, or if there were not enough time to offer all interested parties the opportunity to bid.

However, I have two concerns about this section: (1) some of the criteria may be written too vaguely, and may allow the continuation of current abuses; and (2) no provision is made for periodic recompetition of contracts for continuing work such as maintenance or operation of military bases and plants.

To the first point, Subsections 201 (3) and (5) are written too loosely. It is particularly interesting to note that two of the problems identified by the GAO in its report on noncompetitive contracting were that agency officials often placed unreasonable and arbitrary time contraints on a procurement which rendered competition impossible, and that officials often concluded, without seeking alternatives, that only one firm was qualified or willing to produce the product. Section

201 in its current form would not protect from these abuses, and could possibly make it easier for agency officials to evade the requirement for competition.

Second, initial competition for a contract is not meaningful if the contractor can do whatever it wants after the contract has been awarded. For many types of contracts, there is no reason that there could not be periodic recompetition. This periodic recompetition would help to assure better performance by the contractor. Under the plan I envision, the incumbent contractor who had performed adequately would still have a substantial advantage over other competitors, if for no other reason than this greater experience. But the requirement for recompetition would act as a check on his performance and pricing. Periodic recompetition is done by the Department of Defense for many operations or maintenance contracts at government-owned contractor-operated plants, government test ranges, and government bases, but there is no reason that this should not be a legal requirement.

In Sections 203 and 503, I share a concern expressed by the late Senator Metcalf in his dissenting report on this bill. Senator Metcalf argued that these sections allow entirely too much authority for cancellation of contract solicitations. Arbitrary cancellation of a contract can be used as an excuse to negate an instance where an agency official's favored contractor does not submit the best bid. This technique could be used in place of repetitive solicitations of best and final offers, which can be abusive and has been prohibited by another section of the bill.

Obviously, the government must be permitted to cancel a solicitation in cases where no contractor was responsive to the request, where no satisfactory bids were received, or where the government has decided not to pursue the project, but I would favor language which prohibits cancellations except in specified circumstances.

Title III defines procedures as to when the government shall use "competitive negotiation" and when it is authorized to issue sole source contracts. This section draws a distinction between these two contracting methods which does not exist in current law. Currently, all contracts not awarded pursuant to sealed bids are considered noncompetitive.

Sections 301, 302 and 303 provide the basic framework for major systems acquisition. They describe, in general terms, a system of contracting which is currently being installed at the Department of Defense, known as "4-Step Procurement." Four-step procurement is the result of what has become a near-obsession at the Department of Defense with two related problems known as "buy-ins" and "auctions." The problem, as defined by DoD, is that contractors, either through self-imposed or government pressure, submit artifically low bids on government contracts, bids that they know to be unrealistic. It is argued that cost overruns are the inevitable result of these practices.

The buy-in theory mis-states the actual problem with defense contracting. It is not simply that costs escalate from original estimates. The problem is that defense contracting costs are too high. This has begun to have a serious effect on defense readiness, in that we are faced with the possibility that we may not be able to afford necessary weapons.

Cost overruns, in and of themselves, are certainly a serious problem, because they limit the ability of government planners to make reasonable budgets and projections. However, I do not believe that a program aimed at reducing cost overruns without reducing costs will accomplish much.

Four-step procurement will have this effect. By prohibiting auctioneering, it will lessen the incentive of contractors to lower their bids, and it may reduce the submission of unreasonably low bids. It may also reduce favoritism by eliminating the syndrome wherein contractors can underbid the initial winner on subsequent bidding rounds. However, it does not appear to be aimed at reducing costs. In fact, a DoD official was quoted in the Wall Street Journal as predicting that 4-step procurement would probably result in increased defense costs. It would reduce cost overruns by raising initial target prices to the levels that are regarded as more realistic.

If you assume that defense costs are pretty good, and that defense contractors operate at maximum efficiency, then it is probably reasonable to support this program. However, I know of no study which suggests that defense contractors operate with very high efficiency levels. On the contrary, the official studies with which I am familiar find exactly the opposite.

I would like to cite two specific studies. Both are official government documents, prepared by elements of the Department of Defense. The first is the Joint DoD/

OMB study on aircraft capacity utilization, released in January 1977. This study concluded that excess capacity in the industry was costing the government in excess of $300 million per year. Significantly, though, the study concluded that: "the costs of excess capacity should not be measured solely in terms of idle floor space and equipment, but should also be measured in terms of redundant labor existing in these vertically integrated companies; e.g., engineering, management and marketing people. The study found that these extra labor costs far exceed the idle plant and equipment costs."

In follow-up testimony before the Joint Committee on Defense Production, Deputy Undersecretary of Defense Dale Church stated that "For the most part, this cost consists of indirect labor, i.e., engineering, marketing and administrative personnel, retained in anticipation of and to enhance obtaining additional government business. Twenty-five percent or less of the extra capacity costs is associated with under-utilized plant and equipment." The DoD/OMB study recommended limits on the maximum allowable overhead expenses chargeable to government contracts.

Another study, prepared by the Air Force Systems Command, suggests that the rates of inefficiency may be even more serious with respect to direct labor. The study concludes that "Manufacturing costs are about 42 percent of direct costs on a typical production contract. About 50 percent of this cost represents nonproductive labor caused by inefficiencies of one kind or another. If it were possible to achieve only a 20 percent improvement in labor productivity, approximately one billion dolllars could be saved on contracts at 11 of the major Air Force contractors." If it is assumed that other services suffer similar rates of inefficiency, the amount of waste in unnecessary labor would be many billions of dollars.

This study was prepared in 1973, and it is possible that some of the recommendations have been acted upon. However, a perusal of Selected Acquisition Reports and the recent GAO study on Financial Status of Major Federal Acquisitions shows that DoD acquisitions, like most other federal acquisitions, have shown cost growth far in excess of the rate of inflation. Any significant management efficiencies realized as a result of the AFSC study or similar reviews would have acted to hold these costs down.

This failure to deal with the separate and distinct cost problem is, I believe, the most serious failing of S. 1264. The authors of S. 1264 have suggested that increased competition will solve this problem. For some types of contracts, I agree that this may happen. The price of drugs, for instance, which will no longer be exempt from competition, should certainly decline.

But in the area of major systems acquisition, which is the main concern of this Committee, I believe that the ratification of 4-step procurement, the failure to mandate fixed-price contracting, the selective waiver of government surveillance and disclosure requirement detailed in the bill, the much greater relaxation of controls implied and permitted by the policy statement, and the failure to define a strong management system which would correct the existing inadequacies in cost control, will all combine to frustrate the stated intent of this bill.

We cannot have it both ways in federal acquisitions policy. If it is assumed that any low bid is, by its very nature, a buy-in then any reduction in bidding estimates that would result from S. 1264 will simply increase the frequency of buy-ins, which will in turn increase subsequent cost overruns. If, on the other hand, it is believed that contract prices are too high and that contractors are not especially efficient, then it is incumbent upon the Congress to take note of this problem in its acquisition legislation.

In Section 102, you could require procuring agencies or the OFPP to prepare a report to Congress detailing efforts to control overhead, improve contractor productivity, and reduce direct and indirect labor costs. In the amendments section, you could add a new subsection to 10 USC 2382 and other code sections providing for contract audit which would require auditors to review the contractors' records to determine whether there is evidence of excessive, redundant, or unnecessary direct or indirect labor expense. The costs for any such claims would not be reimbursed even if otherwise allowable and allocable. Furthermore, you could beef up the audit function, giving the auditors more clout within their department, improving the competence of their reports, and assuring that their reports will be used.

The definition of cost analysis in Section 305 could be amended by requiring review of what the contract performance actually should cost, rather than simply ratifying the contractor's statement of what it will cost.

Finally, the bill could be amended to stipulate in cases where the contract price has included the rights to drawings and data, that all spare parts must be procured competitively unless sole or restricted sourcing is necessary for safety or other important reasons. Based on a Banking Committee review, which was discussed at recent hearings, this approach could save millions of dollars each year.

Subsection 302(b)(2) preserves a requirement of current law that any changes in proposal evaluation factors shall be communicated promptly to all competitors. This is a reasonable requirement. Requirements for competition would be meaningless if one competitor received information about the government's wishes that was not available to the others.

However, current law also provides that the solicitation shall be null and void if this notification is not made. I recommend that the committee consider retaining this requirements, as an additional protection. Without this requirement, the competitor who had suffered by not receiving notification of the change would have no recourse.

Subsection 303(a) prohibits "auction" techniques. I do not favor such broad language outlawing these practices. Auctioneering techniques on major systems acquisitions can be abusive, but I believe there are many instances in which an auction might be the very best way to proceed with government purchases. Base maintenance and similar service contracts, as well as contracts for commercial items could be competed very effectively through the old-fashioned auction. For instance, if the government has a requirement for a certain number of 35mm. cameras, there is no reason that the various distributors of high-quality 35mm. cameras could not sit down in a room and bid for the rights to sell to the government. The government could define the types of cameras that satisfy its requirements, it could read the advertisements for major New York wholesalers in camera magazines, and it could offer anyone who was interested the opportunity to beat the prices offered by these wholesalers. This would be a productive way of saving on unnecessary red tape, and it could promote very economical purchasing practices.

Subsection 303(e) authorizes the continued use of multiple award schedules by the GSA. Multiple award schedules are a method of buying commercial products without the need to go through a formal competition. The theory is that the government can compare catalogue prices of comparable commercial items and obtain the best price available, while avoiding the red tape of soliciting bids. The abuse by the GSA of this technique is one of the most flagrant examples of incompetence, or worse, that I have ever seen. Recent revelations in the newspapers, which were confirmed to the Banking Committee by GSA Administrator Jay Solomon, have shown that the GSA has used this technique as a device to waste thousands, if not millions, of dollars of taxpayers' money. The GSA has paid higher prices for cameras, television sets, and typewriters, than any individual would pay for a single item at a discount store. It is incredible that the Federal Government, with its phenomenal market power, is incapable of spending money efficiently.

Two alternatives suggest themselves. The first would be to prohibit the use of multiple award schedules, and to require advertised sealed bids for all commercial products. Alternately, if the committee is persuaded that multiple award schedules can be used properly, the bill could require that this technique be used to buy only from the manufacturer or genuine commercial distributors. If this section remains unchanged, the GSA could revert to its old ways after the current storm has died down, and will continue to waste money buying from the government marketing services who have created these abuses.

Section 304 allows for noncompetitive exceptions to the general requirement for competitive negotiation. It requires 30-day advance notice of intent to award a sole source contract, and purports to offer other interested parties the opportunity to bid. Although it improves on the current situation, I do not believe that this section will completely control the noncompetitive abuses highlighted by the GAO. The GAO report showed that in many cases, sole source awards were made because agency personnel had made a predisposition to award the contract in such a manner, rather than because of general market requirements. As Senator Metcalf stated in his dissenting views on this bill: "the subsection ignores one common reality of life: Any potential competitor would know that, if the agency had publicized its desire to award a noncompetitive contract to a prefered source, there is little chance that the agency would look kindly on the entry

of another competitor. And, since Section 303(a) allows the government to accept 'an initial offer . . . without discussions when it is clear that the public need would be satisfied on fair and reasonable terms without such discussion,' the agency could execute its contract with the original preferred source without the inconvenience of being forced to consider alternatives."

Given these comments, I recommend that you look particularly closely at this section. At the very least, the government should be required to state its reasons in the Commerce Business Daily as to why only one source can qualify, and should be required, rather than permitted, to seek additional sources when substantial follow-on orders are anticipated.

Section 305 rewrites the Truth in Negotiations Act, which is one of the most important sources of information about the actual and fair costs of defense procurement. It establishes a formal distinction between less detailed price data and more detailed cost data which does not exist in current law. It is important to understand the distinction drawn by S. 1264 between cost and price data and analysis. Cost analysis, according to the bill, means "the element by element examination of the estimated or actual costs of contract performance." Price analysis is limited to a review of prices previously paid for similar or identical items.

One necessary correction, which is implied in the bill, would be to stipulate that competitive negotiations are not automatically exempt from submission of cost or pricing data. Staff members of the Subcommittee on Federal Spending Practices have stated that this is their intent, but I believe this matter needs clarification since "competitive negotiations" are considered to be competitive.

Two of the cost data exemptions cause me some problems. The first would require submission of price data only in cases where "the price is based on an established catalogue or market price of a commercial item sold in substantial quantities to the general public." First of all, this exemption may be unnecessary. Under the spirt of S. 1264, I would assume that most commercal products should be procured competitively. In these instances, the nature of the procurement, rather than the item purchased, would totally exempt the contractor from submission of price or cost data, and the selective exemption would be redundant.

However, in the case of noncompetitive procurement of commercial products, exempting contractors from the submission of cost data could be unwise. The GSA purchasing scandal has shown that prices paid for commercial products can be vastly inflated. Submission of price data would not disclose this overpricing, because previous inflated prices would simply be factored into the new calculations. Submission of cost data would be necessary to protect the government's interest.

The second price data exemption of concern to me is the one which allows submission of price data only in cases where there was a "recent comparable competitive acquisition." This broadly worded exemption could also permit the factoring in to new defense contracts of inefficiencies and cost-overruns from prior contracts. In theory, almost any follow-on contract from other than a sole source solicitation could qualify. This broad new exemption is unwarranted.

Title IV establishes simplified methods for small purchases. Although I do not disagree with this concept. I am troubled by the vagueness of this provision and the blank check that is given to OFPP to develop guidelines. One particular area of concern is that federal agencies could split larger procurements into parts in order to evade the stricter major purchase guidelines. If this splitting off were done for the purpose of increasing competition and increasing the ability of small business to compete, then I would favor it; but, if it were done solely to avoid normal contracting requirements, then I would not. I recommend that the Committee consider adding language that would limit option clauses, add-ons, and contract modifications; that would require explicit justification for repetitive purchases from the same source; and that would require a description of why volume purchases at reduced prices are not possible.

Additionally, the recent GSA procurement scandal has shown that predatory contractors can overcharge the government on small purchases as easily as, if not more easily than, they can on large purchases. If the types of sloppy contracting procedures engaged in by the GSA are permitted to continue, then I would look with strong disfavor on provisions exempting small purchase from normal contracting safeguards.

Section 501 describes types of contracts. Although it states a preference for fixed-price contracts, it actually makes it easier than current law for agencies to issue cost-plus contracts. Current law requires a finding that the use of cost-

plus contracting would be less costly to the government and that it would be impracticable to obtain the required products or services under any other type of contract. No such requirement is contained in S. 1264.

The report of the Committee on Governmental Affairs cites a Commission on Government Procurement finding that "such determinations are usually speculative, and result in stereotyped findings which merely repeat the language of the statutory requirements." However, I do not understand how the admittedly inadequately limitations on cost-plus contracting would be improved upon by deleting the requirement for a specific finding of need and substituting a vague statement that fixed-price contracts are preferable. If the current protections are inadequate, they should be beefed up, not repealed. This could be done by preserving the requirement for a finding that cost-plus contracting is necessary; limiting cost-plus contracting to certain specified circumstances; and requiring a detailed statement as to why it is impossible to issue a fixed-price contract and what alternatives, such as splitting off the high-risk portions of the contract, were considered.

This section, with its meaningless statement of preference for fixed-price contracting, does much to undermine the broader case of the sponsors of S. 1264. The intent of the bill to remove contracting safeguards and substitute competition would be rendered meaningless if cost-plus contracting became more widespread. Section 501 would leave this matter entirely to the procuring agency's discretion.

Section 504 authorizes widespread multi-year contracting. Multi-year contracting is supported by agencies and contractors on the grounds that it can improve the planning process. At the minimum, I would urge the Committee to consider language which would guard against anti-competitive practices. A flat prohibition against sole source contracting for multi-year contracts, and a requirement for recompetition at the end of the contract term should be considered. In addition, the Committee should consider whether multi-year contracting would restrict the effectiveness of the Congressional authorizations and appropriations processes.

Section 505 authorizes advance, partial, and progress payments. I would recommend that progress payments be based on progress rather than spending. In addition, Section 505 as written would repeal the 1973 Proxmire-Byrd amendment which requires Congressional notification of large advance payments and provides the opportunity for Congressional disapproval.

Several years ago, Senator Goldwater and I introduced a resolution to disapprove a large advance payment on the F–14 fighter program. This resolution was approved, and the payment was not made. I believe that the experience with this resolution shows the wisdom of retaining this provision.

Section 507 provides for determinations and findings by government officials. It essentially re-states current law. One difference is that current law in many instances requires that the official making the determination state his reasons for making the decision. I am not sure it would be possible to make a determination without such a statement of support, and I do not understand why this requirement is not retained.

Section 508 provides for enforcement of laws against collusive bidding. I note that this is the only section of S. 1264 which could properly be considered an "Enforcement" section. This section should also establish tough penalties for government officials who willfully ignore procurement laws. This is the best protection we can provide against favoritism, unsound purchasing practices, and flagrant disregard for the law. The GAO bid protest mechanism, provided in Section VII, simply cannot be effective in providing restitution to companies who are treated unfairly by government contracting officials, because most matters protested to the GAO are, by the time GAO rules on them, a fait accompli. It would be much more useful if we provided a strong deterrent against arbitrary abuses of power.

A related matter which might be dealt with here would be to preserve language from 10 USC 2276, which establishes penalties for any person, whether employed by the government or a contractor, who "deprives the government of the benefits of competition or of a full and fair audit." Although all such laws are extremely difficult to enforce, I believe that their deterrent effect can assure that the laws we pass will not be ignored by agency officials as we have seen in the recent GSA scandal.

Section 509 provides for the selective waiver of certain government surveillance and disclosure requirements. The waiver is to be granted to firms which

have a high percentage of commercial or fixed-price governmental business. This section is an extension of the current Department of Defense program known as CWAS—Contractors' Weighted Average Share in Cost Risk. CWAS currently provides exemptions from government audits of the reasonableness of some indirect overhead costs. Section 509 somewhat restricts contractor eligibility requirements, but it makes all costs exempt from audits for reasonableness and adds exemptions for four additional government surveillance and review requirements. Two of these added categories, Renegotiation and Cost Accounting Standards, touch on matters that fall under the jurisdiction of the Banking Committee.

I have been trying for the past three years to persuade DoD to abolish the CWAS program. The GAO prepared a study of the CWAS program, at my request, which showed that CWAS has not saved the government an ounce of effort in reviewing contracts, but that it has prevented government auditors from questioning flagrantly unreasonable costs. On the basis of these findings, I believe that any new federal acquisitions act should abolish the CWAS program and prevent its revival, rather than expanding it so that its waivers apply to four additional types of government surveillance and disclosure requirements that are not touched by CWAS.

Changes made since the original version of S. 1264 do make this section considerably less objectionable, but I believe it would be wrong to endorse a section simply because it would do less damage than its original version would have done. Therefore, I recommend that Section 509 be deleted.

Section 601 provides for delegation of the authorities granted by S. 1264 to agency heads. Although senior agency officials canot be expected to make all contractual decisions, the bill may go too far in authorizing delegation to lower levels. I recommend that the Committee consider whether certain decisions should be made at higher departmental levels.

Title VII establishes bid protest procedures. I do not believe that primary reliance should be placed on this technique for assuring sound contracting practices. In bid protest cases that the Banking Committee has reviewed, we have found that the protestor seldom receives any remedy. Even when the GAO finds that agency rules were disregarded, it does little more than suggest that the agency avoid the same mistakes in the future.

In order that Congress could be able to evaluate GAO disposition of protests and agency procurement practices which lead to such protests, I would suggest adding a provision calling for a report by the Comptroller General to the Congress. This report should contain a summary of protest activity, including the number dismissed for various reasons. In addition, this report should contain a GAO evaluation of the salient issues raised by the protests, and a discussion where appropriate, of agency practices which appear to be generating a significant number of protests. Finally, the GAO should be required to report to the Congress on all agency decisions to proceed with the award of a contract despite a pending GAO protest, and that it should review and report on agency implementation of GAO recommendations.

Another matter related to protests has been brought to the attention of the Banking Committee by a number of small business firms. As you know, many small business firms cannot afford to hire enormous legal and administrative staffs. Evaluation of a government action and preparation of a bid protest can require a significant investment of resources. Every year, between 10 and 20 percent of all bid protests are dismissed on the grounds that they were not filed in a timely fashion. Although the GAO does not break down these statistics by type of firm, I am confident that a high percentage of these dismissals are suffered by small business firms. I recommend that the Committee consider allowing a slightly longer time period for small business firms to file protests in recognition of their limited legal resources.

Senator MORGAN. We will now go back into session. Let the record reflect that Senator Chiles is with us.

Senator, let's see, if I recall right, you had already made your statement and we were having some colloquy?

Senator CHILES. Yes, sir.

That is right. I am sorry that Senator Proxmire has been so busy that he wasn't able to be here personally because I was hoping to be able to participate with him or just open this colloquy.

Senator MORGAN. Well, I think we should try to do it anyway.

Senator CHILES. Yes.

Senator MORGAN. During the last meeting our staff had some questions. Had you finished?

Senator CHILES. Do you know whether Senator Goldwater is going to be here today or not?

Senator MORGAN. I don't think so.

Senator CHILES. He had asked us the other day for the following information, to provide for the record a brief step-by-step presentation of how you foresee this bill being implemented for the Defense Department to purchase: (1) An aircraft carrier, (2) fighter aircraft, (3) a tank or tracked vehicle, (4) and an administrative vehicle. Consider that in this step-by-step presentation, the process of deciding on which system has been determined to be best for the mission is completed. He gave us that as an assumption. And then the subcontracting process, the follow-on procurement, spare parts procurement, personnel training, and long-term operating costs.

We have done that and I have a letter I can submit for the record or I can read it into the record.

Senator MORGAN. How long is it?

Senator CHILES. It will take about 5 minutes or a little less.

Senator MORGAN. Why don't you give us your answer. I would be interested in it.

Senator CHILES. Let me read this into the record. I will do it briefly.

The first three items you enumerate would come under the heading of major systems and would all follow the same basic procedures, so I will treat these three together.

Senator MORGAN. What were those three items?

Senator CHILES. These are the aircraft carrier, fighter aircraft, and tank or tracked vehicle. Special procedures have been developed for major systems in addition to the functional specification approach of S. 1264. These requirements include the program decisions which precede the selection of a particular system. They are embodied in OMB Circular A–109, which was developed by the Office of Federal Procurement Policy in close collaboration with me and my staff and which the Department of Defense has already begun to implement.

The steps involved in a major system acquisition are: Statement of need approved by the Secretary of Defense and made available to Congress. This could be up to years earlier than in the past when the need and solutions came to Congress all at once after time and money had already been spent examining all alternatives. This major change which OMB Circular A–109 brings about also requires the Secretary of Defense to sign off on a new program the the beginning of that new program. We find that for many of the major weapon systems we purchased in the past, the Secretary of Defense didn't even know or sign off on those programs until after some of the funding had been in the research part of the congressional budget for years. So we are now at least requiring that the Secretary of Defense sign off on a new program at the very start.

A program manager is assigned and an acquisition strategy is prepared, which is tailored to each program. The strategy is a time-phased plan that addresses how the acquisition program would be conducted. Alternative concepts to fill the need are competitively identified and defined.

Section 302 of S. 1264 provides for competitive negotiated solutions at this point based on functional need. The marketplace, by offering

alternative solutions to satisfy that need would help determine what DOD would ultimately settle on as a requirement. At this point no detailed specifications or written justification for negotiations are required, as is true under current procedures.

Next, alternatives are tested, demonstrated, and evaluated to determine the one or ones most beneficial to the Government. Section 303 of S. 1264 provides for sustaining competition among alternative approaches until sufficient test information becomes available to warrant selecting a particular product. The most beneficial solution or solutions go through full-scale development to permit testing in an operational environment.

S. 1264 includes a policy statement that large-scale production shall only be undertaken after adequate operational testing.

Again, Mr. Chairman, this would really be trying to prevent cost overruns and trying to prevent tremendous change orders that sometimes have been made when we have locked into a production schedule before we had adequate testing. Generally, unless you know exactly what you are going to do, you find that it takes tremendous additional costs to make changes during production. That has happened with a number of our major weapons systems.

Full production is carried out and the operational forces equipped. The same sequence of problem solving would continue to apply in all major system situations: (1) Identification of the problem; (2) consideration of alternatives; (3) test, evaluation and selection; and (4) production.

S. 1264 would not require any change in the procedures already embodied in OMB Circular A–109. What it does is facilitate this process by eliminating needless paperwork and providing for greater marketplace competition. This same approach to filling agency's needs would apply to all purchases under S. 1264.

The Office of Federal Procurement Policy has proposed to effect these changes with respect to major systems in advance of enactment of S. 1264 because of the significant dollars involved and the additional precontract steps required in the selection process. The fundamental objectives of S. 1264 are:

(1) To simplify the procurement process by providing a consolidated statutory base for a single Government-wide acquisition regulation;

(2) To broaden the competitive base by requiring the use of functional specifications to the maximum practical extent—this would permit a variety of alternative solutions to be offered rather than having every offeror bid to a single predetermined solution embodied in detailed specifications;

(3) To minimize sole source acquisition by broadening the competitive opportunity and by requiring more stringent high-level justification for sole source; and

(4) Provide statutory recognition of the competitive negotiation as a viable method of procurement and eliminate much of the paperwork now needed to justify negotiations, even though negotiations account for over 90 percent of defense contract dollars.

Many of the contracts, which are now negotiated either competitively or sole source, under one of the 17 negotiation exceptions in the

Armed Services Procurement Act will become competitively sealed bid procurements. This will be equivalent to formal advertising as we know it today, but using functional specifications wherever practicable.

When conditions are such that an award based on a sealed bid cannot be anticipated, we expect most others to be competitively negotiated with increased competition through a use of functional specifications. This would be particularly important in cutting down the volume of sole source awards and giving the marketplace an opportunity to respond to the Government's functional needs.

At the same time, S. 1264 recognizes that there are exceptional circumstances in which competition is not available, or not practicable, as, for example, in the purchase of replacement spares manufactured only by the original equipment manufacturer, or follow-on purchase of aircraft or ships after an initial competition.

In all cases, though, the buying activity would be required to publicize its requirement 30 days in advance in the Commerce Business Daily and give others an opportunity to come forward and demonstrate their capability to satisfy the Government's requirements. We expect the biggest impact on noncompetitive procurement to result from the use of functional specifications, whether for first time requirements or for repetitive buys using restrictive specifications. The requirement to publicize would be a further valuable check on the system.

The subcontracting process—follow-on procurement, spare parts procurement, personnel training, and long-term operating costs—will not change substantially with the enactment of S. 1264.

Section 304 of the bill authorizes noncompetitive procurement when it is determined in the best interests of the Government. It does add the requirements for publicizing in order to continually test the marketplace and to obtain sufficient data to establish competitive sources when follow-on requirements warrant that.

As to the long-term operational costs, the concept of total cost to the Government is an integral part of S. 1264. To the extent that life cycle costs can be quantified, they become an important factor in evaluating alternative solutions.

For the example, you cited, an administrative vehicle could be purchased through sealed bid competition using a functional specification as one might use for buying a family car. For example, fuel economy, a four-door, solid color sedan with power steering and brakes. The invitation for sealed bid would include a description of any factors in addition to price that would be considered in evaluating bids. These are such things as operating and maintenance costs, which could be evaluated along with fuel economy to determine the lowest total cost to the Government.

In summary, S. 1264 would improve current procedure practices in several respects by providing for:

(1) A single statutory base for a uniform Government-wide regulations;

(2) Greater competitive opportunities, whether the Government is buying major systems or commercial-type items;

(3) Reduce paperwork by eliminating unnecessary detailed specifications and written justifications for competitive negotiations; and

(4) Greater flexibility in choosing the method of procurement which most effectively generates competition.

The bill, in essence, permits the Government to use the same common sense techniques that a prudent consumer would use in buying to satisfy his requirements.

[Senator Chiles' letter to Senator Goldwater follows:]

U.S. SENATE,
COMMITTEE ON GOVERNMENTAL AFFAIRS,
SUBCOMMITTEE ON FEDERAL SPENDING
PRACTICES AND OPEN GOVERNMENT,
Washington, D.C., October 4, 1978.

HON. BARRY GOLDWATER,
Committee on Armed Services, U.S. Senate,
Washington, D.C.

DEAR SENATOR GOLDWATER: At the Armed Services Committee's hearing on S. 1264 on September 22, 1978, you asked for the following information:

"Please provide for the record a brief step-by-step presentation of how you foresee this bill being implemented for the Defense Department to purchase (1) an aircraft carrier, (2) a fighter aircraft, (3) a tank or tracked vehicle, and (4) an administrative vehicle. Consider in this step-by-step presentation the process prior to deciding on each of these systems (assume these systems have been determined as best for the mission), subcontracting process, follow-on procurement, spare parts procurement, personnel training, and long-term operating costs."

The first three items you enumerated would come under the heading of major systems, and would all follow the same basic procedure, so I will treat these three together. Major systems are of special concern since they account for such a large share of procurement. Because of this, special procedures have been developed for major systems in addition to the functional specifications approach of S. 1264. These special requirements include the program decisions which precede the selection of a particular system. They are embodied in OMB Circular A-109, which was developed by the Office of Federal Procurement Policy in close collaboration with me and my staff, and which the Department of Defense has already begun to implement.

The steps involved in a major system acquisition are:

Statement of need approved by Secretary of Defense and made available to Congress. (This could be up to years earlier than in the past, when need and solutions came to Congress all at once, after time and money had been spent on examining alternatives.)

Assignment of a Program Manager.

Acquisition strategy prepared which is tailored to each program; a time-phased plan that addressed how the acquisition program will be conducted.

Alternative concepts to fill the need are competitively identified and defined. Section 302 of S. 1264 provides for competitive negotiated solutions at this point, based on functional need. The market-place, by offering alternative solutions to satisfy that need, would help determine what DOD should ultimately settle on as a requirement. At this point, no detailed specifications or written justification for negotiating are required, as is true under current procedures.

Alternatives are tested, demonstrated, and evaluated to determine the one or more most beneficial to the government. Section 303 of S. 1264 provides for sustaining competition among alternatives approaches until sufficient test information becomes available to warrant selecting a particular product.

The most beneficial solution(s) goes through full-scale development and initial production to permit testing in an operational environment. S. 1264 includes a policy statement that large-scale production shall only be undertaken after adequate operational testing.

Full production is carried out and the operational force equipped.

The same sequence of problem-solving will continue to apply to all major system acquisitions: (1) identification of the problem; (2) consideration of alternatives; (3) test, evaluation, and selection; and (4) production. S. 1264 will not require any change in these procedures, already embodied in A-109. What it does do is facilitate this process by eliminating needless paperwork and providing for greater market-place competition. This same approach to filling agency needs will apply to all purchases under S. 1264. The Office of Federal Procurement Policy has proceeded to effect these changes with respect to major systems in advance of enactment of S. 1264 because of the significant dollars involved and the additional precontract steps required in the selection process.

The fundamental objectives of S. 1264 are to: (1) simplify the procurement process by providing a consolidated statutory base for a single government-wide acquisition regulation; (2) broaden the competitive base by requiring the use of functional specifications to the maximum practicable extent. This permits a variety of alternative solutions to be offered rather than having every offeror bid to a single predetermined solution embodied in a detailed specification; (3) minimize sole source acquisition by broadening competitive opportunity and by requiring more stringent high-level justification for sole source; and (4) provide statutory recognition of competitive negotiation as a viable method of procurement and eliminate much of the paperwork now needed to justify negotiation even though negotiation accounts for over 90 percent of defense contract dollars.

Many of the contracts which are now negotiated, either competitively or sole source. Under one of the 17 negotiation exceptions in the Armed Service Procurement Act will become competitive sealed bid. This will be equivalent to formal advertising as we know it today, but using functional specifications wherever practicable. When conditions are such that an award based on a sealed bid price cannot be anticipated, we expect most others to be competitively negotiated, with increased competition through use of functional specifications. This will be particularly important in cutting down the volume of sole source awards and giving the market-place an opportunity to respond to the government's functional needs. At the same time, S. 1264 recognizes that there are exceptional circumstances in which competition is not available or not practical, as, for example, in the purchase of replacement spares manufacturered only by the original equipment manufacturer, or the follow-on purchase of aircraft or ships after an initial competition. In all cases though, the buying activity would be required to publicize its requirements 30 days in advance in the Commerce Business Daily and give others an opportunity to come forward and demonstrate their capability to satisfy the government's requirements. We expect the biggest impact on noncompetitive procurements to result from the use of functional specifications, whether for first-time requirements or for repetitive buys using restrictive specifications. The requirement to publicize will be a further valuable check on the system.

The subcontracting process, follow-on procurement, spare parts procurement, personnel training and long-term operating costs will not change substantially with the enactment of S. 1264. Section 304 of the bill authorizes noncompetitive procurement when it is determined in the best interest of the government. It does add the requirements for (1) publicizing, in order to continually test the market-place; and (2) obtaining sufficient data to establish competitive sources when follow-on requirements warrant. As to long-term operating costs, the concept of total cost to the government is an integral part of S. 1264. To the extent that life-cycle costs can be quantified, they become an important factor in evaluating alternative solutions.

The fourth example you cited, an administrative vehicle, could be purchased through a sealed bid competition using a functional specification as one might use for buying a family car; e.g., a fuel-economic four-door solid color sedan with power steering and brakes. The invitation for sealed bids would include a description of any factors in addition to price that would be considered in evaluating bids. These could be such things as operating and maintenance costs which would be evaluated along with fuel economy to determine the lowest total cost to the government.

In summary, S. 1264 would improve current procurement practices in several respects by providing for:

(1) A single statutory base for uniform government-wide regulations;

(2) Greater competitive opportunities, whether the government is buying major systems or commercial-type items;

(3) Reduced paperwork by eliminating unnecessary detailed specifications and written justifications for competitive negotiations;

(4) Greater flexibility in choosing the method of procurement which most effectively generates competition.

The bill, in essence, permits the government to use the same common sense techniques that any prudent consumer would use in buying to satisfy his requirements.

If you would like any further information, I will be glad to provide it.

Sincerely,

LAWTON CHILES.

Senator MORGAN. Thank you, Senator.

Senator CHILES. In addition to inserting the letter in the record, if you will allow me, we will send it to Senator Goldwater too.

(Subsequent to the hearing Senator Proxmire submitted the following reply to questions submitted by Senator Goldwater:)

U.S. SENATE,
COMMITTEE ON BANKING, HOUSING, AND URBAN AFFAIRS,
Washington, D.C., December 20, 1978.

Hon. BARRY GOLDWATER,
Committee on Armed Services, U.S. Senate,
Washington, D.C.

DEAR BARRY: At the Armed Services Committee hearings on S. 1264, the Federal Acquisition Act of 1977, counsel asked that Senator Chiles and I provide our views on the following question:

Please provide for the record a brief step-by-step presentation of how you foresee this bill being implemented for the Defense Department to purchase (1) an aircraft carrier, (2) a fighter aircraft, (3) a tank or tracked vehicle, and (4) an administrative vehicle. Consider in this step-by-step presentation the process prior to deciding on each of these systems (assume these systems have been determined as best for the mission), subcontracting process, follow-on procurement, spart parts procurement, personnel training, and long-term operating costs.

In my answer, I will attempt to describe how I foresee the bill being implemented, and will also discuss suggestions for improvement.

First of all, I should point out that S. 1264 says very little about acquisition procedures subsequent to source selection. The bill does define access to contractor records, more restrictively in many cases than current law, and also describes contractor standing to appeal or protest agency decisions. However, most other matters are left to the discretion of the Office of Federal Procurement Policy and the contracting agency officials.

It is difficult to define the source selection procedure that would be utilized for the fourth example in your question, the administrative vehicle. Depending on the type of vehicle to be purchased, the size of the purchase, the characteristics of the marketplace, the type of regulations issued by OFPP, and the decisions of agency officials, such a vehicle might be purchased through the sealed bid method (defined in title II), competitive negotiations (title III), the small purchase method (title IV), or even, conceivably, the multiple award schedule (subsection 303(e)). It is, therefore, impossible to generalize about this procurement.

I assume that the first three enumerated weapons systems would be procured through the method of competitive negotiation, described in title III. Although differences in technical complexity, development requirements, and volume of production would dictate varying acquisition strategies, the basic legal framework would remain the same.

S. 1264, as approved by the Committee on Governmental Affairs, prescribes competitive negotiations for all acquisitions greater than $500,000 unless: (a) a situation exists such that use of the advertised sealed bids method is considered appropriate; or (b) only one source can produce the item, in which case a "noncompetitive exception" is authorized.

I assume that the cognizant official in each of these cases would determine that the sealed bid method of source selection would not be appropriate. S. 1264 does not require a specific written finding to support this conclusion, although I would favor such a requirement. Consideration of competitive negotiation would be the next step in the process. In the case of the aircraft carrier, it might be determined that only one contractor could satisfy the requirement, in which case notice of the Government's intention to issue a sole source contract to that firm would be made. In the case of the tank or tracked vehicle and the fighter aircraft, such a finding would be conceivable, but unlikely. Barring such a finding, solicitations would be issued to numerous sources.

Competitive negotiations are currently used for most major weapons systems. Most of the troubled procurements of recent years—e.g., the C–5A, B–1, F–14, and DD–963—were awarded through this method. Title III does not describe in detail the specific techniques to be followed during such negotiations. Instead, it cites a number of principles that are to be followed.

One of these principles is the use of functional specifications. Unless the agency decides otherwise, S. 1264 suggests that it refrain from reciting detailed product

specifications. This is supposed to permit greater flexibility and the opportunity for creative, cost-saving approaches. Although I believe that functional specifications can be very productively used to purchase common commercial items, I believe that the use of this technique should be considered carefully before it is adopted for major systems. Functional specifications could lead to very arbitrary source selection decisions. Because of the widely differing approaches that would be possible, it would be quite easy for the agency to unilaterally disqualify a bidder on the grounds that his design was unacceptable.

The other source selection principles are generally consistent with the latest source selection scheme announced by the Department of Defense, known as "Four-Step Procurement." Four-step procurement is generally characterized by a technical competition, which can be on the basis of designs, proposals, or actual prototypes. The distinguishing characteristics are that: (1) auctioneering techniques are prohibited; (2) technical transfusion between proposals is prohibited; and (3) detailed discussions of price are not to be conducted until after the winning contractor has been selected.

As I said in my prepared statement, I have serious reservations about the four-step procurement method. One of these reservations is that, in its effort to discourage contractor "buy-ins," the bill appears to eliminate any incentive for contractors to submit reasonable bids.

Other concerns about four-step are that the program would allow agency officials to disqualify competitors on the grounds of design defects—a possibility that would be particularly strong if functional specifications were used; and that the agnecy would be hamstrung during final cost negotiations, if the selected contractor refused to negotiate a fair price, because the losing competitors would no longer be available to act as an alternate source.

The bill does permit multiple source awards; such awards, however, are also permitted under current law. This provision would not greatly change the current procedures.

In all three of the awards made pursuant to competitive negotiations, I assume that the contractors would be required to support their proposals with cost data and that they would be required to submit to contract audit. The assumption that cost data would be required is based on the understanding that previous contracts for similar weapons systems would not be considered "recent comparable competitive acquisitions." If they were considered to be so, price data only would be required.

One possible loophole could arise during follow-on procurement as a result of subsection 305(b)(3). This section authorizes contractor submission of price data, as opposed to more detailed cost data, in cases where there has been a "recent comparable competitive acquisition." Neither the bill nor the report adequately define these terms. It is possible that agency officials could interpret this exemption as applying to follow-on procurements to a competitively-negotiated source selection. Nothing in the bill would appear to preclude such a determination. Because of my misgivings about the adequacy of competition emanating from competitive negotiations, I believe that this exemption should be eliminated or clarified to guard against this abuse.

The bill, approved by the Committee on Governmental Affairs, has very little to say about the questions of subcontracting, follow-on procurement, spare parts procurement, personnel training, and long-term operating costs. The bill's failure to speak to spare parts production is a particular weakness. Recent hearings before the Banking Committee showed that significant cost savings are possible through greater use of competition in spare parts production. The hearings also showed that agency officials often make unjustified decisions that sole or restrictive source production is necessary. Procedures spelled out in title II and title III may make it more difficult to initiate noncompetitive spare parts contracts, but I recommend that this issue be given further consideration.

Given the silence of the bill on most contract administration matters, it should probably be assumed that the enumerated acquisitions would proceed after source selection in more or less the same way that such acquisitions would continue under current law: The agency would sign a cost-plus contract; the contractor would submit data which would support his highly inflated cost estimates; auditors would review his costs and make relatively minor recommendations for cost disallowances, many of which, according to current practice, would be ignored by agency officials; the contractor would get into cost, scheduling, and performance problems; performance would be degraded; production volume would be cut back; and costs would rise.

Perhaps OFPP has many good ideas for controlling contractor costs and performance. Perhaps this agency intends to implement the many excellent recommendations advanced by official bodies which have suggested ways to improve contractor productivity. If OFPP does have such ideas, they will undoubtedly be incorporated into the new procurement regulations which would be issued pursuant to S. 1264. However, the Senate is being asked to take this on faith, because most matters dealing with major systems acquisition will be left entirely to this agency to define. In my prepared statement, I described some of the contract cost issues which are not dealt with in S. 1264. These same comments could be applied more generally to most other steps in systems acquisition following on to source selection. I believe that the committee should consider whether additional guidance on these matters is necessary.

One matter of special concern to me, in light of the bill's general vagueness, is section 2(b)(9), which states that it is the policy of the United States to "minimize Government surveillance of contractor operators and contractor performance, and to waive any controls and surveillance not necessary to insure satisfactory performance of contracts." Many types of existing Government controls and surveillance are not addressed in the bill. This preamble language would establish it as congressional policy that such unenumerated safeguards should be repealed. I do not believe this should be done without careful, specific consideration of each separate procedure.

I hope that these remarks are helpful in further outlining my views on this bill. Please do not hesitate to call on me if you have any other questions or comments.

Sincerely,

WILLIAM PROXMIRE.

Senator MORGAN. Mr. Dawson, since you submitted the questions for Senator Goldwater, do you have any questions at this time?

Mr. DAWSON. Just two occur to me.

Senator Chiles, one is the determination that after you have made a source selection, oftentimes the committee will review procurements and notice that the increase in cost to Government of a particular procurement occurs after the selection is made through change orders?

Senator CHILES. Yes.

Mr. DAWSON. And through change of specifications made by the Government?

Senator CHILES. Right.

Mr. DAWSON. This bill would not have an effect on that?

Senator CHILES. No; but OMB Circular A–109 would, and this bill fits in with 109. If they follow A–109, they should carry out a competitive testing program to evaluate the alternative methods and sources for products they want to buy. The testing program should last long enough so that you do not have those major change orders during production. I think this bill dovetails in with A–109. I would have to say one of the prime purposes of A–109 and this bill is to require the Government, before it makes up its mind exactly what detailed product it needs, to consider functional alternatives to solve the need. For example, take tank killers; what you are really looking for, what you really want is to destroy tanks. So you need to consider what kind of terrain the system would operate in. What are your mobility requirements, your speed requirements, your other requirements? At that stage, you do not draw the picture of the system, you do not say, "I think the armament has to be so thick," and you do not specify what kind of hits it has to take. Instead, you go out to your competitive sources and allow them to start coming back and feeding in how they would construct this weapon, what they think should be done, and then you test those alternative sources up to the point where you have the basis to make your selection. That way, they are tested before you go into production. In the past we have locked in too quickly to untested

systems; many times we only used one source. I think we ought to spend a little more money in the front end and test at least two competitive alternatives and use that competition to control costs and assure quality. I think that is our protection.

Mr. DAWSON. Senator Chiles, we are deeply appreciative of your taking the time to sit down and answer that rather lengthy question that Senator Goldwater drafted. The answer that you provided is very helpful. Since Senator Proxmire submitted a statement that is before the committee, I would like to ask Senator Morgan whether we couldn't submit that same question to Senator Proxmire so we could get into this colloquy among the Senators that have certain views on this subject?

Senator MORGAN. I see no reason why we shouldn't. Mr. Stirk, do you want to ask any questions on this phase?

Mr. STIRK. With regard to the operational testing concept, particularly with regard to an aircraft carrier, how would you go about the operational testing of an aircraft carrier?

Senator CHILES. I think primarily what you would have to be testing would be the subsystems as opposed to the platform itself. I don't think that we would have two platforms built, there would be no way you would justify that. But you know that carrier is made up of a number of subsystems, and those subsystems would be the essence of what you would be doing with that carrier.

Now, at some stage you might be testing some fairly expensive subsystems, but those, I think, could be tested as opposed to competitively testing the platform of the carrier itself. Now, we are talking about the provision of different weapons to be placed on carriers, like the SIRCS program, which is a shipboard intermediate range defense against weapons systems.

Now, the military is beginning to realize what they need; when you build a carrier, you want it to last for a certain number of years. Yet you are going to have subsystems in that carrier, subsystems which will be in rapily developing technological fields. So, you might want to put those new systems into the major system. Now, we are going to tremendous expense as we retrofit a new weapons system onto say, an old carrier.

In some instances, the Defense Department is saying that it is not worth trying to refit this particular cruiser, we better wait until we get a new one. That has caused us to begin to talk about a whole kind of architectural design of the platform which will enable us to plug new subsystems into the existing platform as they develop. To do that, you have to say up front that a subsystem will operate in its proposed environment. By thinking about these considerations at the front end of a major acquisition, we can make tremendous savings and put our new technology to work a lot quicker.

That fits into A–109, the question of how you will start off at the beginning of a major acquisition. I think that if someone had thought through the A–109 concept a long time ago, it would have gotten on the track earlier.

Mr. STIRK. Thank you.

Senator MORGAN. Lawton, do you have any other comments before we go back to colloquy?

Senator CHILES. I don't think so.

Senator MORGAN. Mr. Roberts?

Mr. ROBERTS. I wonder if I could address a very general kind of question to you, based on the long experience you have had and the recent experience in your committee of dealing with the GSA problems and related difficulties in procurement, if you view the system of procurement that we have as a kind of organic whole. I suppose you would say that this bill addresses the statutory framework part of this whole system—that is, the basic structure.

Senator CHILES. I think that is right. I think that today we have a statutory framework that grew up over a number of years and has become a hodgepodge. This bill is trying to prune it off and start back with a simple framework.

Mr. ROBERTS. I am wondering if you have developed a view based on your experience as to which among the various factors in the organic whole is the one most responsible for the problems we have. Let me try to explain this.

Is it likely to be flaws in the statutory framework, conflicting things in the framework that you have identified? Is it more likely to be in the management process between the contractor and the Government? Or is it other factors like incompetence or corruption of individuals in the system? Or is there any way of answering that question?

Senator CHILES. Well, it is hard to answer. In a way it is a chicken and egg approach. This would be a rambling answer. If I had a week to think about your question, I would give you a more concise answer. But I think part of our failures are because of the statutory framework, and the hodgepodge way in which regulations have been built on the framework. Furthermore, because of this concept of detailed specifications, we have developed a system that no longer relies on competition; it almost thwarts competition and works against having a competitive base. That, in turn, causes many of the other problems.

Now, because we have not had meaningful competition in the past, some problem would develop in some specific areas. As that problem would develop, the agency's response, Department of Defense, or GSA or any of the other agencies, would be to issue a set of detailed regulations dealing with that particular problem. Or else they would assign some additional inspectors, or write some additional contract language, or, if it were a product related problem, to write some more detailed specifications. Well, they didn't realize in dealing with all of those little problems, they often created greater problems in the rest of the system and created less competition. So you ended up with a system in which the detailed specifications and the contract officers and other inspectors who are supposed to give you protection. But the system was too complicated, there was no competition and as a result it broke down. You only had one person bidding, and one person getting the contract. Then the company with the contract starts finding ways to get around the terms of the contract by change orders, by getting new terms written in. Then we find that the Government inspectors can be corrupted, or that they are not trained. or that they just don't really follow the letter all the way through. Before long you find that the whole system has been corrupted.

I think what we are trying to do in this bill is to recognize that the best policeman on the block is competition. You can use all the inspectors, all the detailed specifications and all the other things the Government has been trying to do for the last 35 years and you still end up

with these kinds of problems. There is nothing better than having two or more companies really competing on a contract; you are going to hear from those companies when the system doesn't work correctly. They are going to be seeing their Congressman, they are going to be up here before the committees. Head-to-head competition is one of the best guarantees that I know of in our system; it insures that you are going to get a fair price, that you are going to get good products.

I would certainly have to say that ineffective management is one of the prime causes in this GSA situation. Beyond that however, what the GAO has reported that the problems in GSA are just the ones that we know about; these same problems exist in every other agency. Managers have gotten the idea that their sole function is to buy the product. They seem to have forgotten that they really need to protect against fraud, waste, and corruption, and have adequate ways to go out and to try to detect it. The mentality that says get the job done at any cost doesn't get the job done in the best way.

Part of solving these problems is to retrain your managers and to get their thinking changed around. But another part of it is to create a competitive atmosphere that is going to help them get the job done and give them some protection against potential abuses at the same time.

Mr. ROBERTS. I think that is very helpful. I would like to ask two specific questions and then move on.

We talked a bit the last time we met about title VII of the bill and bid protest procedure and I wonder if you can clarify for us the committee's intent as to the binding nature of the GAO bid protest decision that has been a subject of great controversy.

The language in the bill makes some of us, at least, not sure as to whether the committee's intent is that the decision will be binding on the executive branch or merely advisory.

Senator CHILES. Well, I will have to say if you can't tell completely what we said, it is because we were a little murky in that area. We have not said that it is completely binding and we have not said that it is advisory.

Part of that reason is because of the concern in the constitutional area, and part of it is because we are not exactly sure that we should come down completely on one side or the other. What we have said is that if there is a bid protest pending before the GAO, the contract cannot be awarded unless at least an Assistant Secretary signs off on it. So we haven't left a total vacuum. We have provided that the decision to award while a protest is pending must escalate up to the Assistant Secretary level and he must then personally approve it.

Mr. ROBERTS. But on the legal issue that everyone has been disputing about, your intention was to not to take——

Senator CHILES. We didn't decide that. We didn't think that we could decide that legal issue in this bill or that we should.

Mr. ROBERTS. Yes, sir.

Turning your attention to the competitive negotiations section, particularly section 303(a), I note that in the process of developing the legislation, the degree of restrictiveness of section 303(a)—that is, the types of discussions which are allowed between the contractor and the Government during the competitive negotiations period—has changed somewhat. There has been some concern expressed to us by the Department of Defense that even though the prescribed types of

discussions are now somewhat looser than they were before, that they still restrict too much the kinds of things that the contractors in the competitive range and Government can talk about during the competitive negotiation period. Price, for example, has been raised as one.

Do we face a danger here that if we make the Government go through with a kind of blinder on during the competitive negotiations stage, that we are going to get to the end of that and select a winner which is very sensible on the technical side, and then sort of open the envelope on the price question and find ourselves in a bind?

That is a crude way of describing the problem.

Senator CHILES. Well, I think perhaps it was because the fear of the danger you described that we loosened up our original version. We don't feel that the bill is that limiting now. Certainly our current language is not so sacrosanct that we couldn't look at it if there were concerns raised. What S. 1264 does not do is require the use of programs similar to the four step. The Defense Department uses the four-step procurement system as a test program for negotiated procurement. It breaks negotiations into separate parts: evaluation of your technical proposals, evaluations of cost, establishment of a competitive range and selection of the successful offeror and negotiation of a definitive contract.

The four-step negotiations prohibit the Government from telling an offeror where his proposal is deficient. We have not intended and would not make the four-step negotiations the standard method of negotiation in Government procurement. S. 1264 is designed to prohibit those practices in the current system which have led to cost overruns and buy-ins in the past. But S. 1264 does not set such rigid categories. It does not prevent the Government from discussing the weak points in a competitor's proposal. It simply sets up a definite start and a finish to the negotiations, and attempts to prevent auctioneering and technical transfusions.

It also tells the Government, "Don't negotiate a definitive contract with each offeror." I don't think S. 1264 would prevent the four-step acquisition process from ever being used; after all it is used today. If the Defense Department wanted to use it, I think they could within the parameters of S. 1264.

We have heard from an awful lot of contractors who are concerned about the auctioneering problem. There is a tendency, if you don't have some kind of prohibition in place, for the contracting officer, who thinks he is doing the best thing in the world for the Government, to use auctioneering practices. Overall, we heard enough to think that the Government doesn't get the best deal that way. Many times a contractor gets so desperate that he will lower his bid below cost in order to get that contract. Then, when he has the contract, he has to cut corners, or get some cost overruns or he is in trouble.

Mr. ROBERTS. You wouldn't approve of using auctioneering techniques even in a commercially available fixed price type situation?

Senator Proxmire, in his statement, makes the statement he thinks there are occasions where it would be all right, and he uses the example of just a fixed price contract for a commercially available——

Senator CHILES. Here is the danger. When you start talking about corruption, and you start talking about fraud, then you need to start talking about auctioneering in the same breath. It's really directly op-

posed to the concept most of us really like in sealed bidding: the idea that each bidder has one shot to make his best offer. Then, when you open those envelopes, the low bid wins.

If you allow auctioneering, and if I were a contracting officer, I could take care of my favorite, and in turn my favorite is going to take care of me. All I have to do is keep asking for more "best and final" offers until his is the lowest. We found that practice rampant in GSA on contracts for buildings and other things. It looks like some bidders got information about what they should bid based on what other people were bidding. That is a real danger.

It sounds good on its face to use these auction practices for off-the-shelf purchases, but it has the potential to create serious abuse.

Mr. ROBERTS. I have no further questions.

Thank you very much.

Senator MORGAN. Mr. Stirk has some questions. John is on my staff.

Mr. STIRK. Senator, back to your answer to Senator Goldwater's question. The general procurement policy in defense procurement has been to operationally test a production unit of any item. We usually do this because when you test other than a production unit you run into a lot of problems when you try to go from an R. & D. to a production unit. When you were explaining to me how you would test for operational purposes, things going into a carrier, how would we handle this, in your explanation of operational testing?

[A short recess was taken to go for a vote.]

Senator MORGAN. I understand you have an appointment at 11:45?

Senator CHILES. Right.

Senator MORGAN. If it is all right, why don't we go on?

Senator CHILES. Let me just try to see if I can answer this question.

I think your concern is, how would we test a new tank, for example, under this bill. What would be required? Would it be a full-scale production model or would it be a prototype, and if it is a prototype how do you know that you have locked in your cost?

Mr. STIRK. One of those systems on a carrier, how would you operationally test unless you got a production item?

Senator CHILES. Well, let me say the bill itself does not require that it be an operational item, it is silent on that. It does try to get you, as A–109 does, to test, as far as you can, what would be operational. I think then you would really be leaving it up to the agency, with the guidance of the Office of Federal Procurement Policy, to do this on a case by case basis. I don't think there is any way that you would be able to test a production model of a totally new tank or plane. You could and should test more than one prototype competitively though.

So, the bill itself does not lock in testing of production models in every case. It calls on the agencies, with guidance from OFPP, to use common sense on a case by case basis.

Mr. STIRK. Section 509 says that only firm fixed price and fixed price with escalation contracts are competitive. This doesn't seem to square with the definition of competitive contracts in the rest of the bill.

Could you comment on that for us, Senator?

Senator MORGAN. Feel free to call on your assistant.

Senator CHILES. I think what we are saying is that normally fixed price contracts are competitive. In a situation where we are allowing the waiver we wanted to make sure that all of the risks are placed on

the contractor, we looked to the GAO for guidance on the formula we used. We really were interested in getting relief for the smaller contractors and we wanted the waiver to be as tight as we could make it.

Mr. STIRK. In section 306 there is language which permits the Government to get into the company's business to ensure efficient and economical contract performance. There has been some suggestion that this runs contra to the basic intent of the bill by decreasing the competitive independence of the contractor.

Could you comment on that, Senator?

Senator CHILES. Well, that section is an audit section, and it does not distinguish between audits of cost-type contracts and audits of fixed-price contracts. We feel that no matter what kind of contract that you use, the government should always have the right to inspect the contractor's facilities to verify that cost and quality. These audits are basic controls that the Government now has and we want to make sure they are not waived under S. 1264.

These audits must be distinguished from some of the surveillance requirements in section 509 of the bill. In those cases, we felt that you could waive reviews of management efficiency if you could get the contractor to assume all the risk in a contract award through head to head competition. But the right to audit is something that we don't want to interrupt in any way. We think that the Government always should have the right to go into a contractor's facilities and be able to look at records to verify costs and also verify quality.

Mr. STIRK. Currently there is a distinction between the Government's authority to audit a contract based on the different types of risks assumed by the contractor. In section 306, it appears that there is no distinction between the Government's authority to audit——

Senator CHILES. That is correct.

Mr. STIRK [continuing]. Different types of contracts.

Senator CHILES. That is correct. We don't feel that there should be a distinction based on the type of contract. We think the Government should always have the right to audit.

Mr. STIRK. If I understand the bill correctly the basic thrust——

Senator CHILES. And we do change the current law on that by eliminating any distinctions.

Mr. STIRK. If I understand the basic thrust of the bill correctly, it is to increase competition while reducing Government interference in what should be a business relationship?

Senator CHILES. Yes, sir, that is what we are attempting to do.

Mr. STIRK. We are looking for not only price competition but competition in dissimilar items to achieve the same objective?

Senator CHILES. That is right; innovative competition as to how you would carry out the functions or purposes that the Government wants carried out.

Mr. STIRK. The greater the surveillance and interference with the contractor ordinarily the less competition we will have and the greater leveling off of the competitive position. It appears, however, that the increased access——

Senator CHILES. Again, I think we have to look back quickly to what was the purpose of having that surveillance? It was because we were dealing so much with sole source contracts and cost plus contracts. You wanted to find out what the contractors were throwing into their cost figures, and so we got into more and more surveillance. If you turn

around and make your policeman more competition however, then you don't need all of those surveillance requirements. In fact, today those requirements can work against competition by creating paperwork barriers to entry.

Mr. STIRK. What the committee was wondering, if perhaps that increased access and surveillance works counter to the real basis of the bill in setting up a business type relationship, if the Government is going to get into telling the contractor whether he is efficient and economical and getting into his business more, that moves away from the business competitive atmosphere.

Senator CHILES. Some people are afraid because it looks like we have cut some of the surveillance requirements. Others fear that our surveillance authority is too broad. Our objective is to establish effective surveillance requirements, and eliminate overlapping requirements which produce paperwork instead of results. We feel that you can minimize certain requirements, and allow the government in its own discretion to waive them for contractors who do 75 percent of their business competitively and whose sales volume is below a certain threshold (ten million dollars).

On the other hand, when it comes to the audit for price and quality, we feel that the Government, like any prudent consumer, should have that right to insure that its getting what its paying for. That doesn't mean a continual parade of people onto the production lines, causing all kinds of problems and paperwork.

Mr. STIRK. Does this relate to the controversy that we have had in various quarters about should cost studies——

Senator CHILES. Well, the should cost study provision was added at the recommendation of GAO on the basis again that the Government should try to know what its potential costs ought to be before it commits itself.

Mr. STIRK. Senator, section 303 has drawn criticism from some sources for encouraging technical transfusion by the Government among the proposals submitted. The rationale is that the Government must make its decision on the winner relatively early in the proposing sequence without having had the opportunity to seriously question each proposal or to suggest alternative approaches to each proposer.

After never having had real head to head competition between proposers, the Government will then negotiate parts of the unsuccessful proposals into the winning proposal under threat of going back to one of the unsuccessful proposers. It is said that this thereby decreases competition, promotes technical transfusion, but still does not result in the best proposals since the Government has not been able to refine the individual proposals.

Could you comment on that for us?

Senator CHILES. Well, if someone can read those criticisms into S. 1264, those same criticisms would apply for today's system. I think S. 1264 would not entirely prevent what you are talking about; I'm not sure any bill could. But we are not changing the existing law or existing practice to allow it in S. 1264.

I think the thrust of S. 1264 is to prevent auctioneering and to prevent technical transfusion. Once you go beyond those sanctions and try to structure a rigid set of procedures on a step-by-step basis, I think you get in trouble. I think again that this bill would allow more of the specific procedures to be established by the Office of Federal Pro-

curement Policy in order to get some kind of flexibility within the boundaries of the statute.

Mr. STIRK. On the other hand, of course, that same section has drawn criticism from other quarters as being contrary to the desire to get the best product at the best price, because once the Government chooses the winner and begins final negotiations on price and technical factors, they are stuck with whatever the contractor wants. It is suggested that, as final negotiations go on, the other proposers in complex procurements have disbanded their bid teams and are no longer viable sources for procurement.

Would you comment on that?

Senator CHILES. Well, that is exactly the dilemma you find yourself in if you come down squarely on one side or the other. That is why the bill didn't try to shape one side or the other, because we felt we couldn't do that in a statute.

Again, what you have pointed out is possible today, and takes place today.

Mr. STIRK. I would like to submit the other portion of these questions for the record.

Senator MORGAN. Senator, since you have an appointment, if it is agreeable, we will submit questions. That ought to give us a record to work on for a while.

[Questions with answers supplied follow:]

QUESTIONS SUBMITTED BY THE COMMITTEE TO BE ANSWERED FOR THE RECORD

Question. Is your understanding of the term "should cost" a study performed by the government before contract award to assess approximately what the product or service should cost?

Answer. This indeed would be what is intended by the "should cost" provisions in S. 1264 (See section 306 (c)). Such studies would enable the government, before award, to determine if the costs to be incurred in effect represent an efficient and economical way to do the job.

Question. Section 3(g) defines functional specifications. Other sections of the bill use the term and place stringent limitations on the use of detailed product specification.

(*a*) What is the genesis of these terms?

Answer. (a) The concept of functional specifications comes from the studies of the Commission on Government Procurement. Volume 3 of that study contains an assesment of the "requirements" phase of the requisition process. The term "functional specification" is derived from the conclusions drawn in that study.

(*b*) What is the difference between a functional specification and a performance specification?

Answer. (*b*) An essential characteristic of a functional specification is that it does not prevent consideration of alternative solutions to the agency's needs, thereby restricting competition. Furthermore, a functional specification focuses on a description of the end problem to be solved by the proposed acquisition, not just what performance characteristics would be necessary to solve the problem. Performance specifications could be drawn up in such a way as to restrict the consideration of alternative products in the same way that detailed product specifications do. For example, a performance specification for an airplane could be written in such a way as to exclude propeller driven planes, even when a propeller plane would otherwise be considered and could possibly resolve the acquisition problem faced by the government.

(*c*) Is a detailed product specification the same thing as a design specification?

Answer. (*c*) Even though the two terms do not carry the identical meanings, the effect they have is the same: both restrict competition by limiting the array of alternatives available to the government in any given purchase situation. A design specification is somewhat akin to a blue-print. A detailed product specification may not mandate one design, but would set out the physical characteristics

of the proposed purchase in an extensive manner. To the extent that both act to restrict competition, they can be used interchangeably.

(*d*) In Section 302(e), what is the difference between "detailed specification" and "detailed product specifications"?

Answer. (*d*) No difference. Drafting correction needed.

(*e*) Was the word "product" inadvertently omitted between the words "Detailed" and "specifications" in the final line of Section 302(a)?

Answer. (*e*) Yes.

(*f*) Will the functional specifications concept preclude the use of "brand name or equal" purchase descriptions without approval of an 'agency head' "?

Answer. (*f*) As a general rule, no "Agency head" approval would be required however, if the use of a "brand name or equal" purchase description excludes consideration of products which are used for the same function.

(*g*) Will procurement of replacement spare parts to a manufacture's specification or part number require agency head approval?

Answer. (*g*) Yes. Such approval would be given for a class of replacement parts, however, rather than on an item-by-item, purchase-by-purchase basis.

Question. Section 2(b)(7) provides: "Initiate large scale productions only after the item or equipment to be acquired has been proven adequate by operational testing;"

(*a*) Will this preclude any concurrence between development and production?

Answer. (*a*) This provision is one of the statements of policy in S. 1264. It establishes as a policy that, in major systems acquisitions, the government should defer initiation of production until full scale development has been completed. It would not preclude concurrence in every case, but it would establish a presumption against concurrence. It is anticipated that the procurement regulations implementing this policy would require that determinations to initiate production prior to the completion of development be made by top level agency managers.

(*b*) What determines "proven adequate by operational testing?"

Answer. (*b*) No single set of criteria would suffice as a determinant as to exactly when a system has been proven adequate by operational testing. The thrust of this provision is to make sure that the government does not commit itself to the production of a system which exists only on paper. Operational testing serves to define the system more precisely, thereby eliminating uncertainty in cost, quality and schedule during production.

(*c*) Must full scale development work be completed before production is authorized?

Answer. (*c*) This question was addressed in the response to (*a*) above. Once again, S. 1264 does not preclude concurrance in every instance, but the thrust of S. 1264 would make concurrence the exceptional situation, and subject to close scrutiny.

(*d*) What happens in the cases where development work continues well into production?

Answer. (*d*) Once again the thrust of S. 1264 is to reduce uncertainty in cost, quality and delivering schedule. S. 1264 does not preclude development work during production; such prohibitions would ignore the opportunities available for further refinement of a major system during the production phase of the acquisition process.

Question. What specifications are covered by the "sunset" provision for specification review in section 514? If it includes all MIL-specs we are talking about many thousand specifications and subspecifications.

Answer. Section S. 14 of S. 1264 is intended to apply to all specifications. Studies by the Commission of Government Procurement revealed that, of over 5,000 federal specifications examined, over 2,000 were four or more years old. While age alone does not create obsolescence in product descriptions, it can serve to preclude the consideration of new products. Furthermore, without a "sunset" provision, there is no effective way to eliminate product descriptions which have outlived their utility, or to revise and update specifications to take advantage of new products.

Question. In title VII, are procurements funded by foreign countries subject to the protest procedures?

Answer. No, it is not the intent of S. 1264 to subject procurement funded by foreign countries to the bid protest procedures under title VII of the bill.

Question. In your proposed new contract Disputes Act, direct access is provided to the Court of Claims. If this is done do you think it would be a good idea to send protests to the Court of Claims rather than to GAO?

Answer. Although the Court of Claims has substantial expertise in the area of law involving federal government contracts, the General Accounting Office has had more than fifty years of specific experience in handling bid protests. Title VII carries out the recommendations of the report of the Commission on Government Procurement. The Commission found that GAO should be continued as the forum for the resolution of contract award protests.

Question. Section 502 provides for warranties against contingent fees. Will the contingent fee statement only be required in negotiated and two-step advertized procurements? Currently it is required in any advertised procurement over $25,000.

Answer. It would be the intent of S. 1264 to provide for warranties against contingent fees in all advertized or sealed bid contracts. The limitation of the requirement just to two step advertized procurements was inadvertent, and can easily be rectified.

Question. In Section 702(a), does the definition of "interested party" supersede the Comptroller General decisions on protests by subcontractors where the government did not directly control the award of the subcontract?

Answer. The definition of "interested party" in section 702(a) is not intended to supersede the Comptroller General decisions on protests by subcontractors where the government did not have significant control over the award of the subcontract.

Question. While the bill provides great emphasis on competition, there is no provision for maintaining a competitive base on a continuing basis, except for the provision in section 304(b). Shouldn't there be some procedure for splitting awards, even though one or more of the awards may be at a higher price, for mobilization base requirements (not to secure continuing competition)?

Answer. The procedure referred to in the question is similar to procedure used today by the Defense Department under the Armed Services Procurement Act (10 U.S.C. 2304(a)(16)). The committee report accompanying S. 1264 indicated that section 304(a) would allow the Government to maintain the mobilization base by indicating that such a consideration would be a legitimate "requirement" for justifying a sole-source contract award. An alternative way to accomplish the same goal would be to insert language into S. 1264 itself which specifically authorizes such awards. As I indicated in my testimony before the committee, I would have no objections to such an insertion if the Armed Services Committee felt it was appropriate.

Question. What contracting procedures can be waived in the event of war or a national emergency, under this bill?

Answer. There is no specific "national emergency" authority to award contracts in S. 1264 because, under today's system, the term "national emergency" has lent itself to overbroad interpretation. It is not stretching credibility to say that, for some agencies, national emergency means "We need to spend all of our money before the end of the fiscal year." Section 304(a) does allow agencies to award contracts with very short lead times, provided top level agency approval is obtained. Finally, in the event of a war, the President could seek authority from Congress to waive the requirements of S. 1264, as was the case in World War II.

Question. How can the government require a contractor to accept a contract for national defense necessities under this bill?

Answer. As well as I could determine, there is no provision in current law which enables the government to require a contractor to accept a contract. Certainly S. 1264 does not give the government such authority. However, today, once a contract has been awarded it normally contains a clause which allows the government to require a contractor to finish work which was contracted for. S. 1264 does not repeal that practice, and it would be the intention of S. 1264 that such clauses continue to be inserted in Government contracts.

Question. What can be done quickly under this bill to secure performance of services or delivery of supplies when there is a strike?

Answer. S.1264 does not specifically address the question of how to assume contract performance during a strike; such concerns are probably beyond the scope of the bill. Currently, the policy of the Defense Department, embodied in Section 12-101-1(e) of the Defense Acquisition Regulation, is to avoid direct intervention in any labor-management disputes involving a government contractor, and confine its role to urging the parties in dispute to utilize available arbitration mechanisms (such as the National Labor Relations Board). Of course it is always possible for the government to terminate a contract for convenience in such

situations. Finally, the President could invoke 90 day "cooling off" provisions of the Taft-Hartley Act to insure continued contract performance.

Senator MORGAN. Before we adjourn, I want to commend you for your in-depth knowledge of this subject. I don't think I will ever have this kind of knowledge of the Procurement Act. I am not sure I want it, to tell you the truth, because I am relying on these folks. But I marvel at the knowledge that you have of this subject matter.

Senator CHILES. I thank you very much, Mr. Chairman. I want to say how much I appreciate your chairing these hearings and giving us the opportunity to talk about the bill.

We feel that this bill would have a tremendous effect on military procurement and it properly is before this committee. We need the thinking of this committee on the bill, and we thank you very much for the attention that you have given it.

Senator MORGAN. We will try to work on it some during the break so that at the beginning of the year we are ready to really get down to it so you won't be delayed next year.

Senator CHILES. Well, I think that would be very, very helpful to us. We know that this bill cannot pass this Congress. It has not had as much work on the House side; the thrust was coming from this side. That is what in effect the committees in the House have said, "When you get us a bill, we will begin to work on it over here." So the quicker that we can get that bill to the House, the better chance it will have of going through over there.

We have been working on this bill for about 3 years, and it is at a point where, when we get the input of your committee, we have something which is valid, something which would help the procurement process. Any help that you all give through the recess to see that we get something that would come out of this committee quickly next year would be very, very helpful to us.

Senator MORGAN. We will welcome any suggestions from you and your staff.

Senator CHILES. We will be introducing a new bill at the beginning of next year. I would like to have your cosponsorship of that bill, if you feel that we have a good product, and, also, of course, any thoughts or developments that you want to make on that new bill.

Senator MORGAN. Thank you very much. We will stand in recess.

[Whereupon, at 11:45 a.m., the committee was recessed, subject to the call of the Chair.]