Calendar No. 657

95TH CONGRESS
2d Session

SENATE

REPORT
No. 95-715

FEDERAL ACQUISITION ACT OF 1977

REPORT

OF THE

COMMITTEE ON GOVERNMENTAL AFFAIRS
UNITED STATES SENATE

TO ACCOMPANY

S. 1264

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

together with

ADDITIONAL VIEWS

MARCH 22 (legislative day, FEBRUARY 6), 1978.—Ordered to be printed

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MARCH 22 (legislative day, FEBRUARY 6), 1978.—Ordered to be printed

Mr. CHILES, from the Committee on Governmental Affairs, submitted the following

REPORT

together with

ADDITIONAL VIEWS

[To accompany S. 1264]

The Committee on Governmental Affairs, to which was referred the bill (S. 1264) to provide policies, procedures and criteria for the acquisition of property and services by executive agencies, having considered the same, reports favorably thereon with an amendment and recommends that the bill as amended do pass.

The amendment is in the nature of a substitute.

I. PURPOSE

This legislation repeals the two basic laws governing Federal purchasing and replaces them with a single, modern statute applicable to all executive agencies which is designed to stimulate competition and encourage innovation. Past reforms in procurement have usually focused on a particular aspect of the process, or have attempted to redress a symptomatic abuse in the system. Thus, the current laws controlling Federal purchasing have become fragmented and outdated, and have led to the creation of a regulatory system whose restrictions and inconsistencies actually hamper rather than facilitate the efficient, economical purchase of products and services by the Government.

This legislation, which has its origins in the recommendations of the Commission on Government Procurement, looks at the acquisition process in its entirety, and seeks to correct the root causes of the problems in the current system.

II. Summary

The initial sections of S. 1264 as amended set forth policy considerations and definitions.

Title I—Acquisition Methods and Regulatory Compliance.—Title I sets forth three equally valid alternative purchasing methods. It also requires the Office of Federal Procurement Policy (OFPP) in the Office of Management and Budget (OMB) to prepare a single procurement regulation covering executive branch acquisition. It requires OFPP to include an assessment of agency compliance with the act in its annual report to the Congress.

Title 2—Acquisition by Competitive Sealed Bids.—Title 2 deals with the first of the three purchasing methods: competitive sealed bids. It establishes criteria for its use, and sets procedures for publicizing, evaluating, and awarding sealed bid acquisitions.

Title 3—Acquisition by Competitive Negotiations.—Title 3 deals with the second purchasing method: competitive negotiations. It sets forth competitive negotiation procedures and establishes criteria for the use of noncompetitive or sole source negotiations. It also defines both the General Accounting Office (GAO) and executive agency access to records authority, and extends the Truth in Negotiations Act (Public Law 87-653) to civilian agencies.

Title 4—Acquisition by Simplified Small Purchase Methods.—Title 4 establishes procedures for the third procurement alternative: for purchases less than $10,000.

Title 5—General Provisions.—Title 5 establishes general provisions which affect Federal acquisitions, including authority for multiyear contracts, progress payments, cancellation of solicitations, rejections, and for a limited waiver of certain Government surveillance requirements. It also requires periodic reviews of specifications, establishes a program to assist minority owned businesses, calls for prompt payment of money owed by the Government to a contractor and sets out requirements for publicizing Government contracting opportunities. It continues the current ban on the use of cost-plus-percentage of cost contracting method, states a preference for fixed price contracts and requires Government employees to report any evidence of collusive bidding practices to the Attorney General.

Title 6—Delegation of Authority.—Title 6 sets forth the extent to which the authority to make determinations required by the act may be delegated within an executive agency. The delegability of certain decisions, such as those related to noncompetitive contracts, is limited.

Title 7—Protests.—Title 7 confers statutory recognition on the "bid protest" function that the Comptroller General has performed for over 50 years. It allows for judicial review of bid protest decisions as provided by the Administrative Procedures Act.

Title 8—Applicability of Subsequent Laws.—Title 8 requires all subsequent laws which amend this Act to specifically so state. The intent of title 8 is to preserve the concept of a single statutory base in the future and to codify all subsequent laws relating to Federal acquisition in the same part of the United States Code.

Title 9—Amendments and Repeals.—Title 9 makes necessary conforming amendments and repeals.

III. Need for the Legislation

In 1977, the Federal Government spent $84 billion for the acquisition of property and services in more than 13 million contract actions. The framework of statutes and regulations governing Federal purchasing is outdated, inconsistent and needlessly complex. The result is a cumbersome system which hinders the efficient, economical provision of products and services to the Government in an equitable manner.

Lack of a single statutory foundation

Two basic statutes provide the foundation for the entire framework of Government contracting: the Armed Services Procurement Act of 1947, which applies to the procurement activities of the Defense Department and the National Aeronautics and Space Administration (NASA), and chapter IV of the Federal Property and Administrative Services Act of 1949 which generally governs the purchasing activities of civilian agencies. Studies by the Commission on Government Procurement revealed more than 30 troublesome inconsistencies between these two basic statutes. Further, the procurement regulations which the General Services Administration (GSA) issues for civilian agencies are precluded from affecting specified functions of certain designated civilian agencies. This impairment provision has created an additional proliferation of inconsistencies in the "flowdown" from statutes to regulations and procedures. This in turn has added significantly to procurement-related costs incurred by the Government, and has generated confusion and misunderstanding among businesses.

Although some of the inconsistencies stem from special problems originally encountered by one agency, most of them arise simply because there are two basic statutes and because each has been amended at separate times without regard to the other. The existence of two statutes has hindered the ability to focus on procurement as a Government-wide activity, and has encouraged parochial interests to obtain special statutory consideration for narrow concerns.

Lack of meaningful competition

It has long been the policy of Congress that the Federal Government ought to award contracts competitively. Stressing effective competition in Federal procurement has two fundamental benefits: first, it saves the Government money by encouraging firms to offer better products at lower prices, and second, it serves to minimize favoritism and collusion by giving all qualified sources the opportunity to compete for and to win Government contracts. Yet, current procurement statistics show a failure on the part of procuring agencies to carry out the mandate for competition. In fiscal year 1976, the Defense Department awarded over $23 billion dollars in contracts without competition; that represented over 57 percent of the $40 billion it spent on procurement. This number included 117,000 noncompetitive awards greater than $10,000, of which 31,000 were greater than $100,000.[1] It should be noted that most criticism of Government procurement

[1] Office of the Secretary of Defense, "Military Prime Contract Awards," Fiscal Year 1976, p. 44. See also additional written statement submitted by Dr. William Perry, Director of Defense Research and Engineering, U.S. Department of Defense, during hearings on S. 1264, July 1977.

policies has focused on the activities of the Defense Department. Yet a recent GAO study revealed that lack of competition in procurement is every bit as widespread in civilian agencies as it is in the Defense Department. That study, which surveyed a sample of the procurement activities of 5 major civilian agencies found that, of $248 million in negotiated procurements, $158 million or 64 percent were awarded noncompetitively.[2]

This legislation tightens up the current approval process for proposed noncompetitive contracts, and then requires an actual notification of the marketplace to ensure that there is only one qualified supplier. Thus an agency can no longer determine on its own that a contract can be awarded noncompetitively, but instead must allow the determination to be made by the market itself.

INABILITY TO BENEFIT FROM INNOVATION

Specifications are product descriptions that the Government uses for purchasing purposes. Unlike industry product standards which cover safety requirements or which test materials, Government specifications often outline the actual design of the product (e.g., a mousetrap) the Government wishes to purchase. These product descriptions cannot be used to purchase new products unless they are continually revised and reissued. Yet the Commission on Government Procurement examined Government specifications for commercial products and found that many were so old that their value was marginal.[3] In January of 1976, the General Accounting Office found that 56 percent of the 6,148 Federal specifications were over 5 years old, and 12 percent were over 15 years old.[4] One reason for such a large number of old specifications is the cost involved in preparing and maintaining them.

The General Accounting Office found that the average cost to develop new specifications for a single product was over $17,000 in fiscal year 1976, and the average cost to revise an existing specification was almost $7,000. By contrast, the average cost of preparing a simple purchase description, as would be generally required by this legislation, was $1,100.[5] Finally, the Commission on Government Procurement found that many Government specifications were so complex that they inhibited or excluded the use of commercial products.

When this committee acquired the specifications necessary for a supplier to bid on a Federal purchase requirement for mousetraps, the complete specification was over 102,000 words and weighed 2 pounds. An attempt by the committee to acquire the specifications and related documents necessary to bid on the purchase of hominy grits by the Government took over 3 months and ended in failure when some of the required documents were found to be out of print. The documents accumulated by the committee approached 1 foot in height.

Such overspecification discourages competition by limiting the Government's ability to use products already available in the commercial

[2] "Competition For Negotiated Government Procurement Can And Should Be Improved," Report to the Congress by the Comptroller General of the United States, September 15, 1977 (PSAD–77–152), p. 4.
[3] The "Report Of The Commission On Government Procurement," Volume 3, pp. 18–21, Government Printing Office, December 1972.
[4] "Government Specifications For Commercial Products—Necessary Or A Wasted Effort?," report to the Congress by the Comptroller General of the United States, November 3, 1977 (PSAD–77–171), p. 28.
[5] *Ibid.*, p. 19

marketplace. Further, they hinder effective small business participation, because it is usually most difficult for a small firm to gather and understand all the documents referred to in a specification.

SURVEILLANCE

It is important to recognize that current Government surveillance requirements grew for a reason: to insure control and accountability in the spending of the Federal dollar. These requirements, however, should be a supplement to, and not a substitute for effective competition. The surveillance requirements the Government imposes upon businesses performing Government contracts have become so inconsistent, confusing and overlapping that many businesses, especially small ones, simply do not bother to seek Government contracts. Agencies impose separate reporting requirements and make differing interpretations of the reasonableness, allowability and allocability of contractor costs incurred. The absence of a single procurement statute and uniform audit procedures causes agencies to duplicate and diffuse Government surveillance efforts, and imposes a heavy regulatory and paperwork burden on businesses.

The impact of this regulatory burden is felt most keenly by small businesses, who usually do not have the legal and technical expertise to understand the Governments requirements. Ironically, the cause for the proliferation of this requirements has been the erosion of fundamental congressional policy designed to assure accountability in quality and in price—open, effective competition. This lack of competition has necessitated the creation of elaborate substitute mechanisms designed to achieve a price equivalent to one that otherwise would be obtained through competition.

Therefore, this legislation, while allowing the Government broad access to contractor records to insure quality and fair pricing, allows companies whose business is predominantly competitive and whose cost-type contracts with the Government are limited to seek a short term waiver from certain Government management surveillance requirements. A fundamental objective of this bill is to concentrate Government surveillance efforts where they are most needed—on those companies which operate in a noncompetitive environment.

THE PLIGHT OF SMALL BUSINESSES

Since the end of World War II, Congress has recognized that small business ought to play an important role in supplying Government needs. Small business participation enhances the Federal contracting system by improving and broadening the competitive base, providing innovative technology, lowering costs and performing a vital role in industrial mobilization. Yet, the current system—with its inconsistent policies and procedures, excessive paperwork, over-specification in purchase descriptions, duplicative surveillance requirements and insufficient competition—actually impedes rather than promotes effective small business participation. A fundamental objective of this legislation is to simplify those aspects of today's system which handicap or prevent a small business from competing for and winning Government contracts. This objective is accomplished by making structural reforms

designed to facilitate small business entry and participation in the Federal purchasing system, and by special initiatives designed to increase the number of contracts awarded to small businesses.

IV. History and Background of Government Procurement

From the time the Second Continental Congress established a Commissary General in 1775, Government procurement has commanded the attention of public officials and private citizens. In many respects, the system which today spends $84 billion a year for products and services faces the same considerations the Commissary General found in 1775: maximize competition, obtain fair prices and assure accountability of public officials for public transactions. Ironically, the policies and procedures designed to reach these objectives have usually been developed in a haphazard manner as patchwork solutions to specific problems which arose at specific times.

Antecedents to the current system

The most significant developments in procurement policies and procedures have occurred during and soon after periods of large-scale military activity. The first law regulating Federal procurement, which provided that all purchases for the Army be made by the Treasury Department, was passed by the Second Congress in 1792. In 1861 Congress enacted a law requiring advertising for Government purchases, except in matters of "public exigency." This law, and earlier less comprehensive statutes, established the congressional mandate to maximize competition and accountability through formal advertising. Except during periods of war this 1861 statute, amended in 1910, applied to the military establishment until 1948; to General Services Administration designated agencies until 1949; and to other executive agencies until 1965. The law, known as section 3709 of the Revised Statutes, still applies to purchasing activities not in the executive branch.

During both World War I and World War II, the Government found normal procurement procedures too inflexible to mobilize, coordinate and utilize the resources necessary for the defense efforts. In World War I, the War Industries Board, established to control wartime resources, products, labor and prices, relaxed or eliminated many procurement procedures. The end of World War I brought a return to formal advertising and peacetime procedures. This period also marked the Government's first substantial involvement in the procurement of technological products from the growing aviation industry. When formal advertising techniques proved too inflexible for aircraft procurement programs, the Congress enacted the Air Corps Act of 1926.[6] The Air Corps Act allowed the Government to stimulate innovation to purchase quality aircraft by establishing aircraft design competitions and by giving agencies the discretion to weigh performance as well as price in contract awards. This was perhaps the first formal recognition that sealed bid procurement cannot always generate effective competition or insure that the Government gets the best product at the lowest price.

Post World War I revelations of excessive wartime profiteering led to a ban on the cost-plus-a-percentage-of-cost contracting method

[6] 10 U.S.C. § 2271–2279 (Chapter 135 of Title 10, United States Code).

and the prohibition of agreements for contingent fees to curb influence peddling. The Vinson-Trammel Act of 1934 imposed profit limitations on contracts for aircraft and naval vessels, and the Renegotiation Law of 1941 allowed the Government to renegotiate certain contracts to eliminate excessive profits.

In World War II, the War Production Board, with its extraordinary authority over the Nation's wartime production effort, eliminated the statutory requirement for formal advertising. In fact, the Board went so far as to prohibit its use without specific authorization.

POST-WORLD-WAR II DEVELOPMENTS

The experiences of World War II provided the impetus for the passage of the Armed Services Procurement Act of 1947. The 1947 act, which applies to the Defense Department and NASA, stated a preference for formal advertising but authorized the use of negotiations under 17 justifiable exceptions. It generated the Armed Services Procurement Regulation (ASPR) which governs military procurement, sets limitations on the use of certain types of contracts, and underscored the importance of small business participation in Government contracting.[7]

The Federal Property and Administrative Services Act of 1949 established a statutory basis for the procurement procedures of civilian agencies. Control of procurement policy and, to a limited extent, certain procurement operations was conferred upon the General Services Administration, along with a rather complex set of exemptions for certain agencies and activities.[8] In 1959 GSA published the Federal Procurement Regulations, which set up civilian agency procurement policies and procedures. Because of the limitations on GSA's authority, these regulations are limited in coverage, and are augmented by individual agency procurement regulations.

In the last 3 decades, the growth in the size of procurement, especially in the Department of Defense, and the acceleration of technology have required new procurement techniques and complex contractual and managerial arrangements.

The increased use of negotiations and of cost-type contracts generated concern over the nature and efficiency of the controls in the acquisition process. In 1962, the Truth in Negotiations Act (Public Law 87-653) was passed as an amendment to the Armed Services Procurement Act, to strengthen safeguards and clarify procedures pertaining to negotiated procurements by the Defense Department. It required the Department of Defense and NASA to conduct "oral and written discussions" with all firms "within a competitive range" in competitive negotiated procurements. In addition, for negotiated contracts greater than $100,000, it required defense contractors to disclose current, accurate and complete cost or pricing data and allowed for price reductions if defective data were provided. The use of incentive-type contracts was emphasized in the Defense Department. Based on the contractor's accomplishments in cost, performance and schedule, fixed price or cost-reimbursement type incentive contracts provided for adjustment of profits or fees up or down. In 1970, Congress sought to create uniformity in contractor treatment of costs by establishing

[7] 10 U.S.C. § 2301-2314 (Chapter 137 of Title 10, United States Code).
[8] 41 U.S.C. § 251-260 (Chapter 4 of the Federal Property and Administrative Services Act.

the Cost Accounting Standards Board, which requires defense contractors to account for certain costs in a consistent manner.[9]

SOCIOECONOMIC GOALS AND THE PROCUREMENT PROCESS

The depression saw the first concerted Federal attempts to promote socioeconomic goals through the procurement process. These included the Davis-Bacon Act, setting minimum wages on Federal construction contracts; the Walsh Healy Act, upgrading wages and conditions of employment on Federal supply contracts; the Miller Act, requiring payment bonds to protect subcontractors and material suppliers on Federal construction jobs; and the Copeland Act, preventing salary kickbacks on Federal construction work. Federal procurement of products made by workshops for the blind was ordered by Congress in 1938. This was expanded in 1971 to products made by other handicapped persons. The Buy American Act, which took effect in 1933, promoted both business and labor interests by giving preference to domestic sources for Federal purchases.

Since World War II, efforts to use the Federal procurement process to promote socioeconomic goals has continued in a wide range of areas. Small business and labor surplus area assistance and preference programs have been intensified, and the Small Business Administration was established as a permanent Federal agency in 1955. The labor standards laws of the 1930's have been extended to employees of service contractors with regard to wages, fringe benefits, hours, and health and safety conditions. Equal employment opportunity programs have been intensified, and enforcement techniques have become more stringent. The Federal procurement system has been used to further programs relating to: (1) discrimination against women and the aged; (2) health and safety regulations; (3) hard core unemployment; (4) minority enterprises; (5) wage and price controls; (6) distribution of Federal work; and (7) environmental pollution. This legislation leaves socioeconomic statutes or programs intact, and instead focuses on modernizing the acquisition process.

V. History of the Legislation

THE COMMISSION ON GOVERNMENT PROCUREMENT

Until the creation of the Commission on Government Procurement in 1969, there had been no comprehensive examinations devoted exclusively to the way in which the executive branch acquires products and services. The Dockery Commission of 1894, and the First and Second Hoover Commissions looked at procurement and made recommendations for improvements in the process. These examinations of procurement policies and procedures were undertaken in the context of a general review of the administrative efficiency of the executive branch. However, by the late 1960's and early 1970's, procurement expenditures had grown to over $50 billion annually. The complexity of the system, its effectiveness and its economic impact on the Nation led Congress to pass legislation establishing the Commission on Govern-

[9] Public Law 91-379, 50 U.S.C. App. § 2168.

ment Procurement.[10] In doing so, the Congress recognized that patchwork solutions to individual problems had created an overly complex system. Given the size of the system, a mere 2-percent increase in efficiency could translate into over a $1 billion annual saving.

The Commission, a 12 member, bi-partisan body composed of representatives from both Government and the private sector, was charged to study the Federal procurement process and to make recommendations to improve its efficiency. In early 1973, it delivered its final 4-volume report recommending 149 changes for the considertion of the Congress and the executive branch.

The first congressional step to implement the Commission's recommendations was the enactment of Public Law 93-400, which established the Office of Federal Procurement Policy (OFPP) in the Office of Management and Budget. The OFPP Act was designed to create a high level focal point for leadership in developing and coordinating executive branch procurement policy. Among other things, the new office was charged with implementing the Procurement Commission's many recommendations for reform.

The establishment of OFPP was the first recommendation of the Procurement Commission. The enactment of a modern consolidated statutory base is the second major legislative recommendation of the Procurement Commission.

HISTORY OF S. 1264

S. 1264 builds on legislation introduced by Senator Lawton Chiles on February 19, 1976 (S. 3005). Although no hearings were held during the 94th Congress, the Senate Subcommittee on Federal Spending Practices, Efficiency and Open Government received extensive comments from the private sector and the General Accounting Office as well as informal written comments from executive agencies about the proposed legislation. In April of 1977, Senator Chiles, joined by Senator William Roth, introduced S. 1264, a refined version of S. 3005 designed to address many of the concerns raised during the review of S. 3005. Senators Heinz, Packwood, and Riegle joined as cosponsors shortly thereafter. The subcommittee received comments from 25 Government agencies and over 40 interested parties in the private sector.

HEARINGS

Five days of hearings on S. 1264 were held by the Subcommittee on Federal Spending Practices and Open Government in July 1977. The following witnesses appeared before the subcommittee:

Henry M. Jackson, U.S. Senator (D-Washington), former Commissioner, Commission on Government Procurement; Lester A. Fettig, Administrator for Federal Procurement Policy, Office of Management and Budget; Prof. Robert Judson, Executive Director, U.S. Navy Center for Acquisition Research, U.S. Naval Postgraduate School, former Deputy Director of Studies, Commission on Government Procurement; Michael J. Timbers, president, Washington Management Group, former Commissioner, Federal Supply Service.

[10] Public Law 91-129, 41 U.S.C.A. § 251 (Supp. 1977).

Elmer B. Staats, Comptroller General, U.S. General Accounting Office, Chairman of the Cost Accounting Standards Board, former member of the Commission on Government Procurement; Mr. Vico E. Henriques, vice president, Computer Business Equipment Manufacturers Association (CBEMA); Mr. Herman Director, Chief Economist, Federal Contracts, National Small Business Association.

Dr. William J. Perry, Director of Defense Research and Engineering, U.S. Department of Defense; Mr. Roy S. Mitchell, chairman, Public Contract Law Section, American Bar Association; Prof. Harold C. Petrowitz, Washington, School of Law, The American University; Mr. Earle C. Williams, president, National Council of Professional Services Firms (NCPSF).

Joel W. Solomon, Administrator, General Services Administration; Hon. A. Vernon Weaver, Administrator, Small Business Administration; Mr. M. J. Tashjian, Director, Division of Procurement, Energy Research and Development Administration; Mr. David Westermann, president, the Hazeltine Corp., representing the National Security Industrial Association (NSIA).

Dr. Karl G. Harr, Jr., president, Aerospace Industries Association (AIA); Adm. Stuart J. Evans, Assistant Administrator for Procurement, National Aeronautics and Space Administration; David Packard, chairman of the board, Hewlett-Packard Co., former Deputy Secretary of Defense; Mr. Patrick F. Cadigan, director, Western Electronics Manufacturers Association (WEMA); Prof. Ralph C. Nash, National Law Center, the George Washington University.

Statements and written responses to questions from the following witnesses who had planned to testify were also made a part of the hearing record: Mr. William C. McCamant, executive vice president, National Association of Wholesaler-Distributors (NAWD); Mr. Gilbert A. Cuneo, executive partner, Sellers, Conner and Cuneo Law Firm; Mr. Dennis H. Trosch, Assistant General Counsel, U.S. Department of Defense; Mr. Irving Jaffe, Deputy Assistant Attorney General, Civil Division, U.S. Department of Justice; Mr. Paul G. Dembling, General Counsel, U.S. General Accounting Office.

The witnesses focused on major issues raised by the bill: (1), the nature and use of functional specifications as purchase descriptions; (2), procedures for the award of noncompetitive, or sole source contracts; (3), the waiver of certain surveillance requirements for contractors who operate in a competitive environment; (4), the use of unsolicited proposals; and (5), the General Accounting Office's role in deciding bid protests.

All witnesses supported the basic objectives of the bill and urged its passage.

Functional specifications

Both Government and private sector witnesses supported the legislation's stress on functional purchase descriptions. Dr. William Perry, Director of Defense Research and Engineering, Office of the Secretary, U.S. Department of Defense, testifying for the Department of Defense, noted that DOD's past use of highly detailed specifications had "the effect of substituting our judgment for industry's ability to

innovate." Dr. Robert Judson, Executive Director, U.S. Navy Center for Acquisition Research, Naval Postgraduate School and former Commission on Government Procurement Deputy Staff Director stated that functional purchase descriptions meet public accountability concerns in Government procurement by providing a valid purchase description which is fair to all potential bidders, and by establishing a clear basis to insure that the product delivered satisfies the Government's needs. Michael Timbers, former Commissioner of the Federal Supply Service, supported the legislative endorsement of functional purchase descriptions. All witnesses stated, however, that the legislation needed to provide a measure of flexibility to insure that agency standardization objectives and logistical support considerations could be met.

Sole source

S. 1264 as introduced permitted agencies to award noncompetitive contracts only upon high level agency approval and then only after issuing a formal solicitation which elicited one response. Government agency witnesses were concerned over the requirement for high level agency approval of all noncompetitive awards. Despite the award of 117,000 sole source contracts in excess of $10,000 in fiscal year 1976, the Defense Department stated that its current review procedures for sole source contracts were adequate. Michael Tashjian, testifying for ERDA, suggested that quarterly reports listing sole source awards be prepared for high level agency review rather than requiring high level advance approval in each instance. The American Bar Association agreed that the agency approval levels for sole source contracts should be raised, but underscored the difficulty of rigidly setting approval levels for all the different agencies covered by the bill.

While the objective of requiring an actual market test prior to the award of sole source contracts was generally supported, witnesses expressed concern over the paperwork involved in preparing a full-blown competitive solicitation in each instance. NASA representatives suggested publishing a synopsis of an agency's intent to award a noncompetitive contract as an alternative method of alerting the private sector of an agency's requirements. Both NASA and ERDA witnesses stressed the need to involve procurement officials early in the acquisition process. Michael Tashjian, Director, Division of Procurement, for ERDA, stated that:

> It seems to me that if we allow for a little more advanced participation by the procurement personnel in the planning process, it would allow us to avoid some sole-source awards that are determined independently by technical people.

Professor Ralph Nash, of the National Law Center, George Washington University supported the need for prior market searches but was concerned over the delays and the unnecessary internal paperwork which might be required. He suggested using an alternative procedure, "* * * which says that before any agency may initiate sole source procurement, it must publish in the Commerce Business Daily or some appropriate place, an intent to go sole source, with proper justification, and then have a waiting period of, say 30 days, where anybody who felt they had a way to solve that problem or deal with that situation would come in."

Surveillance

Section 509 of S. 1264 as introduced allowed contractors to apply for a waiver from certain Government "management efficiency" requirements if 75 percent of a contractors business was conducted competitively. Executive agencies generally supported the provision. Dr. William Perry, testifying for the Department of Defense stated:

> We note, and endorse, the provisions on limiting Government surveillance as an ideal example of how, with the assistance of this legislation, we can reduce our regulatory burden on industry, and still do an efficient and effective procurement job. We would generally concur with other proponents of this legislation that there is little to be gained by monitoring a contractor's total management systems where 75 percent of that contractor's business activity is subject to the forces of the competitive marketplace.

Elmer Staats, testifying for the General Accounting Office, opposed section 509 in the bill as introduced. While he supported eliminating unnecessary Government regulations, he stated that,

> * * * although a contractor's business operation may consist of 75 percent or more commercial or competitive Government contracts, there is no assurance that the other 25 percent is being conducted in a manner to protect the Government's interest.

Industry witnesses supported the provision. Some suggested broadening its application to all segments of a company if one segment met the competitive test, and the entire company used uniform management accounting practices.

Unsolicited proposals

Both Government and industry witnesses criticized the legislation's omission of procedures dealing with the award of contracts based on unsolicited proposals. NASA and ERDA representatives contended that restrictions on the consideration of unsolicited proposals could hamper their research and development missions, and noted that the Commission on Government Procurement recommended encouraging the use of unsolicited proposals. Representatives from the American Bar Association and the National Security Industrial Association also supported encouraging the use of unsolicited proposals. The National Security Industrial Association conceded, however, that there was a need to establish sufficient procedural safeguards to insure that unsolicited proposals not be used as a device to award contracts to favored companies.

Bid protests

Title VII of S. 1264 as introduced, provided a system and procedure for resolution of bid protests by the General Accounting Office. Paul G. Dembling, General Counsel for the General Accounting Office stated that the Comptroller General has been acting on bid protests for more than 50 years. He noted that the GAO's authority in this regard stems from the Budget and Accounting Act, 1921, which places in the

GAO the responsibility for settlement and adjustment of public accounts. That act also makes GAO's certification of balances of public accounts final and conclusive on the executive branch. He supported title VII, with a few modifications, as it largely reflects the GAO's longstanding procedures and practices in the area of bid protest resolution.

Irving Jaffee, Deputy Assistant Attorney General, Civil Division, Department of Justice opposed title VII as an unconstitutional delegation of executive authority. He stated that the proper place for the resolution of protests is in the executive branch.

Gilbert A. Cuneo, of the law firm Sellers, Conner and Cuneo, supported legislative continuance of GAO's role as a protest resolving forum. Roy S. Mitchell, testifying on behalf of the American Bar Association, strongly supported the enactment of title VII with some modifications to assure "more effective performance of the protest adjudication function in the public interest. * * *"

VI. Explanation of Committee Action

The committe made several changes in S. 1264, as introduced, in response to concerns raised during hearings and comments received. What follows is a summary of the major committee amendments to S. 1264.

SMALL AND MINORITY BUSINESSES

A major purpose of S. 1264 as introduced was to aid small businesses by eliminating structural obstacles in the current system which unduly inhibit small business participation. This purpose was recognized and supported both by the Small Business Administrative and by small business groups during hearings on S. 1264.

The committee felt it appropriate however to further spell out its support for small business participation in Federal procurement and therefore amended S. 1264 to underscore that support. Section 2 was expanded to include specific statements of policy designed to guide agencies in promoting small and minority business participation in Federal contracting. The policy section, as amended, calls for: Practices designed to assure Government contracting with small and new businesses to the maximum extent practicable; the Government to make procurement information, including applicable laws and regulations, available for review and examination; and the Government to seek opportunities for minority businesses to grow through Federal contracts. Section 504, which authorizes multiyear contracting, was amended to require an agency determination that the use of a multiyear contract will not inhibit small businesses participation. A new provision (section 511) was added to require the Government to pay interest on its overdue bills. While this requirement will benefit all businesses, it will be particularly helpful to small firms who are often hamstrung by having to carry overdue Government accounts receivabe for long periods of time. S. 1264 as amended also calls for periodic reviews of all agency procurement programs to insure that participation goals for minority-owned businesses are established and met.

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FUNCTIONAL SPECIFICATIONS

As introduced, S. 1264 did not define the term "functional specifications". During hearings, concern was raised about the possible varying interpretations of the term, and the impact they might have on an agency's ability to define its purchase needs.

Consequently, a definition was developed and included in the legislation, based on language suggested by the major executive branch procuring agencies. The definition would allow a statement of the qualitative nature of the product required and the minimum essential characteristics and standards to which such a product must conform if it is to satisfy its intended use.

In addition, S. 1264 was amended to require the OFPP in OMB to establish and oversee a program to reduce the use of detailed specifications, and require agencies to conduct sunset reviews of all specifications at least every 5 years. The purpose of these changes is to insure that Government specifications do not become outdated and to establish a coordinated program to review agency compliance in the executive branch.

CONDUCT OF COMPETITIVE NEGOTIATIONS

S. 1264 as introduced placed strict limitations on the nature of the discussions held during competitive negotiated procurements. These limitations were designed to insure that all competitors were treated equitably, and to reduce the time and expense associated with protracted contract negotiatons.

While this intent was generally supported during hearings, the approach originally set forth was criticized as being too rigid to apply to all negotiated procurements.

Concern was expressed that S. 1264 as introduced would not only prohibit inappropriate forms of contract negotiations, but also would, in certain instances, preclude meaningful contract negotiations.

In response to these comments, section 303(a) of S. 1264 was amended to specifically set out those forms of discussions which are prohibited during contract negotiations. For example, an agency is prohibited from making multiple requests for best and final offers from firms in competition for a Government contract. It was further revised to allow detailed negotiations to be held with all competitors in specified situations where such flexibility is essential.

These revisions maintain the legislation's safeguards against favoritism in the award of Government contracts, while insuring that the competitive negotiation process provides a setting for meaningful discussions.

NONCOMPETITIVE PROCUREMENT

Section 304 of S. 1264 deals with noncompetitive, or sole source procurement. In the bill as introduced, the award of noncompetitive contracts was authorized in three situations: The declaration of a national emergency, a public exigency situation, or in situations where only one source capable of performing the work exist. In all other instances, the agency was required to issue a full-blown Request for Pro-

posals. If only one response were received, then the agency could enter into a sole-source contract.

During the hearings, concern was raised that this system would prove too cumbersome and would generate unnecessary paperwork. In addition, the committee was also concerned about opportunities for abuse in situations where an agency determined in advance that "only one source" was capable of performing a particular contract.

Section 304 was subsequently amended to eliminate opportunities for abuse in "only one source" situations and to reduce paperwork. As amended, S. 1264 requires the agency to prepare a justification for proposing each sole-source contract, and then, prior to beginning any negotiations with a single offeror, publicize its desire to award a noncompetitive contract for 30 days. During that time, if another firm comes forward and demonstrates an ability to meet the requirements of the work, then the contract must be awarded competitively. Since the publication requirement would take the form of a summary of the proposed work, additional paperwork would be minimal. More importantly, an agency determination to award a sole source contract would be subject not only to high level internal approval but also to an actual market test. The approach prevents an agency from substituting its judgment on competition for the marketplace's ability to generate alternative bidders, and insures that Government contracting opportunities will be disseminated to a widespread, interested audience.

The committee also revised S. 1264 to allow for the award of contracts stemming from acceptance of unsolicited proposals. Such proposals, offered by industry on its own initiative and not in response to an agency request or communication, allow the Government to benefit from the innovative ideas of the private sector. The committee agrees with the Commission on Government Procurement recommendation that their use should be encouraged.

CONTRACT AUDITS AND SURVEILLANCE

S. 1264 as introduced allowed contractors who conducted 75 percent of their business competitively to seek a 2-year waiver from certain Government management efficiency "surveillance requirements." Concern was raised by the Comptroller General over the nature and scope of such a waiver. In response to these comments, section 509 of S. 1264 was amended to focus the benefits of this waiver on smaller contractors. The definition of competitive Government contracts for purposes of obtaining the waiver was narrowed considerably. In addition, contractors who held more than $10 million in noncompetitive Government contracts were precluded from obtaining the waiver, no matter what percentage of the firm's business is being conducted competitively. Finally, an agency's authority to cancel the waiver at its discretion was clearly set forth, and the section was revised to explicitly state that its operation in no way impaired the Comptroller General's authority to examine contractor records.

Section 306 of S. 1264 establishes both executive agency and the Comptroller General's authority to examine contractor records. The committee amendments to this section were designed to bring the au-

thority in line with current statutory authority, and to broaden the access to records authority to allow for agency "should cost" examinations of contractor records."

Section 305 of S. 1264 expands the coverage of the Truth in Negotiations Act (Public Law 87–653) to all executive agencies. The committee amended this section to clarify its intent and to clearly distinguish between those situations which call for submission of price data from those which require cost data to be provided.

COMMERCE BUSINESS DAILY

S. 1264 as introduced called for proposed Government procurement actions to be advertised in accordance with section 8(e) of the Small Business Act. That section requires impending procurement actions to be publicized in the Commerce Business Daily, a Government publication.

Since a major purpose of this bill is to group all procurement law together, the committee felt it appropriate to incorporate section 8(e) of the Small Business Act into S. 1264, as amended. In doing so, the committee established a uniform dollar threshold for advertising purposes which would be applicable to all Federal agencies.

The committee further eliminated the current exemptions from advertising requirements for those procurements involving: (1) personal or professional services, (2) contracts with educational institutions, (3) offers solicited only from foreign sources, and (4) contracts for utility services. The elimination of these exemptions is consistent with the committee's intent to increase competition by widespread dissemination of Government purchasing needs.

DELEGATION OF AUTHORITY

As introduced, S. 1264 limited the delegation of authority to make procurement related decisions to a level no lower than the "head of the procuring activity."

During hearings on the legislation, concern was raised about the workability of such a statutory restriction, because the term, "head of procuring authority" was well defined only in the Department of Defense. Other agencies either had no such position, or differed widely in their interpretation of the nature of the position.

After careful consideration, the committee rejected the notion of legislatively pegging the authority to make decisions to a predetermined agency level. The different size of the procurement activities of agencies covered by S. 1264 would have required setting specific approval levels for each agency, a cumbersome and overly rigid method to achieve accountability.

Further, the notion that all decisions, from those related to a $10,000 contract to those involving a multibillion dollar system acquisition, should be made only by the agency head or at a uniformly specified level within an agency was found to be simplistic and unrealistic. In the

[11] 10 U.S.C. 2313(b)(c). See also Appendix B of this report, letter to Hon. Lawton Chiles, Chairman, Subcommittee on Federal Spending Practices and Open Government, Committtee on Governmental Affairs, U.S. Senate, from Robert F. Keller, Acting Comptroller General of the United States, October 27, 1977.

Department of Defense, for instance, the Secretary would be forced to personally review and approve literally tens of thousands of actions each year. Such reviews would become meaningless checkoffs, and would be as ineffective in protecting against abuse as no reviews at all.

The committee concluded that the key to maintaining accountability is to assure meaningful review of important decisions. S. 1264 was consequently amended to require that the authority to make procurement related decisions should be maintained at the highest organizational level practicable in the executive agencies.

The effect of this provision limits delegating of the authority to make decisions pertaining to noncompetitive contract procedures, waivers of contractor surveillance requirements, and use of detailed specifications. The Office of Federal Procurement Policy is required to establish regulations setting internal agency approval levels, consistent with the size of the procurement and the nature of the decision.

Finally, the committee has indicated that OFPP is to comply with section 8(b) of Public Law 93-400 in issuing regulations pertaining to the delegation of authority to make determinations. Section 8(b) requires OFPP to transmit a report concerning the regulation to the Senate Committee on Governmental Affairs and the House Committee on Government Operations at least 30 days prior to its effective date.

GENERAL ACCOUNTING OFFICE'S ROLE REGARDING BID PROTESTS

When S. 1264 was first introduced, it was acknowledged that its provisions with respect to title VII were not immutable, but were clearly open for discussion and debate. As a result of such discussions, several substantive changes have been made in title VII as reported.

Concern was expressed regarding the binding effect of the Comptroller General's bid protest decisions on the executive agencies in view of the constitutional separation of powers question. Section 703 (b), as introduced, provided that decisions of the Comptroller General would be binding upon all interested parties. The committee, however, amended this section to avoid constitutional conflict with the executive branch. Section 703(b) now provides that the Comptroller General's decision "shall be issued under (his) authority to settle accounts of the Government under the Budget and Accounting Act, 1921, as amended." This language maintains the status quo regarding the authority of the Comptroller General over settlement of accounts conferred by the Budget and Accounting Act, 1921. The committee did want to clarify and make explicit the Comptroller General's authority over bid protests implicit in the Budget and Accounting Act, 1921, as amended.

Another significant change between title VII as introduced and title VII as reported concerns a provision granting subpena power to the Comptroller General. Originally, section 703(c)(4) authorized formal discovery proceedings and the issuance of subpenas.

There was concern about granting this authority because the Comptroller General had never possessed such expansive authority before. The committee decided, after much consideration, to delete this provision because the need for such authority was not clearly demonstrated during the hearings.

Title VII as amended includes a provision for judicial review of an action, or the failure to act, of an executive agency or of the Comptroller General, by an aggrieved person with respect to a solicitation or award. The committee found this to be appropriate and necessary because the GAO procedures do not provide for a trial-type hearing. Judicial review would help assure agency compliance with the basic policies of the act.

Other minor changes were made by the committee. Title VII as reported contains definitions of the terms "protest" and "interested party." These were included to avoid later interpretive problems. Title VII as introduced included provisions describing the procedure to be followed in rendering decisions. The committee deleted these provisions because it believed that such procedural matters should be dealt with by regulations.

TECHNICAL CHANGES

The committee made a number of technical perfecting amendments designed to clarify the legislation's intent.

VII. Discussion of Key Issues

EFFECTIVE COMPETITION

The fundamental objective of this legislation is to establish an effective procurement system, that is, one which enables the buyer to elicit and benefit from competition in satisfying each of his purchase needs. Historically, Congress has relied upon a statutory preference for a procurement device—competitive sealed bidding—to generate the competition which should enhance the Government's ability to make the most effective, economical purchases. In many instances, however, sealed bidding forestalls that objective by preventing the Government from making tradeoffs between price, cost, and performance in its purchase decisions. S. 1264 is designed to insure that the Government is able to make economical purchases in all situations by using that procurement device which most effectively generates competition.

Competition is not a procurement device, but a phenomenon of the marketplace. It is not caused by a particular procurement technique but is rather the objective which a technique should be designed to attain. Competition results when several sellers, acting independently and offering alternative products or services, attempt to secure the business of the buyer by proposing the most attractive contract terms which best meet the buyer's need. The buyer evaluates different aspects of each proposal to determine which proposal best satisfies his purchase requirements on the most attractive terms.

There is more than one form of competition. "Price competition" focuses on the initial purchase price of the item to be acquired: the bidder offering the lowest initial purchase price wins the contract. "Total cost competition" considers the entire cost of an item over its lifetime: for example, maintenance costs and energy consumption are weighed along with initial purchase price.

Buying something at the lowest price possible per unit cost is not necessarily the most prudent way to make a contract award if the buyer has requirements which extend beyond initial purchase price. The prudent consumer goes to lowest unit price in low technology areas, as does the Government. Both use competition to buy clothespins, for example, using the lowest price of what's available in the marketplace.

In high technology areas, however, both the prudent consumer and the Government would use different techniques in approaching big ticket items. A consumer may buy a more expensive refrigerator because Consumer Reports has determined that it will last longer or to take advantage of a better service network (i.e., the prudent consumer has adopted life cycle costing as superior in this circumstance to unit cost criteria.) Or a seamstress may buy a more expensive sewing machine because it will accept a larger variety of accessories which, as a skilled seamstress, she intends to make use of. (Here, she has made a tradeoff favoring multiple end-use considerations.)

This bill, in essence, permits the Government to use the same common sense techniques that a prudent consumer uses in fulfilling his or her marketing chores. It does so by recognizing that the nature of the product or service will dictate the Government's purchase considerations. The nature of the purchase considerations in turn will determine what procurement method will most effectively generate competition.

Current statutes express a preference for competitive sealed bidding. Negotiated procurement is authorized, but its use is restricted by procedural requirements that are not related to market considerations, but which instead mandate the existence of a particular condition (e.g. negotiations are appropriate in the purchase of medicine). These current requirements are designed to discourage noncompetitive negotiated procurements, but they also serve to make the use of competitive negotiated procurement techniques unnecessarily difficult.

S. 1264, as amended, recognizes that competitive, negotiations can be a more effective way to enhance competition in certain types of purchase situations. In doing so, the bill first makes an explicit distinction between competitive and noncompetitive negotiations. It removes the requirement for a written determination prior to using competitive negotiations. It replaces the current list of specific sealed bidding exemptions with generic criteria describing those marketplace conditions which dictate the use of sealed bidding, or of competitive negotiations.

Competitive sealed bid procedures are appropriate when the Government's purchase decision is based on price alone. Awards based on price alone can usually be made only when the products or services to be purchased are well developed and involve few technological considerations. For such purchases, sealed bid procedures maximize competition and assure that the Government will get the most for its money.

The use of competitive sealed bid procedures, in which award is based on low purchase price alone, rules out the opportunity to consider differences in design or product concept which can lead to important trade-offs between price, cost and performance. Such trade-offs are impossible to make without competitively evaluating all aspects

of each competitor's proposal; that evaluation process is impossible without holding discussions with the competitors.

In this regard, the conclusion that competitive negotiation is a valid procurement technique is one shared by this committee, the General Accounting Office and the Commission on Government Procurement.[12]

S. 1264, as amended, further establishes safeguards to prevent opportunities for abuse in competitive negotiations, and to insure that all competitors are treated evenhandledly. These include a requirement that the Government inform all competitors what its purchase criteria will be, and the relative importance of each criteria. It requires that any changes in those criteria or in the purchase requirements be promptly communicated to all competitors on an equal basis. Finally, it prohibits certain forms of discussion between the Government and the competitors in order to insure that the confidentiality of each offer is protected.

This bill is not intended to reduce the use of competitive sealed bidding, but rather to remove undue restrictions on the use of competitive negotiations. In fact the bill's mandate for functional purchase descriptions and the use of two step sealed bidding procedures should increase the use of competitive sealed bidding.[13]

S. 1264, as amended, does not remove any safeguards against noncompetitive contracts. On the contrary, it requires not only a written justification, and high level approval for each proposed noncompetitive negotiated procurement, but also forces agencies to publicize their intention to enter into a noncompetitive contract. If a qualified competitor comes forward in response to this advance notification, then the proposed contract must be awarded competitively. Thus, a determination to enter into a noncompetitive contract is subject not only to internal agency review, but also to challenges from the marketplace iteself.

FUNCTIONAL SPECIFICATIONS

The term "functional specification" means a statement of a needed function to be performed by a product or service, of the essential characteristics and standards required, and of the conditions or constraints surrounding its intended use or application. This legislation encourages the Government to state its purchase requirements functionally, that is, to describe the problem to be solved rather than predetermining what specific product will best solve it. A valid functional specification should accurately reflect the needs of the Government while avoiding unduly restrictive requirements which tend to limit competition without satisfying a real need.[14]

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[12] The "Report Of the Commission On Government Procurement," Volume 1, p. 20, Government Printing Office, December 1972. In June 1968, Elmer Staats, Comptroller General of the United States, testified before the U.S. Senate Subcommittee on Anti-trust and Monopoly Legislation on competition in defense procurement, that "Each of these methods (formal advertising, competitive negotiation, and single source negotiation) when used in appropriate situations is an acceptable method of procurement." Later as a member of the Commission on Government Procurement he supported the approval of recommendation A–3, which called for the authorization of the use of competitive negotiation methods of contracting as an acceptable and efficient alternative to formal advertising.

[13] See page 36 of this report for a more detailed description of two-step sealed bidding.

[14] Article by Robert Judson, "The Use of Functional Purchase Descriptions For Advertised Procurements," printed in the *National Contract Management Journal*, Volume 11, No. 1, Summer 1977, pp. 1–13. Arlington, Virginia. This article assesses the use of functional purchase descriptions in sealed bid procurements.

The Government has long published detailed specifications to control the products it buys.[15] The purposes are worthwhile: shorter product lists, simpler logistics, uniform quality, objective competition based on price alone, and common usage in multiple application.

Thus, it would appear sound at first glance that the Government should spell out exactly what it wants to buy. However, except in the case of mating parts, subassemblies and other such constrained products (for which this legislation would allow the use of detailed product specifications), there are troublesome contradictions with this rationale.

Probably the worst thing is the formidable bar to innovation erected by a mandated design. Significant improvements in design concept, performance, and ownership cost attainable by newer designs and other imaginative solutions have little chance to be considered.

Second, by being static, detailed specifications always lag behind the advances continually emerging in other markets.

Third, product specifications which are stretched to cover as many applications as possible—the driving logic of standardization—may suit no one use very well; users may be unable to get products really needed.

Fourth, competition is sometimes illusory when exactly the same design is offered by the "competitors"; only a narrow range of price competition is really possible. In fact a price significantly lower than others may signal a possible buy-in.

For a great many Government procurements the committee advocates the use of functional specifications in place of detailed specifications. The advantages expected are these:

—Significant cost saving opportunities are created because a variety of product solutions may be considered. Detailed specifications on the other hand, offer little or no latitude for choice of product, design shortcuts, materials or manufacturing method. Competitor costs, and prices cannot be very different.

—More firms, especially small businesses, will be likely to compete. Unlike rigid specifications, functional specifications do not limit bidders only to those who can build the one pre-specified design.

—Innovation and the play of new technologies will be encouraged, since specifications would be end use descriptions rather than product design blueprints. For example, stating a need as "Rodent elimination" rather than calling for a particular mousetrap design could foster some imaginative solution. The "better moustrap" of folklore may not be a conventional moustrap at all if today's sciences and creative design processes are challenged. The idea is to confront creativity with a function to be performed or a problem to be solved, and to open the door to all valid alternative solutions.

—The use of commercially available products will be encouraged, doing away with the need for suppliers to redesign products because Government specifications often trail current commercial products even in mature technological fields.

[15] The Commission on Government Procurement reported over 36,000 government specifications in use in 1972. The *Report Of The Commission on Government Procurement*, Volume 3, p. 19, Government Printing Office, December 1972.

—Functional specifications are less threatened by obsolescence since they usually encompass the needs of more customers, and since they can be continually reused despite changes in technology which would immediately make product specifications obsolete.

SURVEILLANCE

Surveillance in Government procurement has come to mean those activities the Government undertakes to assure itself that a contract price is reasonable, and that the quality of the product or service meets the standards called for in the contract.

Section 306 of S. 1264, as amended, broadens the current statutory authority for governmental inspection of a contractor's records to meet these objectives in a number of ways.

First, it extends the current statutory authority of the military services to inspect contractor records to all executive agencies.[16] That authority is currently broader for military agencies than it is for civilian agencies. Second, section 306, as revised based on suggestions offered by the Comptroller General, would allow inspections to insure "efficient and economical" contractor performance. These inspections could include "should cost" studies of a contractor's work on specific contracts. Finally, this legislation does not alter in any way the Comptroller General's current authority to inspect the plants and examine the books of a contractor.[17]

The legislation, as amended, does recognize that the uncoordinated use of this authority could lead to multiple, duplicative inspections which would be inefficient and costly to the Government. It therefore calls for the establishment of regulations which streamline agency inspections by coordinating and consolidating agency requirements and by placing inspection responsibilities in a designated lead agency.

Section 509 of this legislation allows firms which conduct the preponderance of their business under commercial, competitive conditions to receive a limited waiver from certain Government-wide management-efficiency-type surveillance requirements. The intent of this provision is to focus reviews on those companies which operate in a noncompetitive environment. Here, the Government must impose tight controls to insure contract performance at reasonable costs.

The committee felt that such surveillance requirements could be relieved, however, for firms whose government business primarily consists of firm fixed-price contracts with price the deciding factor in the award. Such firms are forced by competitive forces and the nature of their contracts to operate as efficiently as possible. A reduction in surveillance requirements for such firms provides an incentive to seek fixed-price contracts. To obtain the waiver at least 75 percent of a firms business would have to be competitive,[18] and no more than $10 million of the firms Government contracts could be based on actual or estimated costs. The waiver would be short term and could be canceled at any time.

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[16] 10 U.S.C. 2313.
[17] 10 U.S.C. 2313(b) (compare with section 306(b) of this Act). See also 41 U.S.C 254(b)
[18] For purposes of obtaining the waiver set forth in section 509, "competitive" contract means only firm fixed-price and fixed-price with escalation with price the deciding factor in the award. See page 54 of this report.

The requirements of the Truth in Negotiations Act (Public Law 87–653) are incorporated into this act and extended to all agencies. Public Law 87–653, which currently applies only to the Department of Defense and NASA, requires contractors to provide data which allows the Government to assure itself of the reasonableness of the agreed upon contract price. It assists the Government in determining whether the prices or costs associated with a negotiated contract are fair and reasonable.

Public Law 87–653 has been an effective tool to determine the reasonableness of a negotiated price, but its original distinctions between cost data and price data have become blurred. This legislation defines price data, cost data, and the market conditions which determine when each should be used. As is the case under current law, neither price data nor cost data would be required when there is adequate price competition in the award of a contract or when the price is set by law or regulation.

Current law also requires that a formal certification be made of the accuracy, completeness and currency of submitted cost data. This legislation does away with formal certification as a step toward reducing unnecessary paperwork, and simply allows the Government to adjust the contract price for any such errors. Consequently, the Government's right to recover remains fully protected.

Finally, this legislation in no way affects the authority of congressional committees to investigate a contractor's books and records. That authority is explicitly set forth in section 134 of the Legislative Reorganization Act of 1946, which authorizes each standing committee, including any subcommittee of any such committee, to make investigation into any matter within its jurisdiction.[19]

BID PROTESTS

Title VII of S. 1264 reflects the current procedures and practices utilized by the General Accounting Office (GAO) in the resolution of bid protests. A "bid protest" is a protest or challenge by an interested party against the award or proposed award of a contract. If the award involves a Federal agency whose accounts are subject to settlement by the GAO, an interested party may protest to the Comptroller General. The Comptroller General makes a determination regarding the propriety of the award or proposed award under the applicable law and regulations.

The Comptroller General has been acting on bid protests for more than 50 years. His involvement in resolving bid protests stems from the settlement authority under the Budget and Accounting Act, 1921. Section 71 of title 31 places in the GAO the responsibility for settlement and adjustment of public accounts. Section 74 of title 31 makes GAO's certification of balances of public accounts final and conclusive on the executive branch of the Government.

The committee has addressed the question of the binding effect of the Comptroller General's protest decisions on the executive agencies, in view of the separation of powers question raised by the Department of

[19] 2 USC § 190b(a)

Justice. The bill as introduced provided that decisions of the Comptroller General would be binding upon all interested parties. The committee, however, has amended section 703(b) to provide that protest decisions "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."

The committee wants to make clear that title VII is not meant to enlarge the authority of the Comptroller General over bid protests beyond that implicit in his existing authority to settle accounts under the Budget and Accounting Act, 1921, as amended. In drafting this provision, however, the committee was also concerned that nothing in title VII as amended be construed as weakening or questioning the authority of the Comptroller General over the settlement of accounts. It should be noted that the Department of Justice has also challenged, over the years, the Comptroller General's authority over the settlement of accounts.

The Comptroller General originally became involved in the bid protest area because of the need for advice to those concerned with Government procurement, regarding whether particular contract awards would give rise to payments subject to question in the settlement of related accounts. Advance rulings by the Comptroller General state, in effect, whether a proposed payment will, if made, be approved in connection with settlement of the related account.

Title VII largely carries out the recommendations of the report of the Commission on Government Procurement with respect to the resolution of bid protests. The Commission report recommended the continuance of the GAO as an award protest resolving forum.[20] While the Commission did not specifically recommend explicit statutory coverage for this, the committee is persuaded that title VII is necessary to strengthen the effectiveness of the GAO in this area and to increase public confidence in the adequacy of the GAO remedy.

The committee believes that providing effective machinery in the GAO for the resolution of bid protests should also further the realization of the major policies and proposes of S. 1264, as amended. This self-enforcing mechanism will afford ample opportunity for business firms whose economic interests would be directly affected to challenge proposed agency action under the act concerning a solicitation or award as contrary to law or regulation. The GAO's ruling will assist the executive agencies in accomplishing the purposes of this act.

The language that the committee has adopted in section 703(b) maintains the status quo of the authority of the Comptroller General over the settlement of accounts conferred by the Budget and Accounting Act, 1921. It makes explicit the Comptroller General's 50 years of reliance on that same authority for issuing protest decisions.

Finally, the committee has found it appropriate to make provision in section 705 of title VII for judicial review of disputes and protests over solicitations and awards. The committee believes that persons adversely affected by agency action or by protest decisions of the Comptroller General concerning solicitations or contract awards should be able to obtain judicial review of those matters in Federal

[20] The "Report Of The Commission On Government Procurement," Volume 4, pp. 39–45, Government Printing Office, December 1972.

district courts under the provisions of the Administrative Procedure Act, 5 U.S.C. §§ 702–706. The primary reason is that the Federal courts, as well as the Comptroller General, have an important role in assuring the rule of law in Federal acquisition and thus in helping to achieve agency compliance with the basic policies of the act.

Providing a judicial remedy for persons adversely affected by agency or Comptroller General actions will also strengthen public confidence in the fairness of the acquisition solicitation and award process. The very knowledge that agency and GAO actions are subject to court challenge will increase the accountability and responsibility of public officials in their decisionmaking, thereby serving the public interest. The GAO procedures do not provide for a trial-type hearing to establish disputed material facts. Thus, section 705 provides for the courts to make determinations to resolve disputed material facts or when otherwise necessary to comport with basic due process considerations.

The committee further notes that the provision for judicial review accords with the report of the Procurement Commission on the need to clarify the role of the courts in the review of contract award decisions.[21] Such clarification is necessary in view of the present inconsistency of opinions among the judicial circuits concerning the question of protestors' standing to sue.

THE ROLE OF THE OFFICE OF FEDERAL PROCUREMENT POLICY

The need for centralized authority over procurement policy was the first recommendation made by the Commission on Government Procurement in its report of December 1972. The Office of Federal Procurement Policy (OFPP) was established in the Office of Management and Budget in August, 1974 (see Public Law 93–400; 41 U.S.C. 401 et seq), and was charged with providing overall direction of executive branch procurement policy, and establishing a system of coordinated, and to the extent feasible, uniform procurement regulations.

The creation of OFPP by statute represented an important milestone in the efforts of the Congress to exercise effective oversight of Federal procurement policy. It centralizes executive branch responsibilities and provides a high-level focal point for procurement policy directly accountable to the Congress. The Administrator is appointed by the President with the advice and consent of the Senate and is specifically tasked with keeping the Congress fully and currently informed of the major activities of the office.

S. 1264 strengthens those objectives by giving OFPP the responsibility to implement its provisions. The result of the specific assignment of responsibilities to the Office of Federal Procurement Policy is not to diminish Congressional authority, but, rather, to centralize executive branch authority and accountability for carrying out key provisions of the bill. This is in sharp contrast to the previous division of procurement regulatory responsibilities and authority between the General Services Administration and the Department of Defense, and will facilitate congressional oversight. The Office of Federal Procurement Policy will be required to report on all of these assignments in

[21] *Ibid.*, pp. 45–48.

its annual report to the Congress required by Public Law 93–400. The same law requires 30 days notice to the Senate Governmental Affairs Committee and the House Government Operations Committee in advance of issuance by the Office of Federal Procurement Policy of major policies or regulations.

PURCHASES FROM FOREIGN GOVERNMENTS

Defense Department representatives suggested adding a new title to S. 1264 to cover acquisition from other governments and international organizations. Under this proposed new title, an executive agency would be granted the authority to waive all the provisions of this legislation and of any other provisions of law governing government contracting (such as the Buy American Act) to enter into contracts with foreign governments or international organizations. Under the Defense Department proposal, this authority would be exercised whenever the agency determines that to do so would facilitate the common defense. Agencies would be required to submit annual reports to the Congress on the determinations made each fiscal year.

The committee is sympathetic with the potential need for this type of authority. As Dr. William Perry, Director, Defense Research and Engineering stated during his testimony:

> The need for this unique authority stems from difficulties which have been encountered in giving effect to the requirements of U.S. procurement statutes applicable to the Department of Defense in purchases and contracts with other governments and North Atlantic Treaty Organization (NATO) subsidiary organizations. These difficulties have arisen in the implementation of co-production arrangements and in the implementation of "offset" agreements in conjunction with the foreign military sales program.

The committee is compelled to note, however, that neither the Defense Department, NASA, OFPP, or any other executive agency supporting this proposal provided the committee with any documented examples of situations in which these difficulties occurred.

In any case, the committee is of the opinion that the suggested procedures constitute an unduly broad waiver of congressional authority. Finally the committee feels that this suggested provision, while procedural in nature, raises important policy considerations pertaining to NATO standardization and United States arms purchases from other nations. Such questions deserve careful consideration on their own merits, not only by this committee (with regards to the procedures themselves) but also by the Committee on Foreign Relations and Armed Services.

For these reasons the committee did not include authority for acquisitions from foreign governments or international organizations in this legislation. The committee is willing in the future, however, to examine proposals which address the problems encountered in the purchase of products and services from foreign governments and international organizations.

VIII. Section-by-Section Analysis

INTRODUCTORY SECTIONS

Section 1 establishes the short title for the bill as "The Federal Acquisition Act of 1977" and sets forth a table of contents.

Section 2—Declaration of policy.—The intent of this section is to provide the basic thinking and thrust behind the legislation and to provide some definite, yet flexible, guidance for the application and interpretation of the bill's provisions, especially in situations where discretion is permitted or uncertain circumstances arise.

By the same token, however, it is not intended that these statements of findings and policy, in and of themselves, be interpreted as detailed requirements or tests of the validity of specific contractual actions for purposes of contract protests or disputes. At most, it would be expected that these policy statements would lend to the weight of argument, and not, by themselves, constitute tests for breach of procedure.

Section 2(a) sets forth the findings of the Congress which declare that the laws controlling Federal purchasing have become antiquated, fragmented and needlessly inconsistent, causing inefficiencies and waste in Federal spending.

The Congress further finds that national productivity rests on a base of competitive industry applying technological innovation to the provision of products and services. Federal spending practices which stimulate competition and new technologies can encourage the Nation's business community and increase productivity. Therefore, Congress finds that existing Federal spending laws need to be modernized and consolidated into a single statutory base which focuses on effective competition and innovation. These findings are derived from the work of the Commission on Government Procurement, which itself called for the creation of a consolidated statutory base for executive branch purchasing.

Section 2(b) sets out guidance for the executive branch in the acquisition of products and services.

It should be noted that paragraphs (b) (2), (4), (5), (6), (9), and (10) are intended to underscore the importance the legislation attaches to increasing effective small business participation in Federal contracting. Underlying these provisions is the committee's belief that small businesses are generally capable of performing the vast majority of Federal contracts, and should be given the opportunity to compete for Federal contracts on an equal footing with larger companies. It calls for the use of judicious acquisition practices designed to insure Government contracting with new and small businesses to the maximum extent practicable. Such practices may include, but are not limited to, limiting eligibility for certain contract awards to small businesses, breaking out portions of large contracts for small businesses or actively soliciting small business sources.

Enhanced participation would come not only through initiatives aimed at specifically increasing the amount, and number of contracts awarded to small business concerns, but also by the reform of those structural aspects of the current system, such as the lack of informa-

tion regarding contracting opportunities and chronic late payments to contractors, which penalize small businesses.

Section 2(b)(5) calls for agencies to make information on laws and regulations pertaining to contracts available for review and examination. The intent of this provision is to mitigate the barriers to entry which confront many businesses unfamiliar with the Federal contracting system. One strategy might be to establish procurement information centers in local Federal offices or in Federal purchasing centers. Such centers would contain copies of Federal procurement regulations, information about potential contracting opportunities, and explanations in simple English of pertinent procurement requirements. The opportunity to do business with the Government is a hollow one indeed, if prospective suppliers, especially small firms with limited resources, are unable to understand the requirements of the system.

Section 2(b)(7) calls for no large scale production to begin until the item or equipment to be produced has been proven adequate through operational testing. In major systems acquisitions, a significant portion of the total system cost is incurred during production and in the operation and maintenance of the acquisition itself. Therefore, the committee believes that prudence and common sense dictate that the adequacy of an intended acquisition, and its ability to perform in its environment, must be established prior to the commitment of large sums for production.

Section 2(b)(8) calls for providing contractors the opportunity to earn a profit on Government contracts commensurate with the contribution made to meeting public needs and comparable to profit opportunities available in other markets with similar risks and skills. It is not the intent of this provision to require that specified profit levels be incorporated into each contract. Rather it recognizes that negotiating practices intended to obtain low initial contract prices often lead to buy-ins and cost overruns. Such practices act to narrow the competitive base and increase the Government's reliance on firms unwilling to take risks in other markets by driving many capable firms away from Federal contracting.

This provision is not intended to reduce risk for firms doing business with the Government. In fact, this legislation, should increase contractor risk by reducing the use of cost-type contracts, by increasing competition and by eliminating opportunities for favoritism in the award of contracts. This policy simply recognizes that profit is the reward for risk and the basis for future innovation and growth.

Subsection 2(b)(9) calls for the Government to minimize surveillance of contractor operations and to waive any controls not needed to insure contract performance. The intent of this provision is to give recognition to the notion that excessive Government regulation is a burden on the Government, on those who are regulated and ultimately, on the taxpayer. This provision should not be construed as calling for the elimination or waiver of essential surveillance controls. Like any other prudent buyer, the government must assure itself of quality and of reasonableness of price. While the emphasis of this section is on surveillance related to contract performance, there is no intent to preclude pre- and post-contract reviews or audits of such matters as

equal opportunity compliance, small and minority business subcontracting, costs or prices, and other matters essential to the Government's interest.

Section 2(b)(11) calls for the Government to rely on and to promote effective competition so as to insure the availability of competing alternatives and to facilitate the entry of new and small sellers into the Federal contracting system. Although not amenable to rigid definition, this particular description of what constitutes "effective competition" is important in appreciating the thrust of the legislation and the rationale for many of its provisions. Generally, four components characterize effective competition:

(1) The information required to respond to a public need is made available to prospective sellers in a timely fashion;

(2) The buyer and the seller act independently;

(3) Two or more sellers act independently to respond to a public need by offering products which best meet that need, regardless of how the need itself was expressed; and

(4) There is no bias or favoritism in the contract award.

Effective competition is not a procurement technique; it is a phenomenon of the marketplace. This legislation does recognize that even a good procurement system may not be able to generate effective competition in each instance. For example, it may be impossible to award a contract for the provision of electricity to any source other than the local power company.

On the other hand, effective competition is not present simply because two firms are competing for a contract. Effective competition is always enhanced by the presence of a large number of qualified firms willing to compete for a contract. Therefore, the committee is of the belief that executive agencies should always strive to encourage a large number of firms to compete for a contract.

Section 3—Definitions.—Section 3 sets forth a number of definitions.

The term "acquisition" is program oriented; it includes all steps from establishing the Government's need to contract performance. This definition is important to understanding the modern context of procurement: an appreciation that the effectiveness of the buying function depends heavily on the way in which the Government's requirements and needs are initially established. While the definition refers to acquisition by contract with appropriated funds, the act is intended to apply in all respects to revolving-type funds which are capitalized by or reimbursable from appropriated funds. The purchases of nonappropriated fund activities, such as the Army and Air Force Exchange Services, the Navy Ships Stores Organization and similar instrumentalities of other Federal agencies do not constitute acquisition for the purpose of this legislation. Nor is this legislation intended to alter current procedures governing contracts made in implementation of foreign military sales contracts pursuant to sections 22 and 23 of the Arms Export Control Act (22 U.S.C. 2762-63).

The definition of "acquisition" is intended to be consistent with the requirements of Public Law 95-224, the Federal Grant and Cooperative Agreement Act of 1977. The procedures in this bill do not extend to transactions made by using grant agreements or cooperative agreements, but nothing in this section precludes the use of a procurement

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contract and compliance with the bill's procedures in specific instances where such a practice is deemed appropriate.

The term "executive agency" includes the executive departments, independent establishments, military departments, the United States Postal Service, and wholly owned Government corporations.

The judicial and legislative branches including the General Accounting Office, are not subject to the provisions of this legislation. Acquisition activity by these agencies is relatively small, and subjecting them to regulations promulgated by the executive branch agencies could raise constitutional questions under "the separation of powers" doctrine.

The U.S. Postal Service is covered, since it continues to receive a significant portion of its operating expenses from appropriated funds. The committee recognizes however, that the unique composition and mission of the Postal Service may generate special problems and calls for the Office of Federal Procurement Policy to be sensitive to those concerns.

The legislation exempts the acquisition activities of the Tennessee Valley Authority and the Bonneville Power Administration from mandatory compliance with the Act while allowing TVA and BPA to utilize the provisions of the Act where appropriate. The Committee recognizes that each of these entities has highly specialized purchasing needs and each uses appropriated funds for only a small portion of its acquisition needs. Moreover, TVA and BPA are mandated by statute to be self-sufficient and to exercise various independent and broad authorities in carrying out their special regional missions. TVA and BPA must have the freedom to exercise their business judgment in individual instances to be able to maintain the efficiency of their operations.

The term "agency head" refers to the head of an executive agency as defined above; it includes the Secretaries of the Military Departments.

The term "contracting officer" applies to any person who, by virtue of his position or by appointment in accordance with regulations, has the authority to enter into and administer contracts. It also includes an authorized agent of the contracting officer acting within the limits of his authority.

The term "property" includes personal property and leaseholds in personal property, but excludes real property in being and leaseholds in real property. The words "in being" following "real property" are intended to make it clear that the act does cover the acquisition of such real property as new construction, although it does not cover land or existing buildings. Nothing in this act is intended to affect existing authority to prescribe standard lease forms.

The term "total cost" covers all resources consumed in the acquisition and use of property or services. Although typical cost elements are called out, the definition intends flexibility in the use of the term: the primary intent is a good faith effort to quantify the "resources consumed or to be consumed," a common sense proposition for any buyer. The specific details of a "total cost" calculation, as used when appropriate in section 302(b)(1), will vary from case to case depending on (1) which factors may or may not be involved, and (2) which factors are or are not susceptible to sufficiently reliable calculations.

In circumstances where major elements of total cost can be quantified—for example, energy consumption—the committee intends that consideration be given to these costs, even when other elements of total cost cannot be practically estimated and validated.

The term "functional specification" describes the work to be performed in terms of the end purpose to be accomplished. A functional specification should not be stated in such terms that it prevents the Government from considering alternative solutions to its purchase requirements, nor should it limit effective competition.

Any conditions, limitations, or minimum standards prescribed should relate only to the external environment and operating conditions under which the goods or services will operate and which must be accommodated. For instance, a functional specification could properly incorporate characteristics dealing with functionally nonrestrictive form, fit and function: screws must fit into holes. Conditions or limitations which relate to the internal characteristics of the product or service, design features, performance levels tied to design, or detail presumed necessary for performance are to be avoided.

For example, a functional specification for an overhead viewgraph projector may stipulate external conditions (e.g., 120 v. 60 cycle power supply; dimensional standards for storage and slides; requirements for projection distance; visibility and readibility). The functional specification could additionally describe acceptable levels of focus, brightness, and resolution. It would not, however, restrict performance of individual components presumed to be within the overhead projector.

"Brand name or equal" purchase descriptions for readily available commercial type products are precluded by this provision if their use excludes consideration of products which are used for the same function. Such descriptions act to limit effective competition by precluding the consideration of alternative technological solutions.

The term "unsolicited proposal" means a written offer designed to obtain a contract to perform a proposed effort. Unsolicited proposals are submitted to an agency by an individual or an organization of its own initiative; they are not responses to agency requests or communications. The Commission on Government Procurement recognized that unsolicited proposals are an invaluable tool through which the Government obtains creative ideas from the private sector, and called for the elimination of restraints which discourage the generation and acceptance of innovation through unsolicited proposals.[22]

The committee does not intend the term "agency communication" to inhibit agencies from disseminating information about their broad scientific and technological interests. Communications related to agency purchase requirements are prohibited, however, no matter how broadly they are stated. Such communications could result in allowing agencies to award contracts without ever indicating to all potential competitors what criteria were used to select the winner. Such practices would be both a flagrant evasion of the need for competition, and a corruption of the mandate for integrity and evenhandedness in the award of contracts.

[22] The "Report Of The Commission On Government Procurement," Volume 2, pp. 25–26, Government Printing Office, December 1972.

Regulations to guide such agency communications developed by OFPP should discourage the use of "broad statements" of agency needs when in fact such statements could be a first portion of a complete agency request for proposal. An agency may not consider as being "unsolicited" a proposal which is submitted following agency communications related to purchase requirements.

Finally, it is the committee's belief that the increased use of functional specifications will in fact reduce the number of unsolicited proposals. Functional specifications would allow the consideration of new technological approaches to meeting the Government's need within the context of competitive acquisition procedures.

TITLE I—ACQUISITION METHODS AND REGULATORY GUIDANCE

Section 101—Acquisition methods.—Section 101 requires executive agencies to acquire property or services in accordance with this act by using one of three methods set forth in the act:

(1) The competitive sealed bids method as provided in title II; or

(2) The competitive negotiation method, as provided in title III; or

(3) The simplified small purchase method, as provided in title IV.

The committee recognizes that other statutes cover the acquisition of highly specialized products and services. For example, Public Law 92–582 sets forth policies governing the acquisition of architectural and engineering services. S. 1264 is not intended to revise or repeal the procedures contained in that statute, nor should any regulations issued under the authority of this legislation contravene or be at variance with the procedures set forth in Public Law 92–582.

Section 101(b) recognizes that these three acquisition methods are equally valid alternatives when selected in accordance with the criteria set forth in this legislation, as implemented by the Administrator for Federal Procurement Policy. Underlying the provisions of this section is the committee's intent that Federal contracts be awarded through competitive procedures. Generally, the nature of the product or the service to be acquired and the circumstances of the acquisition, when examined against the criteria set forth, will dictate the most effective acquisition method.

As a practical matter, reflecting the large number of low dollar value acquisitions, the simplified small purchase method will probably continue to be used more than any other method.[23] There will be a significant reduction in the award of noncompetitive (sole source) contracts; there will be a resulting increase of competitive negotiation and sealed bid procedures.

It is not the intent of this section that noncompetitive purchasing be considered an "equally valid" alternative; such purchases are to be

[23] In fiscal year 1976, the Defense Department made 9,451,904 procurement actions (excluding intergovernmental actions). Of this number, only 195,645, or approximately 2 percent were actions over $10,000. Of the over 9 million actions under $10,000, 5,881,083 were awarded under the statutory authority of the small purchase exception (i.e., the authority in the Armed Services Procurement Act and the Federal Property Act to negotiate procurement actions under $10,000). See "Military Prime Contract Awards, Fiscal Year 1976, Office of the Secretary of Defense," September 27, 1976, p. 53.

regarded as exceptions, and should be used only in accordance with the procedures set forth in section 304.

Section 102—Regulatory compliance.—Section 102(a) authorizes and directs the Administrator for Federal Procurement Policy to promulgate a single, simplified uniform regulation implementing this act and to establish procedures for assuring compliance with this act within 2 years of its enactment. The requirement that the Administrator "promulgate" a single regulation implementing this act does not mean that the entire effort must be carried out by OFPP alone. It is anticipated that, within the limitations of Public Law 93–400, OFPP will make use of other agency resources as well as interagency task forces and temporary or standing committees. Nor does the requirement for a "single" regulation preclude issuance of a regulation in different parts or formats for differing subject matter, such as a handbook for small purchases or a manual for major systems acquisitions. It is further anticipated that OFPP, in issuing such regulations, will comply with section 8 of Public Law 93–400, which requires OFPP to notify congressional committees at least 30 days prior to the issuance of any major policy or regulation.

With regard to those laws which are not repealed by this act, it would be incumbent on OFPP to adhere to legislative directives contained in such laws in issuing regulations and procedures under this section and this entire act. The committee recognizes that the issuance of a new regulation in 2 years is an ambitious goal, but feels that the goal is attainable.

Section 102(a)(2) requires the Administrator to review procurement regulations on a regular basis and to issue revisions as necessary. It is expected that the Administrator, in conducting reviews of any regulation, will consider concerns raised by executive agencies, the private sector and other interested parties.

Section 102(a)(3) requires the Administrator to conduct periodic studies to determine the effectiveness of agency compliance with this act. Such studies should include, but not be limited to, assessments of agency efforts: (1) To reduce the use of noncompetitive contracting; (2) to enhance and promote small business participation; and (3) to simplify procurement procedures.

Section 102(a)(4) requires OFPP to establish and oversee a program to reduce agency use of detailed product specifications. Such a program should focus on the elimination of outdated and duplicative specifications. The General Accounting Office recently found that the cost to develop a product specification is 16 times the cost to develop a purchase description.[24] The development of a new detailed specification, especially for commercial type products, should be specifically justified on a total cost-benefit basis. Such an analysis should include not only the cost of developing and using the specification, but all costs associated with, for example, special Government-industry coordination, product storage, the provision of spare parts, and special inspections.

[24] "Government Specifications For Commercial Products—Necessary Or A Wasted Effort?" Report to the Congress by the Comptroller General of the United States, November 3, 1977 (PSAD–77–171), p. 19.

Section 102(b) requires the Administrator for the Office of Federal Procurement Policy to report to the Congress on his activities under this section as part of his annual report, as provided for in section 8 of Public Law 93-400. Such a report should include his assessment of agency implementation of and compliance with this act, and recommendations for revisions in this or any other provision of law pertaining to the acquisition of property or services.

TITLE II—ACQUISITION BY COMPETITIVE SEALED BIDS

Section 201—Criteria for use.—This section establishes seven prerequisites, all of which must be met, if the competitive sealed bids method is to be used as the method of acquisition.

The criteria established here are far from arbitrary, but are a generic description of those considerations which must be present in order for competitive sealed bid procedures to generate competition.

A key prerequisite is the availability of products or services which will allow the Government to award a contract to a successful bidder selected primarily on the basis of initial purchase price. The requirement that suitable products or services "are available" does not mean that they be "off the shelf" or already manufactured, produced or otherwise existing and ready for delivery or performance. It simply precludes products or services which have not been proven or developed from consideration in sealed bid procurement.

Contracts awarded under the competitive sealed bidding method are to be of the firm fixed price type: in exceptional cases, fixed price contracts with economic price adjustments may be used when some flexibility is necessary and feasible. The ability to use competitive sealed bidding method is to remain the first consideration in each individual purchase situation.

Section 202—Invitation for sealed bids.—Section 202(a) requires that invitations for sealed bids be publicized in the Commerce Business Daily after the necessity for the acquisition is established. Such publication should take place at least 10 days before invitation for bids are issued, and the synopsis of the proposed acquisition should be sufficiently descriptive to minimize the need for a potential bidder to obtain additional information in order to decide whether to enter the competition.

Section 202(a) further states that the time prior to opening the bids be sufficient to permit effective competition and that the invitation be accessible to all interested or potential bidders. Determinations of the time needed to obtain effective competition will be guided by the complexity of the individual acquisition. As a general rule, the committee is of the opinion that a period of 30 calendar days is a guideline for the minimum time necessary to permit effective competition. While the invitation must be made accessible to all interested bidders, this section provides that eligibility to participate in the bidding may be limited to concerns eligible to participate in small business set-asides or other authorized programs. Such programs include but are not limited to, set-asides for labor surplus areas, for minority businesses, and for products made by the blind or the handicapped. The reference to set-

asides here is not to be construed as authority to make such set-asides; that authority must be made pursuant to the Small Business Act or other specific authorization. This section simply provides agencies with the procedural ability to carry out such authorized programs.

The objective of section 202(a) is to obtain responsive bids from a large number of responsible sources in order to increase the probability of obtaining the lowest available price. Thus, the use of bidders lists, the routine solicitation of previous bidders and suppliers, and the publication of information in newspapers and trade journals should also be employed, in appropriate cases, to elicit a large number of bidders. Finally, agencies should selectively review the extent of competition obtained using sealed bidding methods and take action where necessary to increase competition for future acquisitions.

Section 202(b) states that invitations shall include a description of any factors in addition to price that will be considered in evaluating bids. Evaluation factors "in addition to price" should be limited to factors which can readily be measured or evaluated, such as delivery and transportation costs, or energy consumption. The consideration of total cost may be used under the competitive sealed bidding method, provided that evaluation criteria are set forth in the invitations for bids.

Section 202(c) requires that functional specifications be used in purchase descriptions to the maximum extent practicable consistent with agency needs. The objective of this provision is to increase effective competition by permitting a range of distinct products or services to qualify.

Section 202(d) requires that the use of detailed product specifications be subject to prior approval by the agency head. The agency head must approve a written justification which: (1) delineates the circumstances which preclude the use of functional specifications, and (2) requires the use of detailed product specifications in the purchase description. In general, those descriptions which have the effect of tying the Government's requirements to an approach based on a specific design are to be considered as detailed for purposes of this section, and their use would be subject to prior approval.

The objective of this provision is to afford agencies the ability to forego the use of functional specifications when circumstances militate against their use. For instance, the establishment of logistical support requirements for deployed equipment and the need for component interchangeability require the military services to standardize certain product descriptions. In the same way, the provision of spare parts may require detailed product descriptions. The authority to approve the use of detailed product specifications may be delegated in accordance with section 601 and may be made for classes of items as well as for individual acquisitions. Such approvals should be granted only when the use of a detailed product specification is essential to an agency objective, recognizing the additional costs incurred in (1) developing and maintaining the specification, (2) establishing logistical support systems, and (3) the limitations such specifications place on effective competition and innovation. Agencies should periodically review waivers allowing detailed product specifications to determine if their continued existence is justified.

Section 202(e) establishes a two-step sealed bidding method in which first, the contracting officer requests the submission of unpriced technical proposals and, second, issues an invitation for sealed bids limited to those bidders whose technical proposals meet the standards set forth in the original invitation. This procedure, called two-step formal advertising, is currently used by the Defense Department [25] and other agencies. The objective of this provision is to enable the Government to obtain the benefits and protections of competitive sealed bidding in situations where a variety of distinct products or services are available to meet the agency need. It allows agencies to stimulate competition by avoiding the use of unduly restrictive purchase descriptions.

The first step involves an agency evaluation of each technical proposal and a determination of what proposals meet the standards set forth in the request. In some cases, bid samples provided by offerors may prove helpful in making such evaluations; but the inability to furnish a bid sample need not in itself preclude a bidder from consideration. Invitations for bids are then issued only to those bidders whose technical proposals have been determined to be acceptable. Each bidder responding to the invitation for bids in step two will do so in accordance with the specifications of his technical proposal as finally accepted. In order to increase competition for future acquisitions, agencies may find it useful to debrief offerors whose technical proposals were determined to be unacceptable.

Section 203—Evaluation, award and notifications.—Section 203(a) requires all bids to be opened publicly at the time and place stated in the invitation.

Section 203(b) states that contracts shall be awarded to the responsible bidder whose bid conforms to the invitation and is most advantageous to the Government, price and other factors considered. The question of whether a particular bidder is "responsible" requires sound business judgment, and involves an evaluation of the bidder's experience, facilities, technical organization, reputation, financial resources, and other factors. The procuring agency is best qualified to make this evaluation, and discrimination is accordingly reserved to the agency in this matter. In virtually all cases, this will result in an award to the lowest responsible bidder. However it provides for situations where the public interest dictates an award to someone other than the lowest responsible bidder as is true in current law.[26] This section further provides for rejection of all bids when, for cogent and compelling reasons, it is in the Government's best interest to do so. This represents a tightening of current statutes which do not provide a clear standard.[27]

TITLE III—ACQUISITION BY COMPETITIVE NEGOTIATION

Section 301—Criteria for use.—This section sets forth criteria for the use of the competitive negotiation method of acquisition. Any proposed purchase greater than the small purchase procedures ceiling

[25] "Armed Services Procurement Regulation," October 1, 1975 edition, Section 2, Part 5, Paragraph 2-501 through 2-503.2.
[26] See, for example, 10 U.S.C. 2305(c). See also Senate Report 80-571, Armed Services Procurement Act of 1947, July 16, 1947, p. 16.
[27] 10 U.S.C. 2305(c); 41 U.S.C. 253(b).

which does not meet all of the criteria established for competitive sealed bidding will be made through competitive negotiations.

Current law requires a written determination to justify a decision not to use competitive sealed bid procedures.[28]

While the requirement for written determinations in the case of noncompetitive awards is maintained (see section 304), written determinations are not required for the use of competitive negotiations.

Section 302—Solicitations.—This section establishes certain requirements pertaining to solicitations for offers issued by the Government to interested or potential sources in competitive negotiations. The intent of the section is twofold: (1) to require solicitations to set forth the Government's requirements and the relative importance of evaluation factors in a manner which insures equity and promotes effective competition; and (2) to use functional specifications which allow the agency to consider a range of competing alternative solutions to the Government's need.

Subsection (a) (1) requires that solicitations for offers be obtained from a sufficient number of qualified sources to obtain effective competition, as recommended by the Commission on Government Procurement.[29] In addition to timely notice in the Commerce Business Daily, agencies are to aggressively seek out and use other ways to publicize their needs.

Subsection (b) requires each solicitation to include the evaluation methodology and the relative importance of all factors to be used during evaluation and for final selection. A primary purpose of this requirement is to insure fair and impartial treatment of all offerors in the selection process. The reference to "evaluation methodology" is not intended to require printing in the request for proposals the detailed numerical scoring adopted for internal evaluation discipline to assure uniformity and objectivity of different members of an evaluation panel. That would permit "gaming" the procurement by the offeror. What is intended here is a realistic disclosure of information to permit proposers to intelligently judge the relative importance of significant factors and subfactors and to judge just how important the agency considers cost and business factors in relation to technical aspects.

The committee recognizes that in some instances, such as in the acquisition of research and development, it may be difficult at the outset to assign precise values to the relative importance of cost, technical and other factors included in the initial solicitations. In such special instances, solicitations need not initially set forth the evaluation criteria and their relative importance in a precise methodology but shall, as a minimum indicate the relative importance of all significant evaluation factors. Absent such indication, it would be difficult to insure evaluation and selection in an equitable manner. Subsection (b) (2) gives agencies the authority to adjust the importance of the evaluation criteria, recognizing that agency source selection officials must be able to exercise discretion in making appropriate tradeoffs among such factors. Any changes however, must be promptly communicated in writing to all competitors.

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[28] 10 U.S.C. 2304(a) ; 41 U.S.C. 252(a).

[29] The "Report Of The Commission On Government Procurement," Volume 1, pp. 20–21, Government Printing Office, December 1972.

This section further requires agencies to use total cost criteria when appropriate in evaluating offers where price is a primary or significant factor. The Defense Department currently uses such criteria in the acquisition of major systems, recognizing that the purchase price is only one component of the total system cost. The National Bureau of Standards' Experimental Technology Incentives Program (ETIP) has developed total cost criteria for the acquisition of commercial-type products such as air conditioners, refrigerators and water heaters.[30]

The committee recognizes that the development of total cost criteria can be difficult and therefore will not be appropriate for every acquisition. However, this section is not to be construed as limiting the application of total cost criteria solely to major systems acquisitions. Total cost criteria are appropriate in all acquisitions in which the operating costs promise to be significant, and where validated data can be obtained at reasonable cost. If total cost cannot be estimated, but major cost elements are known, they should be weighed in the acquisition decision. Specific direction in these matters is to be set forth in regulations issued by the Administrator for Federal Procurement Policy, as guided by the considerations set forth above.

Subsection (c) is designed to promote effective competition by requiring agencies to state their purchase requirements broadly in order to be able to benefit from a variety of competing alternatives.

When such descriptions have the effect of tying the Government's requirements to an approach based on a specific design, they are to be considered as detailed for purposes of this section, and their use would be subject to prior approval.

Subsection (d) requires an agency, upon identification of inadequacies in a solicitation which cause misunderstandings of the requirement of a solicitation, to clarify its intent to all offerors in a timely, equitable manner.

Subsection (e) recognizes that agencies may encounter situations which require the use of detailed specifications in a solicitation. Overriding considerations of operational interchangeability or the provision of spare parts are examples of such instances. The use of detailed specifications is authorized in such situations, provided the agency head first approves a written determination to justify such use.

Section 303—Evaluation, award, and notifications.—The intent of subsection (a) is to establish a framework for the conduct of competitive negotiations which stimulates proper and constructive competition and insures the equitable treatment of all offerors. These objectives are obtained by: (1) requiring discussions, when held, to be conducted with all offerors who have a reasonable chance of winning the contract: (2) maintaining the integrity of each offer by limiting the scope of discussion in the early phases of the negotiation process: and (3) prohibiting those types of communication between the Government and the offerors which undermine the competitive process.

Although the bulk of both the military and the civilian procurement dollars are spent through negotiated contracts there is little

[30] "Life Cycle Costing Case Studies," a compendium of previously issued studies compiled by the Federal Supply Service, Logistics Management Institute, Final Report, May 1977, prepared for Experimental Technology Incentives Program, Washington, D.C., pp 1, 33, 53, 87.

statutory guidance for the conduct of negotiations.[31] Chapter 137 of title 10 (U.S.C. 2304(g)) requires only that the military agencies conduct written or oral discussions with all responsible offerors in the competitive range; no statutory guidance exists for the conduct of negotiations by civilian agencies. In adopting this provision, the committee has relied on current statutory and regulatory guidelines, strengthening them where necessary to insure the equitable treatment of all offerors, to simplify the negotiation process, and to prohibit actions which would lead to favoritism in the award of contracts.[31]

Like chapter 137 of title 10, this section requires written or oral discussions to be held with all offerors in the competitive range. The competitive range is to be determined by the contracting officer based on price, technical and other salient factors, and is to include all proposals which have a reasonable chance of being selected for award.

It is important to recognize that the term "discussions" is not synonymous with "negotiations" in this context. Discussions take place during proposal evaluation and are designed to select that offeror or offerors with whom definitive contract negotiations will be conducted. Negotiating definitive contracts with all offerors in the competitive range can be an unnecessary waste of time and money for both the Government and the offerors; it can lead to technical transfusion, auctioneering and buy-ins.

These initial discussions shall generally concern matters relating to the clarification, substantiation or extension of offers. While the emphasis is on clarification of prices and technical factors, there is no prohibition against objective discussions of excesses or weaknesses of offers in the competitive range—as long as they are not used to communicate information on the strengths of a competing offeror's proproposal and do not equalize the competition. The purpose of discussions is to help the contracting officer identify and fully understand that proposal which is most advantageous to the Government.

This section prohibits the use of auction techniques and of technical transfusion. Some agency procurement regulations including those of the Department of Defense, currently prohibit both practices.[33] The committee raised this prohibition to a statutory level in order to underscore its importance, and to insure its uniform application to all Federal agencies. Auction practices by the Government cause firms to submit below-cost offers in order to win contracts, and subsequently may cause contract modifications and cost-overruns during contract performance.

Technical transfusion occurs when one offeror improves his proposal as a result of disclosure by the Government of information pertaining to the proposal of a competing offeror. In this context, technical transfusion represents a subversion of the integrity of the competitive process and an evasion of the responsibility to treat competitors equitably. It also may result in the hybridization of proposals and reduce alternative technical approaches to their lowest common denominator.

[31] In fiscal year 1976, 68 percent of all civilian procurement dollars were spent through negotiation ($12.3 billion); 92 percent of military procurement dollars were spent through negotiation ($37.4 billion).

[32] 10 U.S.C. 2304(g). See also "Armed Services Procurement Regulation," October 1, 1975 edition, Section 3, Part 8, Paragraph 3-805.

[33] *Ibid.*

On the other hand, these prohibitions are not intended to preclude meaningful discussions, which are the essence of the competitive negotiation process. While the prohibition on auction practices does not prevent the contracting officer from telling an offeror that his prices or costs are high, it does prevent him from telling an offeror that his price or cost is high in relation to that of another offeror. This section does not require the Government to cancel a solicitation due to minor technical deficiencies.

This section also adopts the current Defense Department requirement which prohibits making multiple requests for best and final offers.[34] Such a practice not only lengthens the negotiation process, it also creates a game-type situation in which offerors try to determine if an agency request for best and final offers is in fact genuine. The prohibition against multiple requests for best and final offers is designed to insure the equitable treatment of all competitors, to avoid auction type practices, and to establish a point of finality in the discussion process. In this context, multiple means more than one.

This section further allows an initial offer to be accepted without discussion when it is clear that the public need would be satisfied on fair and reasonable terms and the solicitation advises all offerors that award may be made without discussion. This provision extends the current statutory authority in chapter 137 of title 10 (10 U.S.C. 2304(g)) to all Federal agencies. Award without discussion is appropriate in acquisitions involving duly authorized set-asides or in situations in which it can clearly be demonstrated from the existence of adequate competition or accurate cost experience with the product or service that acceptance of the most favorable initial proposal without discussion will result in a fair and reasonable price.

This section limits detailed negotiations of price and technical factors to the successful offeror(s), that is, the offeror who submitted the best final offer. In occasional cases, detailed negotiations may disclose that a contract with the successful offeror in fact cannot be agreed on that would be as advantageous to the Government as a contract that might be agreed on pursuant to another's offer. In such situations, detailed negotiations with the apparently successful offeror may be terminated, after which detailed negotiations may be held with that other offeror. Further, if detailed negotiations with an apparently successful offeror lead to a material relaxation of the Government's requirements, other offerors should be allowed to modify their offers to take advantage of the change.

Finally, the committee recognizes that there are certain contracts which may best be handled under negotiation procedures which permit broader discussions with all offerors in the competitive range. Accordingly, to provide necessary statutory flexibility to the Government, the word "generally" was specifically added to the second and last sentences of this section. In this regard, the committee believes that in acquisitions where technical considerations are of a relatively straightforward and simple nature, the Government may want to utilize full and free negotiation procedures with all offerors within the competitive range. The ability to negotiate in this case in no way affects this

[34] *Ibid.*

section's prohibitions on auction practices or technical transfusion. The OFPP shall issue regulations giving specific guidance as to the circumstances under which negotiations may be conducted with all offerors in the competitive range.

The intent of subsection (b) is to place emphasis on the initial activities of the acquisition process to allow competitive exploration of alternative design concepts in response to agency needs. The objective is to acquire products or services which operate effectively in their intended environment, based on the results of tests or evaluations. In the past, premature commitment to a specific approach has locked the Government into an unproven system, often causing less than desired performance, cost overruns and program delays. The committee is of the opinion that stimulating competition early in the acquisition process will result in the development of more effective, reliable systems and bring about substantial cost savings.

The size and nature of the project, and the availability of funds will determine the application of this subsection, in accordance with regulations issued by the Administrator for Federal Procurement Policy. Finally, this section is to be implemented in accord with the policy set forth in section 2(b)(7) of this act, which states that no large scale production be initiated until the adequacy of the product or service to be acquired has been proven through operational testing.

Subsection (c) is intended to protect the integrity of the competitive process by prohibiting disclosure of any information concerning a contract award to a person not having source selection responsibilities until after selection. Agencies may, at their discretion however, notify offerors who have been eliminated from the competition prior to selection. Such a practice can save the time and money of an offeror who clearly will not be awarded a contract. This prohibition in no way affects the agency's responsibility to cooperate with the General Accounting Office in matters relating to a bid protest.

Subsection (d) allows for the multiple award of contracts. In a research and development acquisition for example, an agency may award contracts to more than one offeror in order to sustain alternative approaches in competition. This section further requires that all unsuccessful offerors be notified with reasonable promptness.

Subsection (e) authorizes the continued use of multiple award schedule contracts. Multiple award schedule contracts are multiple-source ordering arrangements for commercial-type products under which negotiated price schedules are agreed. These price schedules generally reflect discounts from established catalog or market prices. Agencies then order needed products directly from the supplier or manufacturer, justifying as appropriate the purchase of any but the lowest priced product in a category. Currently, the Federal Supply Service in the General Services Administration uses multiple awards for commercial products when Government specifications are not available or when there is a need for several brands of merchandise. In fiscal year 1974, the Federal Supply Service awarded about 8,000 such contracts and Government agencies purchased $870 million in products and services directly from suppliers using these contracts.

In selecting multiple award schedule contractors, FSS uses a benchmark discount procurement technique. Under this procedure FSS

selects a benchmark contractor after considering, among other things, the amount of discount offered on catalog prices, the contractor's ability to handle volume sales, and its ability to provide reasonably complete product lines. All prospective contractors meeting or exceeding the benchmark contractor's offer can be awarded a contract that is then listed on a Federal Supply Schedule.

The committee feels that the continued use of multiple-award schedules is consistent with this legislation's stress on using commercial products available on the market rather than writing detailed specifications for new or different products. Although multiple award schedules are presently negotiated primarily by the General Services Administration, this section authorizes their use by any agency for the use of all agencies—pursuant to agency assignments made by the Office of Federal Procurement Policy.

The committee is of the strong opinion however, that the management of the current multiple-award schedule program can be greatly improved. A recent GAO study disclosed that the Government could have saved $1.2 million on purchases totaling $11.2 million had the Federal Supply Service obtained prices comparable to what other customers received.[35] OFPP should develop procedures which enable the Government to obtain discounts given by contractors to other customers buying large guantities of goods—including the recognition of the total amount of aggregate Government purchases.

Finally, it is important to recognize that this legislations' stress on the use of functional specifications should enable the Government to consider a wider range of commercially available products under formal advertising procedures, through reducing the need for multiple-award schedule programs.

Section 304.—Noncompetitive exceptions.—This section authorizes the use of noncompetitive acquisition methods (1) if the contract to be awarded stems from acceptance of an unsolicited proposal, or (2) if the agency determines that such an award is in the best interests of the Government. This section in no way confers equal status to noncompetitive, or sole-source acquisition, but it does recognize that exceptional circumstances may prevent a contract from being awarded competitively.

The intent of this section is to reduce the number of noncompetitive contract awards by requiring first, a prior high-level written agency determination that a sole source contract will in fact be in the best interests of the Government and second, publicizing the agency requirement to determine if potential alternative sources are present in the marketplace. If capable alternative sources come forward in response to agency publication, this section requires the contract to be awarded competitively.

Currently, chapter 137 of title 10 (10 U.S.C. 2304(a)) sets forth 17 exceptions which allow defense agencies to use negotiations instead of formal advertising; chapter 4 of the Federal Property and Administrative Service Act (41 U.S.C. 252(c)) allows 15 exceptions permit-

[35] "Federal Supply Service Not Buying Goods At Lowest Possible Price," Report to the Congress by the Comptroller General of the United States, March 4, 1977, (PSAD–77–69), pp. 3–9.

ing civilian agencies to negotiate contracts in lieu of using formal advertising. Both of these statutes list circumstances in which formal advertising is infeasible or impracticable, but do not adequately explain that negotiations be conducted competitively.

The committee wishes to emphasize that the inability to use formal advertising techniques does not per se eliminate the mandate for competition in the award of Federal contracts. The committee feels that executive agencies have abused current exemptions in the past by routinely citing them, thereby avoiding the award of contracts through competitive methods.

The agency determination provided for in subsection (a)(1) is to first establish the need for the acquisition and the reason why it can be obtained only from the recommended single source. The determination must include:

(1) a description of efforts to find other firms and the circumstances which make competition infeasible;

(2) reasons why only one contractor has the capability and experience required;

(3) when relevant, why delivery deadlines are so short that only the recommended contractor can meet them;

(4) a description of the estimated additional costs for another contractor to fulfill requirements; and

(5) provisions made or planned to insure competition in the future.

Regulations promulgated by OFPP will establish criteria to help determine when it is in the Government's best interest to enter into noncompetitive contracts.

Subsection (a)(2)(A) sets forth publication requirements for all contracts under this section except those stemming from the acceptance of an unsolicited proposal. This requirement is intended to facilitate the Government's search for other sources where it is aware of only one source, and to permit challenges to the Government's determination, in a particular case, that only one source can meet its needs. Such publication is to occur, pursuant to section 512 of this act at least 30 days prior to solicitation of the proposed source. During that 30-day period no discussions are to take place between the Government and the proposed source, since such discussions might prejudice any competition that result from the identification of other capable sources.

Executive agencies have noted that this 30-day publication requirement could delay the acquisition process for sole source contracts. In fact, no delay need occur if agency officials responsible for specifying needs convey them to procurement officials on a timely basis, rather than waiting until the need is urgent. In the vast majority of cases, however, the savings in cost and performance ensuing from effective competition would far outweigh such administrative delays.

This section recognizes that it may not always be possible to provide as much notice as 30 days in advance of solicitations due to unanticipated, compelling agency needs. In such cases, notice must be published 30 days in advance of proposed award, but discussions between the Government and the prospective contractor may begin immediately.

The intent of this provision is to allow for rare and compelling situations in which the Government's interests would be seriously injured if the 30-day waiting period was strictly observed. A determination that early notice is impracticable along with the reasons therefore, is to be made in writing. This determination is separate from the determination that entering into a noncompetitive contract is in the Government's best interests, and is to be approved separately and at a higher organizational level than the latter.

Subsection a(2)(A) further states that notice of the proposed noncompetitive award must be publicized pursuant to section 512, and that if other sources demonstrate capabilities to meet the requirements of the work to be performed, a solicitation be issued to all such sources. The agency ought normally to afford to any responsible offeror who comes forward as a result of this notice the opportunity to demonstrate its ability to meet the requirements of the work. When there is doubt as to whether a firm has the capability to meet the requirements, that doubt is to be resolved by initiating competitive procurement procedures. In order to broaden the competitive base for future acquisitions, offerors who are unable to meet the requirements of the work should be notified in writing of the reasons therefor with reasonable promptness.

In special instances, the term "requirements" refers not only to the character and attributes of the products or services to be procured and associated performance and delivery requisites, but also encompasses other needs of the Government extraneous to the product or service to be purchased which necessitate restriction of competition to a single source. These needs could include: (*a*) The need to limit solicitation to an existing production source in order to afford the Government the benefit of techniques, tooling, and equipment previously paid for by the Government and previously contracted for on a competitive basis or to avoid duplication of substantial initial investment associated with procurement from a new supplier; (*b*) the need to limit competition in order to keep or make available vital facilities and skills in the event of a national emergency or in the interest of industrial mobilization; and (*c*) the need to limit competition to a single manufacturer for technical equipment when standardization and interchangeability of that manufacturer's parts are necessary in the public interest. The authority to limit competition to maintain the defense mobilization base is not a guarantee by the Government to keep certain firms in business; however, it is a method to keep industrial capacity available to the Government at a minimum cost subject to the availability of appropriated funds. It in no way prohibits the Government from using competitive methods to obtain needed capacity; on the contrary, the use of competitive methods to obtain such capacity is preferred, but may not always be feasible.

Subsection a(2)(B) sets forth procedures for the award of contracts stemming from the acceptance of unsolicited proposals. The committee inserted this provision so that the Government could benefit from truly innovative ideas generated by the private sector, primarily in the research and development fields. Unsolicited proposals are not merely advance proposals preempting a specific agency requirement which normally would be fulfilled by competitive purchasing methods.

An unsolicited proposal within the meaning of this subsection is one which meets all of the following conditions:

(1) It is furnished entirely at the initiative of the offeror;

(2) It is highly innovative and the product of original thinking;

(3) It is of such unique character as to be unavailable elsewhere; and

(4) It clearly contributes to the agency's mission by meeting a specific need or by strengthening its base of technology.

Agency evaluation of an unsolicited proposal is to include, among other factors: (1) The unique or innovative ideas which have originated with, or are assembled together in the proposed effort, (2) the overall merits of the proposed activity, (3) the potential contribution the proposed effort will make to the agency's specific mission if pursued at this time; and (4) the unique capabilities which the offeror possesses and offers which are integral factors in achieving the proposed objective.

Favorable evaluation of unsolicited proposal is not in itself, however, sufficient justification for the award of a contract. If a document qualifies as an unsolicited proposal but the substance of the proposed: (1) is available to the Government without restriction from another source, or (2) closely resembles that of a pending competitive solicitation, or (3) is otherwise not sufficiently unique to justify acceptance, then the unsolicited proposal is not acceptable. The intent of the publication requirement is to cause public awareness of agency requirements and to build the competitive base for future acquisitions. At the same time, however, the publication requirement should not be used to disclose the innovative or proprietary properties of the unsolicited proposer, since this would be self-defeating to the objective of encouraging innovation.

Subsection (b) is intended to provide the Government with the capability to broaden the competitive base in future acquisitions if a noncompetitive contract is awarded. For example, this section provides authority to insert an optional deferred ordering provision for technical data packages into contracts awarded under this section. The Defense Department Authorization Act for fiscal year 1977 [36] required the Defense Department to insert such a provision in each contract for a major weapons system. The application of this section is not limited to major weapons systems. The language of this section does not mandate action, it merely reserves the Government's right to take action to use competition to award Government contracts. The methods by which agencies may broaden the competitive base for future acquisitions is not spelled out. Here, the Administrator for Federal Procurement Policy will have latitude to explore alternative techniques available under law.

Section 305—Price and cost data and analysis.—The basis for this section is the Truth in Negotiations Act (Public Law 87–653), which amended the Armed Service Procurement Act to require the Defense Department to examine contractor cost and pricing data to assure itself of the reasonableness of a negotiated contract. The objective of

[36] Public Law 94–361, U.S. Department of Defense Authorization Act for 1977, Section 805, 94th Cong., 2d Sess. See also Conf. Rept. 94–1004, pp. 11–12.

this section is to assure truth in negotiations by requiring contractors to submit data pertaining to the contract price which is accurate, complete, and current as practicable. This section gives the Government the right to adjust contract prices in order to compensate for information which is incomplete, inaccurate, or out of date, and which resulted in a higher price, fee or cost than otherwise would have occurred.

This section extends the requirements of the Truth in Negotiations Act to all executive agencies and raises the dollar threshold therein to account for the current purchasing power of the dollar. It further distinguishes situations where price data will allow the Government to assure itself of the reasonableness of negotiated prices from those situations where cost data is necessary to achieve that purpose. The committee is of the opinion that this distinction has become blurred in current practice, resulting either in the provision of unnecessary data or in the provision of insufficient data to assure the reasonableness of the negotiated price.

Subsection (a) sets forth the definitions of cost data, price data, cost analysis, and price analysis. The fundamental distinction between cost data and price data is that the latter does not require a proposed price to be broken down into its component cost and profit elements. Price analysis means looking at the contractor's past and present prices and his competitor's prices—in essence, a review of the current market price. In this regard, it is not the responsibility of the contractor to furnish his competitor's prices to the Government. Cost analysis means a detailed examination of a proposed price based on an element by element review of the cost and profit components which together constitute the price—for instance, direct labor and material costs, overhead costs, general and administrative costs.

Subsection (b) states that the analysis of price data shall be used to evaluate the reasonableness of prime contracts and modifications thereto where: (1) the contract 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) where there has been a recent comparable competitive acquisition. In these situations the contracting officer can reasonably rely on the examination of prices in the competitive marketplace to assure itself of the reasonableness of the price quoted or negotiated. For purposes of this section, "recent" means in the last 12 months and "comparable" means for essentially the identical product or service.

Subsection (c) extends the price analysis tests of subsection (b) to subcontracts. For example, a prime contractor who is required to submit cost data may purchase commercial-type products from a subcontractor. In these situations, price analysis may be expected to assure the reasonableness of the subcontract price.

Subsection (d) sets forth the conditions which require the submission of cost data.

Subsection (e) requires the Office of Federal Procurement Policy to issue regulations setting forth circumstances where cost data submission may be required in lieu of the analysis of price data. Circumstances under which cost data might be necessary would include a noncompetitive procurement in an amount less than $500,000 where there is no price history and where cost analysis would be the only

way to determine that the price to the Government is reasonable. This provision will allow the Government to obtain cost data when it finds that price analysis is inadequate to establish a fair and reasonable price in particular acquisition situations.

Subsection (f) states that the Office of Federal Procurement Policy may issue regulations which authorize the written identification of cost data or price data in lieu of actual submission. Identification in writing should be used only in situations where the characteristics and availability of data are clearly adequate to establish a fair and reasonable price.

Subsection (g) states that each contract for which cost data or price data are required is to contain a provision giving the Government the right to adjust the contract price downward if the price was significantly increased because of inaccurate, incomplete, or noncurrent data. This requirement is intended to extend to subcontracts as well. In arriving at the amounts of price adjustments, it is not intended that overstated costs be reduced or eliminated by an "offsetting" understated costs.

Current law requires that all data submitted be certified as to its accuracy, completeness, and currency. The committee felt that this certification requirement was an unnecesary paperwork requirement which did not enhance the Government's ability to adjust contracts found later to be based on faulty data, and therefore eliminated it. The elimination of this certification requirement in no way affects the Government's authority to adjust contract or subcontract prices under his section. Also, it does not preclude the Administrator for Federal Procurement Policy from later providing for certification should experience show the need therefor. Finally, OFPP should develop guidelines to assist in determining when data submitted is current for purposes of this section.

Subsection (h) exempts from all submission requirements those contracts or subcontracts where the price was negotiated through adequate price competition, or where the price is established by law or regulation. In the first instance, the government has been able directly to use the competitive forces of the marketplace to assure itself of the reasonableness of the negotiated price. The section further allows the agency head in exceptional cases to waive the requirements of this section upon stating his reasons therefore.

Section 306—Access to records.—This section establishes agency access to contractor records and sets forth the Government's authority to inspect the contractor's or any subcontractors plants. This section follows current statutory authority contained in chapter 137 of Title 10, United States Code.

Authority under this section extends for 3 years after final payment under a contract negotiated or awarded under title 3 of this act. It is the intent of the committee that the 3-year authority apply to subcontracts as well as to prime contracts.

Subsection (b) provides for GAO access to records authority and further allows Agency heads to waive the examination of records authority for contracts with a foreign contractor or subcontractor. To do so, an agency head must determine, with the concurrence of the Comptroller General, that such waiver would be in the public interest.

As is true under current law, the concurrence of the Comptroller General need not be obtained when: a foreign contractor is precluded by the laws of its country from making its records available for examination, or when an agency head determines, after taking into account the price and availability of property or services from U.S. sources, that the public interest would not be served by applying this subsection. In the second instance, the agency must furnish a written report to the Congress. It is the intent of the committee that any determination under this subsection be made only by the Agency head.

Subsection (c) requires agencies to eliminate multiple inspections and examinations of a contractor's or subcontractor's records to the maximum extent practicable by coordinating inspections and examination responsibilities. Regulations issued by OFPP will guide the application of this section. In this regard, the committee envisions the use of a "lead agency" concept, whereby one agency shall conduct inspections and examinations of a particular contractor's records for all agencies.

The purpose of such inspections and examinations is to evaluate the accuracy of cost data or price data submitted under section 305, and to insure efficient or economical contract performance. This section is not to be interpreted as preventing executive agencies from conducting "should cost" studies using the access-to-records authority contained in Section 306 (a). Such studies constitute a valuable tool in evaluating contractor performance.

TITLE IV—ACQUISITION BY SIMPLIFIED SMALL PURCHASE METHOD

Section 401—Criteria for use.—This section states that simplified small purchase procedures may be used whenever the anticipated total contract price of the product or service does not exceed $10,000. However, it allows the contracting officer to use competitive sealed bidding or competitive negotiations when it would be more advantageous to the Government.

Section 402—Solicitations and awards.—Section 402 requires the office of Federal Procurement Policy to issue simplified procedures for small purchases. Such procedures ought to be designed to reduce the administrative cost of acquisition both for the Government and for the supplier. The use of small purchase procedures does not obviate the need to obtain effective competition consistent with the size of the purchase. Neither is it intended to eliminate the need to broaden the competitive base. Most importantly, it is not intended to reduce effective screening of such purchases for application to small businesses, through set asides or other programs designed to assist small business.

TITLE V—GENERAL PROVISIONS

Section 501—Contract types.—This section bans the use of the cost-plus-a-percentage-of-cost method of contracting under any circumstances.

Current laws contain a similar absolute prohibition against this method of contracting, and the committee agrees with the recommen-

dations of the Commission on Government Procurement that this prohibition should be continued.[37]

The right to use the most suitable type of contract is an inseparable adjunct to the right to acquire products and services by negotiation. This section states that contracts may be of any type or combination of types which will promote the best interests of the Government, consistent with the technical and financial risks involved. This secion further states that, consistent with the nature of the work and the degree of risk involved, the preferred contract type shall be fixed price.

Current law provides for the use of cost type contracts, but only following a determination that such use is likely to be less costly to the Government and that it is impracticable to obtain the required products or services except under such a contract.[38] The Procurement Commission found that such determinations are usually purely speculative, and result in stereotyped findings which merely repeat the language of the statutory requirements.[39] The committee recognizes that, in certain circumstances, the nature of the work or the uncertainties faced by the contractor make cost-type contracts, or contracts which allow for price adjustments after levels of risk have been determined, preferable to firm fixed price contracts.

While this act removes undue paperwork restraints against the use of cost-type contracts, it states a clear preference for fixed price contracts. In negotiated acquisitions, fixed price contracts ought to be used in most cases. They maintain greater control over Government obligations and they reduce the administrative costs associated with the use of cost type contracts. On the other hand, cost type contracts, are to be used only when they promise a clear advantage to the Government. Further, when the technical or financial risks of negotiated contracts are substantial, fixed price contracts for shorter work increments are generally preferred to large, long term cost-type contracts.

Section 502—Warranty against contingent fees.—The objective of this section is to guard against the possibility of a contractor retaining the services of a broker or agent to secure contracts from agencies upon a contingent fee or similar basis. This section requires each contract negotiated under title 3 or awarded as the result of the submission of a technical proposal under section 202(e) to contain a suitable warranty by the contractor that no person has been employed to solicit or secure such contract under an agreement which provides for such a fee. However, bona fide established commercial agencies, maintained by the contractor for the purpose of securing business, are exempted from this warranty. This section further requires all applicable contracts to stipulate that breach or violation of the warranty shall give the Government the right to annul the contract without liability or, in its discretion, to deduct from the contract price or consideration the full amount of such commission, percentage, brokerage or contingent fee. This section restates the current statutory prohibition on such activities as set forth in chapter 137 of title 10, and in chapter 4 of the Federal Property and Administrative Services Act of 1949.

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[37] The "Report Of The Commission On Government Procurement," Volume 1, p. 21, Government Printing Office, December 1972.
[38] *Ibid.*, p. 2.
[39] *Ibid.*, p. 40.

Section 503—Cancellations and rejections.—This section allows an agency, for cogent and compelling reasons, to cancel a small purchase order, an invitation for sealed bids or a request for proposal. Current law (chapter 137 of title 10, United States Code; 10 U.S.C. 230 5(c) 41 U.S.C. 253(b)) provides agencies with this authority, provided its exercise is in the public interest. The committee has added the cogent and compelling test to prevent the arbitrary or inappropriate exercise of this authority, while insuring that the executive agency retains its authority to cancel or reject offers, when to do so would be in the public interest.

Traditionally, the Comptroller General and the courts have recognized that the preservation of the integrity of the competitive bidding system dictates that after bids have been opened, award must be made to that responsible bidder who submitted the lowest responsive bid, unless there is a compelling reason to cancel the invitation. For example, in *Massman Construction Company* v. *The United States*, 102 Ct. Cl. 699, 719 (1945), the court held "[t]o have a set of bids discarded after they are opened and each bidder has learned his competitor's price is a serious matter, and it should not be permitted except for cogent reasons." Similarly, in 40 Comp. Gen. 671 (1961), GAO found that cancellation of a solicitation due to a typographical error in the specifications was not justified, when the facts showed that none of the bidders had been misled by the error.

Subsection (b) states that, when requested, the agency shall fully inform any unsuccessful offer or bidder why his bid or offer was rejected.

Section 504—Multiyear Contracts.—This section provides for the use of multiyear contracting for the acquisition of property or services with annual appropriations for periods not in excess of 5 years.

Currently, multiyear contracting is generally used only when specifically authorized by statute or in the expenditure of "no year" or multiyear appropriations. The Procurement Commission and the General Accounting Office both recommended conferring the authority to enter into multiyear contracts to all executive agencies, recognizing that its use can increase effective competition and reduce costs to the Government.[40] Increased competition is obtained by allowing contractors to spread out initial non-recurring costs over a longer period of time, thereby enabling more firms, especially small firms, to compete for contracts. Reduced costs result from eliminating the startup and winddown costs associated with 1-year contracts, and by reducing the administrative costs associated with annual reprocurements. Multiyear contracts for services also help to stablize the contractor work force, thereby reducing training costs and providing a sustained quality of service from year to year. Finally, granting broader authority for multiyear contracting will not substantially diminish congressional control over agency expenditures. Such control still may be exercised during the authorization and appropriations process.

Qualification of the authority for the use of multiyear contracts by the phrase "Except as otherwise provided by law . . ." is to insure

[40] The "Report Of The Commission on Government Procurement," Volume 1, pp. 27–28, Government Printing Office, December 1972 (5255–00002). See also "Federal Agencies Should Be Given General Multiyear Contracting Authority For Supplies And Services," Report to the Congress by the Comptroller General of the United States, January 10, 1978 (PSAD–78–54).

that the provisions of Public Law 92–582 will continue to control the procurement of ADP equipment by the General Services Administration (GSA). There is no intent to limit or preclude the use of multiyear contracts for other supplies and services.

This section states that an agency shall not use the authority in this section unless appropriations are available and adequate for contract payment for the first fiscal year. Further, prior to the exercise of the authority in this section, the agency head must determine that: (1) the requirement for the property or service is firm and will continue over the entire proposed contract period; (2) the use of a multiyear contract will promote the interests of the United States by encouraging effective competition and promoting economies in operation; and (3) the use of multiyear contracting will not inhibit small business participation.

Multiyear contracts are properly used only to purchase reasonably firm and clearly specified requirements which, according to agency plans, will remain unchanged during the term of the contract. In like manner, multiyear contracts generally are to be used only when the acquisition will require substantial initial costs, either in the form of substantial investments in plant or equipment or assembling and training a work force.

A major benefit of this broadened authority to use multiyear contracts is to increase contracting opportunities for small business by allowing them to spread their initial costs over longer periods of time. The benefits are negated however if, for example, a multiyear contract consolidates a number of individual activities or contains a large bonding requirement. Such requirements actually act to inhibit small business participation and are to be avoided unless special steps are taken, such as set-asides of portions of the work or special bonding considerations for small businesses, to assure effective small business participation.

Subsection (b) allows the Administrator of Federal Procurement Policy to grant exceptions to the 5-year limitations imposed in subsection (a), provided the agency head certifies that an exception is in the best interests of the Government. Exception may be granted only on a contract by contract basis, and are appropriate only when there is a firm known requirement for a period longer than 5 years, and a multiyear contract would produce significant benefits to the Government. Copies of each exception and certification should be delivered to appropriate Congressional committees.

Subsection (c) states that, if a multiyear contract is canceled or terminated, the costs of cancellation or termination must be paid from: (1) appropriations originally available for the performance of the contract in question; or (2) appropriations currently available for the acquisition of similar property or services, or (3) appropriations made available expressly for such payments.

Section 505—Advance, partial, and progress payments.—This section permits executive agencies to make advance, progress, partial or other payments under contracts.

The authority to make such payments is essential during periods of national emergency and in peacetime when contractors who possess skills needed by the Government cannot obtain the necessary financial support from normal commercial sources. Occasionally institutions

of learning, research laboratories, inventors, and similiar contractors who perform experimental, research or development contracts do not have sufficient funds to finance such contracts completely out of their own resources.

Subsection (b) states that provisions limiting advance and progress payments to small business concerns may be inserted into solicitations. This provision is consistent with the congressional policy of promoting small businesses as stated in Public Law 85–800. The provision of such payments makes it possible for small businesses to compete for Government contracts on a more equal footing with larger firms. Advance and progress payments shall be granted to small businesses to the extent practicable under the circumstances existing for each acquisition.

The authority to make advance or partial payments is discretionary with the agency, and under no circumstances shall they exceed the unpaid contract price.

Subsection (d) is intended to insure that progress payments do not exceed the costs incurred and paid for by the contractor as of the date the progress payment was requested. Upon making such payment, the Government obtains title to the inventory reflecting such payment. That title may not be divested by any action of the contractor, nor may it be encumbered by any lien or security interest.

Subsection (e) states that advance payments may not exceed the amount required for contract performance, and may be made only upon adequate security and an agency determination that to do so would be in the national interest. The intent of this requirement is to insure that advance payments are used for actual contract performance and granted only when necessary for contractual performance. Security may take the form of a lien on the property contracted for, on the balance in the account where the advance payments are deposited, and on property purchased for contract performance. This lien is paramount to any other lien. This lien may be very useful, especially in the event that a joint bank account, or a special bank account is established in connection with the advance payment.

Section 506—Remission of liquidated damages.—Section 506 permits the Comptroller General, in his discretion, upon proper recommendation by the agency concerned, to remit sums due the Government under contract terms providing for the assessment of liquidated damages for a delay in performance. This will permit the Comptroller General to meet those situations in which strict application of the liquidated damages provisions would be inequitable either in whole or in part, regardless of whether timely notice was given with respect to the delay.

Section 507—Determinations and findings.—Subsection (a) provides that determinations, finding, approvals, and decisions provided for in this act shall be final. It is the considered view of the committee that where the agency, acting in good faith, makes a determination or decision reasonably supported in fact and law, such determination should be final.

This subsection also provides that determinations may be made with respect to classes of contracts as well as to contracts individually. For

example, a determination to use a detailed product specification for spare parts acquisition need not be made in each purchase. On the other hand, determinations related to noncompetitive contracts as provided in section 304 are not to be made for classes of purchases, but on a contract by contract basis.

Subsection (b) states that each determination, approval or decision shall be based on the written findings of the officer making the determination, and shall be retained in the official contract file.

Current law (10 U.S.C. 2310(b); 41 U.S.C. 257(c) requires such documents to be kept available in the agency for at least 6 years after the date the determination or decision was made, and that copies of the findings be submitted to the General Accounting Office with the contract. The committee believes that such matters are more appropriately handled by administrative regulations.

Section 508—Collusive bidding information.—This section requires agency employees who have reason to believe that a bid, proposal or offer may be in violation of the antitrust laws or of this legislation, to refer the matter to the Justice Department in accordance with agency procedures.

It further requires the agency to make available to the Justice Department any information the Justice Department considers relevant to an investigation or any other action by the United States under laws enforced by the Attorney General. Finally, this section requires agencies to render assistance to the Justice Department when needed. This section will facilitate appropriate action where violations exist and will have a valuable deterrent effect on bidders.

Section 509—Government surveillance requirements.—This section allows contractors who conduct the preponderance of their business activity commercially and under competitive Government contracts to obtain a waiver from certain Government reviews of internal contractor operations. The intent of this provision is to focus Government review of contractor operations on those firms performing a large amount of noncompetitive work for the Government.

It is important to keep in mind that the waiver in this section does not touch Government controls over individual contracts, and that all contractor costs must be legal and necessary for contract performance to be recoverable. The waiver is not intended to provide relief for those large contractors who hold millions of dollars in noncompetitive Federal contracts, nor for those contractors who conduct a significant amount of business through noncompetitive contracts. On the contrary, this provision will focus surveillance efforts on these firms. The contractors who will benefit from this waiver will be small companies who operate largely in a competitive environment.

To obtain the waiver, a contractor must pass both parts of a two part test. First the contracting agency looks at the volume of noncompetitive contracts a contractor has. If that volume is greater than $10 million, then the contractor cannot obtain the waiver under any circumstances. If the amount is less than $10 million, then the agency looks at the contractor's total revenues for its most recent fiscal year. If the noncompetitive Government contracts amount to 25 percent or more of total revenues, then the contractor may not obtain the waiver. If noncompetitive Government contracts total less than 25 percent of total

revenues, than the contractor obtains the waiver. In this regard, the balance of a contractor's business may be entirely commercial, or conducted entirely under competitive Government contracts or may represent a combination of the two. The provision of such information is the responsibility of the contractor.

To be considered competitive for purposes of obtaining the waiver, Government contracts must be either firm-fixed price or fixed-price with escalation, with price the deciding factor in the award. Sole source Government contracts shall not be considered competitive for purposes of this waiver. The bill as introduced afforded a broader definition to "competitive" Government contracts for purposes of obtaining a waiver. The committee subsequently narrowed the definition of competitive Government contracts in response to suggestions offered by the Comptroller General. Competitive Government contracts now include only those which are competitively awarded with price the deciding award factor, and which assign all risk to the contractor.

This section further allows individual segments (i.e., business units) of a corporation which are separately managed and accounted for to obtain the waiver. The committee included this provision to recognize the diversity of activities in which the modern corporation becomes involved. The committee rejected the notion that the waiver of surveillance should be applicable to all of a corporation's activities if 75 percent of total corporate revenues were commercial and/or competitive Government contracts. Such an approach could allow divisions of a corporation which otherwise could not pass the two-part test to obtain the waiver by default. In the same way, the committee rejected the suggestion that failure by one corporate segment to meet the waiver test should preclude all corporate segments from obtaining the waiver. The presence of such controls over one corporate segment does not in itself necessitate their extension to all other segments. Nor does it act to reduce the contractor's cost of establishing procedures to meet those surveillance requirements in other segments which otherwise would be eligible to obtain the waiver.

Subsection (b) prevents a contractor from obtaining a waiver under any circumstances if he held more than $10 million in noncompetitive Government contracts in his most recent fiscal year. The bill as introduced did not contain such a limitation, and was amended in response to suggestion offered by the Comptroller General. While in certain situations that amount may represent a small fraction of contractors total revenues, the committee agrees with the Comptroller General that the size of the Government interest is sufficient to necessitate the imposition of these surveillance requirements upon the contractor.

Subsection (c) lists the five surveillance-type requirements from which eligible contractors may obtain waivers. Contractors may obtain waivers from any or all of the requirements listed.

The first concerns agency reviews of contractor management and procurement systems. Agencies reviews of contractor procurement systems are conducted as a supplement to and substitute for individual contract auditing to determine the efficiency of a contractor's purchasing system.

The committee is of the view that a contractor who operates largely in a competitive environment will be properly motivated to establish

purchasing and other internal management systems which will accomplish much more effective control of costs than will detailed systems reviews by Government personnel.

Other requirements which may be waived by this section are agency determinations of the reasonableness of indirect contractor overhead costs, and advance agreements setting recovery ceilings for certain types of indirect overhead costs (such as independent research and development; bid and proposal costs). The Department of Defense, under its Contractor's Weighted Average Share-in-Cost Risk (CWAS) program, provides a waiver of agency audits of the reasonableness of contractor's indirect overhead costs if a contractor reaches a specified substantial level of risk in his total business operations. Here again, the committee feels that a contractor operating in a competitive environment will be forced to develop effective controls over such types of costs for his entire operation. Independent research and development costs and bid and proposal costs also form a part of a company's indirect overhead costs, and, in a firm fixed price contract, are incorporated into the contract price. Regulations currently require the negotiation of a ceiling for such costs for cost reimbursement purposes. That ceiling is then uniformly allocated over the company's total Government and commercial business and recovered proportionately through Government and commercial sales. The waiver for this requirement is consistent with the thrust of the recommendation of the Commission on Government Procurement, although the eligibility tests set forth here are more stringent.[41] The underlying principle remains the same: a contractor who is subject to the forces of the competitive marketplace will have greater incentive to control his overhead costs since such costs are largely incurred at his own risk. The basic effect of this section is to give statutory recognition to existing executive branch regulations, and is consistent with the legislation's objectives of substituting effective competition for regulatory controls.

This section would further allow eligible contractors to obtain a waiver from the requirements of the Cost Accounting Standards Act (Public Law 91–379) and from provisions of the Renegotiation Act. The Cost Accounting Standards Act requires defense contractors to treat certain costs in a uniform, consistent manner. As a result of this requirement, contractors may be required to establish a separate accounting system for Government contracts, a costly burden for a business with a small amount of Government contracts. The Renegotiation Act allows the Government to renegotiate certain contracts to eliminate excess profits. In both instances, the committee feels that the costs of applying these requirements, both to the Government and to the contractor, must be weighed against potential benefits accrued.

Subsection (d) sets a 2-year limit on the waiver period, at which time it must be reconsidered by the agency before being reauthorized. It further allows an agency to cancel the waiver at any time or to withhold it altogether provided the agency head states his reasons for doing so in writing. An agency may cancel or withhold a waiver at its discretion, although cancellations would be on a prospective basis only and could not be made retroactive. Reasons for canceling or withhold-

[41] The "Report Of The Commission On Government Procurement," Volume 2, pp. 31–42, Government Printing Office, December 1972.

ing a waiver may include, but are not limited to, concern that a contractor is reorganizing his corporate structure specifically to qualify for eligibility under section 509(a), concern over past contractor performance, a contractor's competitive position, future or follow-on contracts or the special nature of the contractor's work.

In addition OFPP should establish regulations which require contractors who obtain the waiver promptly to notify all contracting agencies of the award of any new Government contract which raises the amount of the contractor's noncompetitive contracts above $10 million. In such cases the waiver is to be cancelled.

Subsection (e) states that this section shall not affect the authority of the General Accounting Office to examine a contractor's records, as set forth in section 306 of this act.

Section 510—Maintenance of regulations.—This section keeps existing laws and regulations in effect for 2 years after the enactment of this bill, or until repealed by the Administrator for Federal Procurement Policy whichever is earlier. The objective of this section is to provide for the orderly transfer of procedures during the 2-year period in which a new consolidated regulation is being issued. For purposes of this section, regulation includes not only the Federal procurement regulations and the armed services procurement regulation, but individual agency procedures, including specifications. The section further provides that no regulation preserved by this section may be amended without the prior approval of the Administrator for Federal Procurement Policy.

Except for titles VII, VIII, and IX, no provisions of this bill shall become effective until implemented in regulations issued by the Office of Federal Procurement Policy. Instead of promulgating the entire single regulation implementing the act at one time, the Administrator for Federal Procurement Policy may choose to promulgate individual sections of that single regulation as they are developed, in which case some provisions of the act will be implemented before others, at the discretion of the Administrator. In particular, section 511, "Payment of Funds Due," and section 516, "Limitation on Contract Claims," shall not become effective until regulations implementing those sections are issued, and shall be applicable only to contracts awarded after such date.

Section 511—Payment of funds due.—This section provides for the insertion of a clause in each contract awarded by the United States under this act which calls for interest to be paid on any amount due the contractor for more than 30 days. No amount is considered due until the Government receives a proper invoice and any other required substantiating documentation. Interest payable shall be that established for the Renegotiation Board as of a date 30 days after the date the amount becomes due.[42]

The purpose of this section is to require the Government to pay its bills in a timely manner. Late payments act to undermine public confidence in the efficiency of the Federal Government, and have a serious impact on small businesses, who cannot carry large amounts of accounts receivable for a great length of time. These problems surfaced

[42] 50 U.S.C. App. § 1215(b)(2).

in hearings held before the Senate Small Business Committee in August 1977.[43]

The "amount due" means the amount due in payment for materials or services furnished under the contract. It specifically does not mean any interest payment due, and there shall be no payment of interest on any overdue interest payment. This is because interest payments will most likely be processed and certified in a manner different from other payment procedures, and the amounts for payment might not be immediately available.

To facilitate implementation of this provision, agencies must indicate where invoices or other payment request documents are to be presented and what substantiating documents are to be provided. Regulations should provide for the expeditious resolution of claims resulting from this provision, and give consideration to the cash management practices of the Treasury Department.

Section 512—Publication of interest.—This section requires publication of all proposed acquisitions greater than $10,000 in the Commerce Business Daily immediately after the necessity for the acquisition is established. The intent of this publication requirement is to promote effective competition, offer increased opportunities to small businesses, and generally broaden industry participation in Federal contracting. This section should not be construed as precluding the use of other forms of publicity. On the contrary, agencies should actively seek ways to maximize the dissemination of information regarding proposed acquisitions in a timely manner. Publications of proposed acquisitions which are not timely or which are not sufficiently descriptive do not fulfil the intent of this provision. In developing regulations implementing this section, the Administrator for the Office of Federal Procurement Policy, in consultation with the Commerce Department, the Small Business Administration, and procuring agencies, should reduce delays in the preparation, transmittal and publication of information in the Commerce Business Daily.[44]

This section further provides a waiver for publication requirements in six classes of acquisitions: (1) those which for security reasons are of a classified nature; (2) those which involve perishable subsistance supplies; (3) those which are of an unusual and compelling emergency nature; (4) those made by an order under an existing contract; (5) those made from another Government agency or from a mandatory source of supply; and (6) those for which it is determined in writing, with the concurrence of the Administrator, Small Business Administration, that publication is not appropriate or reasonable.

This section is based on a provision of the Small Business Act (15 U.S.C. 637(e)). This section repeals that provision, and incorporates it into this act with two changes. First, it sets a uniform dollar threshold for publication requirements with Government-wide applicability. Currently, defense agencies must publicize acquisitions greater than $10,000, and civilian agencies must publicize acquisitions greater

[43] "Late Payments To Contractors By Federal Agencies," hearing before the Select Committee on Small Business, United States Senate, 95th Cong., 2d Sess., August 26, 1977. See also "The Federal Government's Bill Payment Performance Is Good But Should Be Better," Report to the Congress by the Comptroller General of the United States, February 24, 1978 (FGMSD–78–16).

[44] "A Report Of The Commission On Federal Paperwork/Procurement," pp. 70–76, Government Printing Office, June 10, 1977.

than $5,000. Second, it eliminates four of the current exceptions to the publication requirement: Acquisitions involving utility services, personal or professional services, services from educational and institutions, and solicitations requested exclusively from foreign sources. The committee is of the opinion that the elimination of these exceptions will promote competition and enhance wider participation without adversely affecting agency requirements.

Section 513—Revisions of thresholds.—This section states that the Administrator for Federal Procurement Policy shall review the prevailing costs of labor and materials at least every 3 years. If such costs have increased or decreased by at least 10 percent, then certain dollar thresholds cited in the act may be adjusted accordingly. These are:

(1) The $500,000 threshold for the submission of data in section 305;

(2) The small purchase procedures ceiling in section 401;

(3) The eligibility ceiling for the surveillance waivers cited in section 509; and

(4) The threshold for publication in the Commerce Business Daily cited in section 512.

The purpose of this section is to insure that thresholds continue to reflect purchasing power of the dollar. In no way does this section authorize the Administrator for Federal Procurement Policy to revise thresholds cited in any other provisions of law related to the Federal acquisition process, such as those in the Davis-Bacon Act. The section further requires that Congress be notified at least 60 days prior to any revision which by itself or together with prior revision, represents a 50-percent increase in these thresholds. Once a revision representing a 50 percent or more increase is reported to Congress, that revised amount shall be the threshold for reporting any future 50 percent or more increases to Congress.

Section 514 Sunset for Specifications—This section states that all specifications, both functional and detailed, are to be reviewed every 5 years and canceled, reauthorized, modified or revised based on the review. The intent of this provision is to insure that Government purchase descriptions do not become obsolete. Procedures established by OFPP are to set timetables for specification reviews and monitor agency compliance with this provision. Any detailed specification reauthorized or revised as a result of review pursuant to this section is subject to the prior agency level approach called for in section 202(d) and 302(e). It is anticipated that agencies shall take appropriate steps to insure that all specifications will not be subject to review under this provision in the same year.

Section 515—Minority Business Participation.—This section requires the Administrator for Federal Procurement Policy, in consultation with the Small Business Administration, to periodically review executive branch acquisition activities to:

(1) Make minority business participation in Government contracting more effective; and

(2) Assure that minority businesses have full opportunity to compete for Federal contracts.

Executive branch strategies may include, but are not limited to, active solicitation of minority businesses by Federal contracting activities, set-aside programs, and dissemination of information regarding contracting opportunities with the Federal Government.

This section also states that targets should be set which reflect the Government's commitment to increasing minority business participation in the Federal contracting system. Use of "targets" concept in this provision is not intended to require or authorize the establishment of quotas for minority business participation. Such targets are to be set for agencies, not for individual contractors. The Office of Federal Procurement Policy in consultation with the Small Business Administration, is to review agency targets, assess agency efforts to meet those targets, and report its findings and recommendations to the Congress pursuant to section 102 of this act.

Section 516—Limitation on Contract Claims.—This section requires an executive agency to make any claims against a contractor under a provision of a contract awarded under this act within 6 years of the final date of payment. There is currently no statute of limitations for claims by the Government against the contractor under a contract.[45] Claims by the contractor against the Government under a contract are eliminated at the time of final payment. This provision will permit contractors to dispose of records after a reasonable period, thereby reducing costs for record retention ultimately borne by the Government. It will further motivate the Government to assess its claims and file them while evidence is still available. This limitation on claims is not intended to apply to warranties of longer duration or other differing provisions to which the parties to a contract may agree.

TITLE VI—DELEGATION OF AUTHORITY

Section 601—Delegation within an executive agency.—The intent of this section is to recognize that while agency heads are responsible for the actions of their agencies, they need not personally review and approve every procurement-related determination set forth in this act. Current law [46] allows the agency head unlimited authority to delegate most procurement decisions, including the determination as to when it is impracticable to obtain competition. No additional guidance is given as to the appropriate levels of delegation in this area, except under a limited range of circumstances (for instance, maintaining the mobilization base, standardization, and security considerations).

This legislation as introduced specified that the authority to make certain determinations be maintained at a level no lower than that of Head of Procuring Activity, a well-established position in the Department of Defense. However, there are substantial differences in the size and nature of individual agency acquisitions, as well as differing

[45] Public Law 89–505 added a new section 2415 to Title 28, United States Code. In its report accompanying this provision, the Senate Judiciary Committee Stated: "Subsection (a) of new section 2415 added by the bill provides for a 6 year limitation which would apply to all Government actions based on contracts whether expressed or implied in law or in fact . . . This provision would extend to obligations which are based on quasi-contracts. In all such contract matters, the actions would be barred unless it were brought by the Government within 6 years after the right of actions accrues, or within one year after a final decision in a required administrative proceeding, *whichever is later.*" (Emphasis added.) See Senate Report 89–1328.

[46] See 10 U.S.C. 2304 (a) (10). See also 10 U.S.C. 2311.

interpretations of the term "head of procuring activity" in each agency. For example, the acquisition activity of the Department of Defense dwarfs that of the Civil Aeronautics Board. Consequently, establishing uniform delegation levels for all agencies through a statute was found to be inappropriate.

Specific delegations within individual agencies for different types of procurement decisions are best handled through regulations issued by OFPP. It is expected that OFPP will be conservative in implementing the requirements of this section to insure proper and meaningful review, and to protect the integrity of the process.

It is also expected that the OFPP regulation implementing this section, and any revision thereto, be subject to section 8(b) of Public Law 93–400, which requires transmitting a report concerning the proposed regulation, or any subsequent revision thereto, to the Senate Committee on Government Affairs and the House Committee on Government Operations, at least 30 days prior to its effective date.

This section limits delegating the authority to use detailed product specifications in section 202 and 302(e), to make determinations regarding noncompetitive procurements in section 304, and to make determinations involving price verification, access to data and surveillance in sections 305, 306 and 509.

This section also states that the authority to award a contract notwithstanding a protest pending before the Comptroller General not be delegated below the Assistant Secretary level.

The authority to make all of these determinations is always to be maintained at a level above that of the contracting officer. In setting specific delegation levels, OFPP should be guided by: (1) the size of the purchase involved and the nature of the determination; (2) the need to assure objective review of the determination; and (3) the importance of building public confidence in the integrity of the system.

The committee feels that the determination in section 304(a)(2)(A), that it is impracticable to publicize the agency's intention to solicit a sole source contract, is normally to be made at the Assistant Secretary level, in view of the congressional intent that noncompetitive awards be reduced.

Section 602—Joint acquisitions.—The intent of this section is to facilitate the acquisition of property or services by one executive agency for another, and to facilitate joint acquisitions. In order to effectively permit an agency to procure for another, or to permit both agencies to procure jointly, it permits the delegation of authority and assignment between agencies of acquisition responsibilities. The decisions and determinations as required in section 507 of the bill will normally be made by the agency actually doing the purchasing, pursuant to section 601, based on information submitted by the agency for which the materials are being purchased.

This section further permits the purchasing agencies to make actual obligations against allotments of funds made administratively by the agency for whom the purchase is being made. Current statutory authority for this provision exists in chapter 137 of title 10, United States Code (10 U.S.C. 2308–2309) for military agencies. This section extends that authority to those agencies named in 31 U.S.C. 686.

TITLE VII—PROTESTS

Title VII provides to the fullest extent possible for the inexpensive, informal, and expeditious resolution by the Comptroller General of protests filed with the General Accounting Office, and relating to the award or proposed award of contracts.

Section 701—Purpose.—This section recognizes the General Accounting Office's existing authority, under the Budget and Accounting Act, 1921, as amended, to decide those bid protests submitted to that Office. The Budget and Accounting Act, 1921, as amended, gives the GAO the authority to settle public accounts, Section 701 recognizes the role that the GAO has played pursuant to the Budget and Accounting Act, in the area of bid protests for the last 50 years. This section defines "protest" as a challenge by an interested party to a solicitation, or to the award or proposed award of any contract which is financed by appropriated funds for the acquisition of property or services or for any sale or lease by the Government.

Protest determinations by the Comptroller General effectively state whether contract expenditures are legal and in accordance with regulations controlling the expenditure of public funds. Such advance rulings prevent unauthorized, erroneous payments in connection with account settlement.

Several important functions are served by the GAO's role in resolving bid protests. It provides an independent forum for such resolutions, thus assuring unbiased consideration of contractor's complaints and promoting public confidence in the conduct of Government business. Due to its historic role in this area, the GAO has developed special competence and expertise in dealing with award protests.

A protester always has the option to lodge a protest with the contracting agency involved.

Section 702—Jurisdiction.—Section 702(a) states that the Comptroller General shall have the authority to decide any protest submitted by an interested party or referred by any agency. The Comptroller General's decision must be in accordance with the procedures issued pursuant to section 704. It defines interestd party as any individual who would suffer a direct economic effect, as contractor or subcontractor, by the award or nonaward of the contract.

Section 702(b) generally prohibits the award of a contract which is the subject of a bid protest pending before the Comptroller General. This section allows, however, for award if there is a written finding that the interest of the United States requires the award and the Comptroller General is advised of this finding.

Current executive branch policy in this area varies from agency to agency. This provision would unify and coordinate executive policy. It would also strengthen the effectiveness of the GAO in resolving protests while insuring that the agencies retain the flexibility to move ahead with critical purchases.

Section 702(c): This provision permits the Comptroller General to declare whether a solicitation, proposed award, or award protested to him under this title comports with law and regulation. This will promote further the effectiveness of the GAO in resolving protests.

Section 703—Proceedings.—Section 703(a) declares that the Comptroller General shall provide for the inexpensive, informal, and ex-

peditious resolution of protests. This is necessary due to the time-sensitive nature of Government contract awards.

Section 703(b) requires that each decision be signed by the Comptroller General or his designee. Such resolution of a protest is issued under the Comptroller General's authority to settle accounts. This provision maintains the status quo of the existing authority of the Comptroller General over the settlement of accounts conferred by the Budget and Accounting Act, 1921, as amended.

The bill as introduced provided that decisions of the Comptroller General would be binding upon all interested parties. The committee, however, has amended section 703(b) to provide that protest decisions "shall be issued under the authority of the Comptroller General to settle the acounts of the Government under the Budget and Accounting Act, 1921, as amended."

Section 703(c) prohibits ex parte proceedings. However, informal contacts with the parties for procedural purposes are not precluded.

Section 703(d) gives the Comptroller General authority to dismiss protests when the protestor has no valid claim. In this way, the Comptroller General can avoid unfounded, frivolous claims and the imposition of dilatory tactics by a protestor.

Section 703(e) permits the Comptroller General to award costs of bid preparation to the successful protestor if he determines that a solicitation, proposed award, or award of a contract does not comport with law or regulation. The initial determination of the amount of such costs may be remanded by the Comptroller General to the executive agency involved, as is the case in current practice. Monetary awards are to be paid promptly out of funds available for that purpose by the agency concerned.

Section 704—General provisions.—This section requires the Comptroller General to issue procedures to implement the protest decision function. The legislation recognizes GAO's long history of sensitivity to agency exigencies, with the expectation that such sensitivity will continue. The Comptroller General is also authorized to delegate his authority to other officers or employees of the GAO.

Section 705—Judicial review.—This section allows for judicial review, by an aggrieved person of any action or inaction of an executive agency or the Comptroller General. Such review is permitted to the extent provided by title 5, United States Code, sections 702–706, including determinations necessary to resolve disputed material facts or when otherwise appropriate. Persons adversely affected by agency action or by protest decision of the Comptroller General regarding solicitation or contract awards should be able to obtain judicial review of those matters in the Federal district courts in furtherance of the remedies long provided by the judicial review provisions of the Administrative Procedure Act.

Factual determinations are provided for because the bid protest procedure by its nature does not always accord basic due process protections. Often, aggrieved parties have no opportunity for a trial-type hearing to establish disputed material facts and, thus, to develop a full record upon which a court could later rule.

TITLE VIII—APPLICABILITY OF SUBSEQUENT LAWS

Section 801—Applicability of subsequent laws.—This section states that any law enacted after the date of enactment of this act may not be construed as amending this act unless it explicitly does so. The Commission on Government Procurement found over 4,000 procurement-related provisions of law scattered throughout the United States Code. The objective of this provision is to attempt to codify and consolidate all future procurement-related statutes together.

Section 802—Separability.—This section provides that if any provision of this act, or the application of it to any person or circumstances is held invalid, such provision is separable from the rest of the act, and the remainder of the act shall not be affected, nor shall the application of such provision to other person or circumstances be affected.

TITLE IX—AMENDMENTS AND REPEALS

This title makes necessary conforming amendments and repeals. It is intended that the Administrator for Federal Procurement Policy will make additional recommendations for amendments and repeals to carry out the objectives of this Act in his annual report to the Congress.

Section 901—Amendments.—Section 901(a) eliminates the present requirement in 7 U.S.C. 6416 which limits the authority of the Secretary of Agriculture with respect to procuring specific agricultural materials. This amendment provides the Secretary with the more flexible procedures of the new Federal Acquisition Act of 1977, herein referred to as the "new act").

Section 901(b) deletes as unnecessary the phrase "in the open market" from 7 U.S.C. 430, 432.

Section 901(c) deletes the definition of "negotiate" at the end of 10 U.S.C. § 2356(b). In light of the new act of 1977, this definition is superfluous.

Section 901(d) deletes unnecessary and obsolete phrases from each of two sections, 10 U.S.C. 4504, 9504. The present effect of the stricken phrase is to allow flexibility, including the option to negotiate, in the procurement of the covered materials. These phrases are no longer necessary because the new act will provide adequate flexibility.

Section 901(e) also deletes phrases which, under the new act, are unnecessary and obsolete. The present effect of these stricken phrases is to allow flexibility, including the option to negotiate, under the particular circumstances addressed in 10 U.S.C. 4505, 9505. The new act provides such flexibility.

Section 901(f) eliminates reference, in 12 U.S.C. 1701c(b)(2), to 41 U.S.C. 5. The present effect of such reference is to provide flexibility in transactions involving the agencies and organizations covered by 12 U.S.C. 1701c(b). The new act allows adequate flexibility, and thus the phrase deleted is obsolete and unnecessary.

Section 901(g) eliminates reference, in 12 U.S.C. 1701z–2, to 41 U.S.C. 5. Section 1701z–2 authorizes the Secretary of Housing and

Urban Development to carry out the functions authorized in section 1701z–1, without regard to 41 U.S.C. 5. The phrase "without regard to section 5 of title 41," is eliminated in the new act because it is no longer necessary to provide flexibility. The new act allows for adequate flexibility.

Section 901(h) strikes the last proviso in 12 U.S.C. 1747g(h). The present effect of the stricken proviso is to allow flexibility, including the option to negotiate, in contracting for hazard insurance and in purchasing and contracting for supplies in amounts not in excess of $1,000. The proviso is deleted as unnecessary and obsolete since the new act will provide this flexibility. Current law, 41 U.S.C. 5 and 251 (c) (3), generally allows negotiation for purchase and contracts which are less than $10,000 and this threshold will be continued under the new act.

Section 901(i) eliminates any reference in 12 U.S.C. 1747k to 41 U.S.C. 5. The purpose of such reference is to give the Secretary of Housing and Urban Development the authority to negotiate in the circumstances covered in 12 U.S.C. 1747k. As a practical matter, however, negotiation is the only procedure through which this contracting power can be exercised, since this provision contemplates contracting with a particular State agency or department. Thus, reference to 41 U.S.C. 5 is not necessary. Authority to negotiate is provided for under the new act.

Section 901(j) eliminates the last sentence in 12 U.S.C. 1788(b). This sentence allows for flexibility, including the option to negotiate, in contracting for supplies in amounts not in excess of $1,000. The new act will provide for this flexibility. Current law, 41 U.S.C. 5, and 251 (c) (3), generally allows negotiation for purchases and contracts less than $10,000. This threshold remains in the next act.

Section 901(k) eliminates a provision in 15 U.S.C. 634(b) (4) which at present allows flexibility, including the option to negotiate, in contracting for hazard insurance and in purchasing and contracting for supplies in amounts not in excess of $1,000. This proviso is deleted as unnecessary and obsolete since the new act will provide this flexibility. Current law, 41 U.S.C. 5, and 251(c) (3), generally allows for negotiation in purchases and contracts for less than $10,000. This threshold will remain in the new act.

Section 901(*l*) eliminates reference to 41 U.S.C. 5 in 16 U.S.C. 580c. The present effect of such reference is to allow negotiation under the specific circumstances contained in 16 U.S.C. 580c. Authority to negotiate is provided for in the new act.

Section 901(m) eliminates reference to 41 U.S.C. 5 in 16 U.S.C. 1052 (b) (1). The present effect of such reference is to permit flexibility, including the option to negotiate, in the acquisition of the materials covered by 16 U.S.C. 1052(b) (1). The new act provides adequate flexibility. Thus, reference to 41 U.S.C. 5 is unnecessary.

Section 901(n) also eliminates reference in 20 U.S.C. 1034(a) to 41 U.S.C. 5. Reference to 41 U.S.C. 5 simply permits negotiation in the contracts covered by 20 U.S.C. 1034(a). This reference is unnecessary since adequate authority to negotiate is conferred by the new act.

Section 901(o) eliminates reference in 22 U.S.C. 287(e) to 41 U.S.C. 5. Again, such reference merely allows negotiations in procurements

covered by 22 U.S.C. 287(e). There is no need for such reference because authority to negotiate is conferred by the new act.

Section 901(p) eliminates reference to 41 U.S.C. 5 in 22 U.S.C. 1047. Reference to 41 U.S.C. 5 is to allow negotiation of the procurements covered by 22 U.S.C. 1047. Such reference is unnecessary since the new act confers authority to negotiate.

Section 901(q) eliminates reference to 41 U.S.C. 5. This reference is unnecessary as the new act grants adequate authority to negotiate.

Section 901(r) eliminates reference to 41 U.S.C. 5 in 30 U.S.C. 556 (b). Reference to 41 U.S.C. 5 now allows negotiation in the procurement covered by 30 U.S.C. 556(b). Authority to negotiate is conferred by the new act, and thus reference to 41 U.S.C. 5 is no longer needed.

Section 901(s) deletes reference to 41 U.S.C. 5 in 38 U.S.C. 1820(b) (regarding the powers of the Administrator of Veterans' Affairs), and inserts in its place the "Federal Acquisition Act of 1977." This section also removes the $1,000 floor contained in 38 U.S.C. 1820(b). Under the present section, the procurement statute applies if the amount of the contract exceeds $1,000. However, the new act allows the use of small purchase procedures when the expected amount does not exceed $10,000. It also permits negotiation under exceptions, to be prescribed by the Office of Federal Procurement Policy, when the amount exceeds $10,000. Under the new act, the Administrator would be permitted to procure noncompetitively below whatever threshold is established by regulation and to use simplified small purchase procedures on contracts not exceeding $10,000.

Section 901(t) deletes a phrase at the end of 38 U.S.C. 5002 which relates to the employment of nongovernmental individuals and agencies in the construction of VA hospitals and other facilities. The stricken phrase is unnecessary under the new act because contracting for architect-engineer services of the VA will be accomplished under the new act and 40 U.S.C. 540, which remains in effect.

Section 901(u) strikes 41 U.S.C. 6a and reference to 41 U.S.C. 5 in 41 U.S.C. 6b(a) and 41 U.S.C. 6a–1. The present effect of the reference to 41 U.S.C. 5 in sections 6a, 6b(a), is to allow negotiation of certain procurements and contracts. Such references are unnecessary since the new act will confer authority to negotiate.

Section 901(v) eliminates an obsolete provision in 41 U.S.C. 45 which applies the Walsh-Healey Act only to contracts entered into pursuant to invitations to bid. This makes clear that the Walsh-Healey Act currently applies to negotiated contracts as well.

Section 901(w) deletes reference to 41 U.S.C. 5 in 42 U.S.C. 263d(b)(3). This section also deletes the parenthetical phrases "by negotiation or otherwise" in 42 U.S.C. 263(b)(4). These deletions are made because the new act provides adequate authority to negotiate.

Section 901(w) deletes references to 41 U.S.C. 5 in 42 U.S.C. 263d(b) concerning the Department of Housing and Urban Development and housing for persons engaged in national defense activities. It also strikes out the first proviso in 42 U.S.C. 1521(b) and inserts in its place a proviso prohibiting the use of the cost plus a percentage of cost system of contracting. This section presently allows procurement by negotiation under certain circumstances, with the further provision that 41 U.S.C. 5 be followed whenever possible, consistent with emer-

gency needs. The references to 41 U.S.C. 5 are deleted as unnecessary and obsolete since the new act provides for authority to negotiate.

Section 901(y) deletes the reference to 41 U.S.C. 5 in 42 U.S.C. 1532, and adds a proviso prohibiting the use of the cost-plus-a-percentage-of-cost system of contracting.

Section 901(z) strikes 42 U.S.C. 1592h(a) and amends 42 U.S.C. 1592h(b) by deleting the superfluous prohibition against cost-plus-a percentage-of-cost system of contracting. Section (a) is stricken because it is merely a reference to 41 U.S.C. 5, allowing negotiation. Such reference is unnecessary as authority to negotiate is conferred by the new act.

Section 901(aa) deletes reference to 41 U.S.C. 5 in 42 U.S.C. 1857 (b)(4), b–1(a)(2). The present effect of such reference is to allow for negotiation in the covered contracts. The new act will provide for such negotiations.

Section 901(bb) strikes the present language in 42 U.S.C. 2051(c), relating to nuclear research assistance, and replaces it with new language which continues the authority of the agency to make its equipment and facilities avaliable for use in research, development, and training. In effect, the first two provisions of 42 U.S.C. 2501(c) are deleted and the third is retained through the new language. The first provision referring to 41 U.S.C. 5 is deleted as unnecessary since the new act contains authority to negotiate. The second provision in 42 U.S.C. 2051(c) allows partial and advance payments and is also deleted because the new act provides for such payments. By the repeal of the first two provisions of 2051(c), the committee intends that the agency be required to follow the new act in its contracting.

Section 901(cc) eliminates the last three sentences of 42 U.S.C. 2061 (b). The first sentence is deleted because it is rendered unnecessary by the new act. The requirements relating to subcontracting contained in this sentence can be imposed under the new act.

The second sentence refers to 41 U.S.C. 5 and allows negotiation in the covered contracts. The new act will confer authority to negotiate, and thus reference to 41 U.S.C. 5 is unnecessary.

The third sentence provides for partial and advance payments. This sentence is deleted as unnecessary because the new act authorizes such payments.

Section 901(dd) strikes the reference in 42 U.S.C. 2063 to 41 U.S.C. 5; 42 U.S.C. 2063 now contains a waiver of 41 U.S.C. 5, thus allowing negotiation under certain circumstances, one of which is in the acquisition of real property. Since 41 U.S.C. 5 does not cover real property, waiver of it is superfluous and unnecessary. To the extent that supplies and services are involved, thus being subject to 41 U.S.C. 5, the waiver of 41 U.S.C. 5 permits negotiation. However, the new act confers authority to negotiate. Thus, reference to 41 U.S.C. 5 is deleted as unnecessary.

Section 901(ee) deletes the second sentence of 42 U.S.C. 2075. This section as unamended allows negotiation under certain circumstances and also allows the making of partial and advance payments under contracts. Both provisions are deleted as unnecessary and obsolete

since the new act confers authority to negotiate and to make such payments.

Section 901(ff) strikes reference in 42 U.S.C. 2096 to 41 U.S.C. 5, and also deletes in 42 U.S.C. 2096 a provision which allows for partial and advance payments. Reference to 41 U.S.C. 5 is a waiver under certain circumstances of that section, such waiver allows for negotiation in the covered circumstances. The new act confers authority to negotiate. Thus, reference to 41 U.S.C. 5 is deleted as unnecessary. Also, the provision to make new partial and advance payments is deleted because the new act provides for such payments.

Section 901(gg) deletes reference, in 42 U.S.C. 4372(e), to 41 U.S.C. 5. Such reference allows negotiation of certain contracts. This reference is deleted as unnecessary in view of the authority to negotiate conferred by the new act.

Section 901(hh) deletes subsection (a) of 46 U.S.C. 1193 and reference in subsection (c) of 46 U.S.C. 1193 to construction, reconstruction, or reconditioning of vessels. It further renumbers subsections (b) and (c) as (a) and (b), respectively. As unamended, subsection (a) and (c) require formal advertising for all contracts for the construction, reconstruction or reconditioning of vessels, while subsection (b) states that all contracts are subject to sections 1151–1161 of title 46. In this regard, 46 U.S.C. 1152, as well as section 1155, indicates that formal advertising should be used. However, it is also provided in section 1152 that, notwithstanding section 1155, the Secretary of Commerce can, prior to June 30, 1979, forego competitive bidding if certain specified conditions are met. Thus, the proposed amendment would remove a basic inconsistency in section 1193 in that all contracts for construction, reconditioning or reconstruction of vessels would be subject to sections 1151–1161.

41 U.S.C. 1151–1161 are not repealed, and thus, left intact is the fairly restricted authority to negotiate set forth in section 1152 which also includes a time limitation. The set of conditions which must be met in order to negotiate as set forth in 1152 are much more specific and prohibitive than those in the new act. Repeal of these conditions is not intended, and any apparent inconsistency between this provision and the new act has been resolved by adding "Except as otherwise authorized by law" at the beginning of section 101(a) title I of S. 1264.

Section 901(ii) deletes reference to 41 U.S.C. 5 in 49 U.S.C. 1638(a).

Reference to 41 U.S.C. 5 allows for negotiation of contracts. This is unnecessary as the new act provides authority to negotiate. It also strikes paragraphs (3) and (4) of 49 U.S.C. 1638(a).

Paragraph (3) imposes geographical restrictions on the award of contracts. Deleting this restriction will allow for fuller competition.

Paragraph (4) grants the Secretary and the Comptroller General of the United States access to records. This is deleted because the new act provides for such access.

Section 901(jj) deletes the second sentence in 38 U.S.C. 5012(a), which refers to 41 U.S.C. 5. This reference is a waiver of 41 U.S.C. 5. Section (a) of the statute deals with the Administrator's powers to lease out certain Government facilities. The amendment would not make the advertising requirements of 41 U.S.C. 5 applicable to the leases. Under 41 U.S.C. 5, advertising is required in other than Gov-

ernment purchases where there is either a "sale" or "contract for sale," the reasonable value of which does not exceed $500. A lease would not constitute a sale or contract for sale. Thus the reference to 41 U.S.C. 5 is meaningless, and deletion of this reference does not affect the authority of the Administrator to negotiate these leases.

This section also deletes section (c) of 38 U.S.C. 5012. Deletion of section (c) conforms to the repeal of 41 U.S.C. 252. The authority to negotiate contracts for the above mentioned services is conferred by the new act.

Section 901(kk) increases the small purchase limit, under 16 U.S.C. 832(g), concerning the Bonneville Power Administration, from $500 to $10,000. This change conforms to the present limit used generally throughout the executive branch. This change is necessary since Bonneville Power Administration is excluded from the operation of the new act. But even if it were included under the act, the act excludes nonappropriated fund purchases. Most of Bonneville's purchases are nonappropriated funds, which would still be controlled by 16 U.S.C. 832(g).

Section 901(11) strikes the second and third sentences in 42 U.S.C. 2075. The present effect of this provision is to give the Nuclear Regulatory Commission authority to enter into contracts by negotiation, and to make partial and advance payments under such contracts. The stricken sentences are deleted as unnecessary, since the new act provides adequate authority both for negotiation and for advance and progress payments.

Section 901(mm) strikes the last sentence in 42 U.S.C. 6009(d), which refers to contracting without regard to 31 U.S.C. 529, and 41 U.S.C. 5. The present effect of the stricken phrase is to allow the use of negotiation and the making of advance payments. This is deleted as unnecessary since the new act confers adequate authority to do both.

Section 901(nn) deletes references to 41 U.S.C. 5, and to 31 U.S.C. 529, in 42 U.S.C. 286d(a)(7). The present effect of the stricken phrase is to allow the use of negotiation and the making of advance payments. This is deleted as unnecessary since the new act confers adequate authority to do both.

Section 901(oo) deletes references to 31 U.S.C. 529, and 41 U.S.C. 5, in 42 U.S.C., section 287b(c)(3). The present effect of the stricken phrase is to allow the use of negotiation and the making of advance payments. This is deleted as unnecessary since the new act confers adequate authority to do both.

Section 902—Repeals.—Section 902 repeals several statutes or provisions of statutes as follows:

Chapters 135 and 137 in title 10, United States Code, cover procurement of military aircraft. Its restrictively worded requirements for formal advertising are replaced by the procedures set forth in the new Federal Acquisition Act of 1977.

Chapter 135 is a codification of the Air Corps Act of 1926, which was promulgated to encourage the development of aviation. It has been described as obsolete by both the Air Force and the Comptroller General. (See letter B–168664 of Comptroller General, dated January 19, 1970.) Chapter 135 has been viewed as merely a permissive pro-

cedure, in light of later procurement legislation. In fact, the 1926 act has not been used since 1941.

Although chapter 135 provides for inspection by congressional committees of audits and reports of inspection made by executive agencies, its repeal in no way limits congressional authority to obtain such information. Congress has plenary power to compel information relevant to its legislative function from executive agencies, private individuals and organizations. A broad oversight authority stems from article I of the Constitution. The investigatory authority of Congress is so essential to the legislative function as to be implied from the general vesting of legislative power in Congress. *See, e.g., Eastland* v. *United States Servicemen's Fund*, 421 U.S. 491(1975); *Watkins* v. *United States*, 354 U.S. 178 (1957).

In addition to the inherent constitutional authority of Congress to investigate, there is direct statutory authority for Senate committee investigations. (See 2 U.S.C. 190b.). This section authorizes each standing committee, including any subcommittee of any such committee, to make investigations into any matter within its jurisdiction. Also, the relationship of Congress to the General Accounting Office provides very broad statutory authority regarding reviews of audits and reports. See 31 U.S.C. §§ 60, 65.

The provisions in chapter 135 which relate to alien employment in Government contracting have effectively been replaced over the years by Department of Defense security regulations. These regulations adequately cover the concerns addressed in chapter 135. (*See, e.g.*, Department of Defense industrial security regulation, April 1975; Industrial Security Manual, April 1974.)

Chapter 137 is the codification of the Armed Services Procurement Act. One of the primary purposes of the new act is to consolidate the authorities under the Armed Services Procurement Act and those under the Federal Property and Administrative Services Act. Chapter 137 is repealed and replaced by the new act pursuant to that objective.

10 U.S.C. 4535, 9535. The effect of these provisions is to allow negotiation in the covered procurements. The new act will confer authority to negotiate, and thus these provisions are repealed as obsolete.

15 U.S.C. 637(e). Section 512 of the new act confers the authority contained in 15 U.S.C. 637(e). Thus, this provision is repealed as obsolete.

10 U.S.C. 7522. These provisions are made obsolete by the new act since it provides for negotiation authority and advance payments, and prohibits cost plus a percentage of cost contracting.

16 U.S.C. 833f. This provision places a formal advertising requirement upon the Bureau of Reclamation and upon the Secretary of the Army with respect to procurement for the Fort Peck reclamation project. The repeal lifts this limitation and thus provides the more flexible procedures of the new act.

25 U.S.C. 96, 97. Repeal of these provisions would eliminate the requirement that all contracts, and associated documents, of the Commissioner of Indian Affairs, or any other officer of the Government, for the Indian Service, be furnished to GAO "before any payment shall be made" on the contracts. There would still remain the provision in 41 U.S.C. 20 (1970) which states that "all contracts to be made, by virtue of any law, and requiring the advance of money, or in any manner con-

nected with the settlement of public accounts, shall be deposited promptly in the General Accounting Office. . . ."

40 U.S.C. 474 (3), (8), (10), and (19). These clauses are repealed because they are obsolete.

40 U.S.C. 609 (a) and (b). This provision authorizes the Commission to negotiate in contracting for the services of architects and engineers. The provision is eliminated as obsolete since the new act confers authority to negotiate. Specifically, the Brooks Act (40 U.S.C. 541 et seq) which requires negotiation for architect-engineering services will continue to apply.

41 U.S.C. 13. The repeal of section 13 still leaves a general 1-year limitation by virtue of restrictions on the use of annual appropriations in 31 U.S.C. 712a. Section 504 of the new act provides for multiyear contracting in appropriate circumstances.

41 U.S.C. 24. Since the new act will govern these contracts, this provision is repealed as obsolete.

Title III of the Federal Property and Administrative Services Act of 1949 as amended. Title III (41 U.S.C. 251 et seq.) covers procurement by nondefense agencies. Its restrictively worded requirements for formal advertising are replaced by the procedures set forth in the new act.

One of the primary purposes of the new act is to consolidate the authorities under title III with those under chapter 137 of 10 U.S.C., Armed Services Procurement Act. Title III is repealed and replaced by the new act pursuant to that objective.

41 U.S.C. 256a. This provision is repealed as obsolete since a similar provision appears in the act.

42 U.S.C. 242m(f). This section allows negotiation and advance payments. Since the new act confers authority to do both, this section is repealed as obsolete.

42 U.S.C. 292f. This section allows negotiation and advance payments. Since the new act confers authority to do both, this section is repealed as obsolete.

42 U.S.C. 300c–11(b)(4). This section allows negotiation and advance payments. Since the new act confers authority to do both, this section is repealed as obsolete.

42 U.S.C. 300c–22d. This section allows negotiation and advance payments. Since the new act confers authority to do both, this section is repealed as obsolete.

42 U.S.C. 300d–5(d). This section allows negotiation and advance payments. Since the new act confers authority to do both, this section is repealed as obsolete.

42 U.S.C. 300e–2(g). This section allows negotiation and advance payments. Since the new act confers authority to do both, this section is repealed as obsolete.

42 U.S.C. 300e–3(h). This section allows negotiation and advance payments. Since the new act confers authority to do both, this section is repealed as obsolete.

42 U.S.C. 1480(a). This provision authorizes negotiation under the circumstances described therein. Because the new act will provide adequate authority, the provision is repealed as obsolete and unnecessary.

42 U.S.C. 2295(e). This provision authorizes negotiation under the circumstances described therein. Because the new act will provide adequate authority, the provision is repealed as obsolete and unnecessary.

42 U.S.C. 4081(b). This provision authorizes negotiation under the circumstances described therein. Because the new act will provide adequate authority, the provision is repealed as obsolete and unnecessary.

82 Stat. 849. This provision places a limitation more restrictive than 41 U.S.C. 10a—Buy American Act—upon armed services acquisition of buses. Its repeal would allow the armed services to acquire buses of foreign manufacture in certain situations.

50 U.S.C. 403c. This section deals with procurement by the CIA under the Armed Services Procurement Act of 1947. The provisions of title 41 referred to in this provision were repealed and are now covered by sections 2301, 2303–2305 of title 10. Sections 2301, 2303–2305 of title 10—chapter 137 of Armed Services Procurement Act—from which CIA draws its procurement authority, are repealed by the Federal Acquisition Act of 1977, thus 50 U.S.C. 403c is also repealed.

IX. Evaluation of Regulatory Impact of S. 1264

Paragraph 5(a) of rule XXXIX of the Standing Rules of the Senate requires each report accompanying a bill to evaluate "the regulatory impact which would be incurred in carrying out the bill."

S. 1264 will bring about a major revision of the Federal acquisition laws controlling the expenditure of more than one-fourth of the Federal budget. The prime purpose of S. 1264 is to consolidate the two current regulations governing Federal procurement policy into one modern, efficient, and effective statute. In this respect, S. 1264 will simplify and reduce regulatory procedures presently required for firms doing business with the Federal Government.

S. 1264 will make greater use of functional specifications instead of unduly restrictive detailed specifications required by existing statutes. This bill will reduce GSA's costly and time-consuming efforts to continually write and maintain detailed product specifications for commercial items purchased by the various Federal agencies. Thus, S. 1264 provides for a reduction in the cost and paperwork generated by current statutes.

Further, S. 1264, if effectively applied, has the potential to substantially reduce paperwork throughout the entire procurement system. The only additional reporting burden imposed by the bill affects OFPP. The Administrator of OFPP will be required to revise and review thresholds indicated by S. 1264 once every three years. This requirement increases paperwork in one sense, but in another, it ultimately reduces paperwork by establishing new thresholds periodically.

S. 1264 has no impact on the personal privacy of individuals who will be involved in contracting with the Federal Government.

S. 1264 will affect all firms that wish to do business with the Federal Government through the procurement process. Very broad estimates by OMB and SBA place the number of firms that contract with

the Federal Government at 125,000. S. 1264 should make it easier for more new and small firms to compete for and to win Government contracts.

S. 1264 should provide a modern, effective, and streamlined statute for commercial firms to sell to the Federal Government. The bill is designed to save money, time, and paperwork. If used throughout the entire procurement system of the Federal Government, it could save the taxpayer millions of dollars annually.

X. Cost Estimate

Pursuant to section 403 of the Congressional Budget Act of 1974, the Congressional Budget Office reviewed S. 1264 and found that "this legislation as a whole will not significantly alter the amount of Government spending. However, some of its provisions could reduce expenditures . . ."

XI. Rollcall Votes in Committee

In compliance with section 133 of the Legislative Reorganization Act of 1946, as amended, the rollcall votes taken during committee consideration of this legislation are as follows:

Vote on Senator Metcalf amendment to delete section 509 of title V: 4 yeas—6 nays.

Yeas	Nays
Metcalf	Ribicoff
Percy	Eagleton
Javits	Chiles
Stevens	Nunn
	Sasser
	Heinz
	(Proxy)

Final Passage: Ordered reported: [47] 6 yeas—2 nays—1 present.

Yeas	Nays	Present
Ribicoff	Metcalf	III Stevens
Eagleton	Percy	
Chiles		
Nunn		
Glenn		
Javits		
Heinz		
(Proxy)		

XII. Changes in Existing Law

In compliance with paragraph 4 rule XXIX of the Standing Rules of the Senate, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman):

A. Amendments:

[47] Committee rules provide that on "Final Passage" proxies may be allowed solely for the purpose of recording a member's position on the pending question.

UNITED STATES CODE

TITLE 7.—AGRICULTURE

* * * * * * *

§ 416. Letting contract for packeting, etc., of seeds, etc., for distribution.

The Secretary of Agriculture [after due advertisement and on competitive bids,] is authorized to award the contract for the supplying of printed packets and envelopes and the packeting, assembling, and mailing of the seeds, bulbs, shrubs, vines, cuttings, and plants, or any part thereof, for a period of not more than five years nor less than one year, if by such action he can best protect the interests of the United States.

* * * * * * *

§ 430. Purchasing and testing of serums or analogous products; dissemination of test results.

The Secretary of Agriculture may purchase [in the open market] from applicable appropriations samples of all tuberculin, serums, antitoxins, or analogous products, of foreign or domestic manufacture, which are sold in the United States, for the detection, prevention, treatment, or cure of diseases of domestic animals, test the same, and disseminate the results of said tests in such manner as he may deem best. * * *

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§ 432. Purchase of cultures for soil and fertilizer investigations.

The Secretary of Agriculture may purchase from applicable appropriations cultures [in the open market] for use in connection with soil and fertilizer investigations. * * *

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TITLE 10.—ARMED FORCES

* * * * * * *

§ 2356(b). Contracts: delegations.

(a) * * *

(b) Subject to other provisions of law, the power to negotiate and administer contracts for research or development, or both, may be further delegated. [In this section "negotiate" means make without the formal advertising prescribed by section 2305 of this title.]

* * * * * * *

§ 4504. Procurement for experimental purposes.

The Secretary of the Army may buy ordnance, signal, and chemical warfare supplies, including parts and accessories, and designs thereof, that he considers necessary for experimental or test purposes in the development of the best supplies that are needed for the national defense. Purchases under this section may be made inside or outside the United States [with or without competitive bidding, and by contract or otherwise. Chapter 137 of this title applies when such purchases are made in quantity.]

* * * * * * *

§ 4505. Procurement of production equipment.

The Secretary of the Army may make or procure gauges, dies, jigs, tools, fixtures, and other special aids and appliances, and specifications and drawings, necessary for the immediate manufacture of arms, ammunition, or special equipment that are necessary to equip the Army and are likely to be needed in time of war. [Whenever he considers it in the best interest of the United States, the Secretary may procure any of those items without regard to laws prescribing competition in the procurement of supplies.]

* * * * * * *

§ 9504. Procurement for experimental purposes.

The Secretary of the Air Force may buy ordnance, signal, and chemical warfare supplies, including parts and accessories, and designs thereof, that he considers necessary for experimental or test purposes in the development of the best supplies that are needed for the national defense. Purchases under this section may be made inside or outside the United State. [with or without competitive bidding, and by contract or otherwise. Chapter 137 of this title applies when such purchases are made in quantity.]

* * * * * * *

§ 9505. Procurement of production equipment.

The Secretary of the Air Force may make or procure gauges, dies, jigs, tools, fixtures, and other special aids and appliances, and specifications and drawings, necessary for the immediate manufacture of arms, ammunition, or special equipment that are necessary to equip the Air Force and are likely to be needed in time of war. [Whenever he consider it in the best interest of the United States, the Secretary may procure any of those items without regard to laws prescribing competition in the procurement of supplies.]

* * * * * * *

TITLE 12.—BANKS AND BANKING

* * * * * * *

§ 1701c. Secretary of Housing and Urban Development

In carrying out his functions, powers, and duties—

(a) * * *

(b) Additional power and duties of Secretary and Federal Home Loan Bank Board.

(1) * * *

(2) utilize, contract with, and act through, [without regard to section 5 of Title 41,] any Federal, State, or local public agency or instrumentality, educational institution, or nonprofit agency or organization with the consent of the agency or organization concerned, and any funds available to said officers for carrying out their respective functions, powers, and duties shall be available to reimburse or pay any such agency or organization; and, whenever in the judgment of any such officer necessary, he may make advance, progress, or other payments with respect to such contracts without regard to the provisions of section 529 of Title 31;

* * * * * * *

§ 1701z–2. Advanced technologies, methods, and materials for housing construction, rehabilitation, and maintenance.

(a) * * *

(e) Contracts or grants; authority; advance and progress payments; work limitation.

The Secretary is authorized to carry out the functions authorized in section 1701z–1 of this title either directly or [without regard to section 5 of Title 41,] by contract or by grant. Advance and progress payment may be made under such contracts or grants without regard to the provisions of section 529 of Title 31 and such contracts or grants may be made for work to continue for not more than four years from the date thereof.

* * * * * * *

§ 1747g. Debentures.

(a) * * *

(h) Payment of expenses and charges; collection of claims.

Notwithstanding any other provisions of law relating to the acquisition, handling, or disposal of real and other property by the United States, the Secretary shall have power, for the protection of the General Insurance Fund, to pay out of said Fund all expenses or charges in connection with, and to deal with, complete, reconstruct, rent, renovate, modernize, insure, make contracts for the management of, or establish suitable agencies for the management of, or sell for cash or credit or lease in his discretion, in whole or in part, any project acquired pursuant to this subchapter; and, notwithstanding any other provisions of law, the Secretary shall also have power to pursue to final collection by way of compromise or otherwise all claims acquired by, or assigned or transferred to, him in connection with the acquisition or disposal of any project pursuant to this subchapter. [*Provided*, That section 5 of Title 41 shall not be construed to apply to any contract for hazard insurance, or to any purchase or contract for services or supplies on account of any project acquired pursuant to this subchapter if the amount of such purchase or contract does not exceed $1,000.]

* * * * * * *

§ 1747k. Rules and regulations.

The Secretary may make such rules and regulations as may be necessary or desirable to carry out the provisions of this subchapter, including, without limiting the foregoing, rules and regulations relating to the maintenance by the investor of books, records, and accounts with respect to the project and the examination of such books, records, and accounts by representatives of the Secretary; the submission of financial and operating statements and the approval thereof; the submission of claims for payments under insurance contracts, the proof of the validity of such claims, and the payment or disallowance thereof; the increase of the established investment if the investor shall make capital improvements or additions to the project; the decrease of the established investment if the investor shall sell part of

the project; and the reduction of the outstanding investment for the appropriate operating year or operating years pending the restoration of dwelling or nondwelling facilities damaged by fire or other casualty. With respect to any investor which is subject to supervision or regulation by a State banking, insurance, or other State department or agency, the Secretary may, in carrying out any of his supervisory and regulatory functions with respect to projects insured under this subchapter, utilize, contract with, and act through, such department or agency. [and without regard to section 5 of Title 41.]

* * * * * * *

§ 1788. Special assistance to avoid liquidation.

(a) * * *

(b) Protection of Fund.

For the protection of the Fund, the Administrator, without regard to the Federal Property and Administrative Services Act of 1949, may—

(1) deal with, complete, reconstruct, rent, renovate, modernize, insure, make contracts for the management of, sell for cash or credit, or lease, in his discretion, any real property acquired or held by him under this section; and

(2) assign or sell at public or private sale, or otherwise dispose of, any evidence of debt, contract, claim, personal property, or security assigned to or held by him under this section.

[Section 5 of Title 41 shall not apply to any purchase or contract for services or supplies made or entered into by the Administrator under this section if the amount thereof does not exceed $1,000, or to any contract for hazard insurance on any real property acquired or held by him under this section.]

* * * * * * *

TITLE 15.—COMMERCE AND TRADE

* * * * * * *

§ 634. General powers.

(a) * * *

(b) Powers of Administrator.

In the performance of, and with respect to, the functions, powers, and duties vested in him by this chapter the Administrtor may—

(1) * * *

(4) pursue to final collection, by way of compromise or otherwise, all claims against third parties assigned to the Administrator in connection with loans made by him. This shall include authority to obtain deficiency judgments or otherwise in the case of mortgages assigned to the Administrator. [Section 5 of Title 41 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 as a result of loans made under this chapter if the premium therefor or the amount thereof does not exceed $1,000.] The power to convey and

to execute in the name of the Administrator deeds of conveyance, deeds of release, assignments and satisfactions of mortgages, and any other written instrument relating to real property or any interest therein acquired by the Administrator pursuant to the provisions of this chapter may be exercised by the Administrator or by any officer or agent appointed by him without the execution of any express delegation of power or power of attorney. Nothing in this section shall be construed to prevent the Administrator from delegating such power by order or by power of attorney, in his discretion, to any officer or agent he may appoint;

* * * * * * *

TITLE 16.—CONSERVATION

* * * * * * *

§ 580c. Purchases of experimental materials, special devices, test models, etc.

[The provisions of section 5 of Title 41, shall not apply to purchases by] *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.

* * * * * * *

§ 832g. Purchase of supplies and services.

Notwithstanding any other provision of law, all purchases and contracts made by the administrator or the Secretary of the Army for supplies or for services except for personal services, shall be made after advertising, in such manner and at such times, sufficiently in advance of opening bids, as the administrator or Secretary of the Army, as the case may be, shall determine to be adequate to insure notice and opportunity for competition. Such advertisement shall not be required, however, when (1) an emergency requires immediate delivery of the supplies or performance of the services; or (2) repair parts, accessories, supplemental equipment, or services are required for supplies or services previously furnished or contracted for; or (3) the aggregate amount involved in any purchase of supplies or procurement of services does not exceed [$500]; *$10,000*; in which cases such purchases of supplies or procurement of services may be made in the open market in the manner common among businessmen. In comparing bids and in making awards, the administrator or the Secretary of the Army, as the case may be, may consider such factors as relative quality and adaptability of supplies or services, the bidder's financial responsibility, skill, experience, record of integrity in dealing, and ability to furnish repairs and maintenance services, the time of delivery or performance offered, and whether the bidder has complied with the specifications.

* * * * * * *

24-195—78——6

§ 1052. Operation of Center and Aquarium; specimens and exhibits; catalogs and other printed matter and films, animations and photographic and other material; employment of experts, consultants, and organizations; use of auditorium and other areas;

(a) The Secretary of the Interior (hereinafter referred to as the "Secretary") shall operate the National Fisheries Center and Aquarium.

(b) The Secretary is further authorized to—

(1) construct, purchase or lease, and operate and maintain vessels for specimen collecting purposes and [without regard to section 5 of Title 41,] to contract for such collection of specimens and to purchase or exchange specimens and exhibit materials;

* * * * * * *

TITLE 20.—EDUCATION

* * * * * * *

§ 1034. Grants for research and demonstration projects; authorization; contracts for conduct of activities; prohibition against grants to other than non-profit agencies or institutions; special advisory committee; appointment; membership; functions.

(a) The Commissioner is authorized to make grants to institutions of higher education and other public or private agencies, institutions, and organizations, for research and demonstration projects relating to the improvment of libraries or the improvement of training in librarianship, including the development of new techniques, systems, and equipment for processing, storing, and distributing information, and for the dissemination of information derived from such research and demonstrations [and, without regard to section 5 of Title 41,] to provide by contracts with them for the conduct of such activities; except that no such grant may be made to a private agency, organization, or institution other than a nonprofit one.

* * * * * * *

TITLE 22.—FOREIGN RELATIONS AND INTERCOURSE

* * * * * * *

§ 287e. Appropriations; payment of expenses.

There is hereby authorized to be appropriated annually to the Department of State, out of any money in the Treasury not otherwise appropriated, such sums as may be necessary for the payment by the United States of its share of the expenses of the United Nations as apportioned by the General Assembly in accordance with article 17 of the Charter, and for all necessary salaries and expenses of the representatives provided for in section 287 of this title, and of their appropriate staffs, including personal services in the District of Columbia and elsewhere, without regard to the civil-service laws and chapter 51 and subchapter III of chapter 53 of Title 5; travel ex-

penses without regard to the Standardized Government Travel Regulations, as amended, subchapter I of chapter 57 and section 5731 of Title 5, and under such rules and regulations as the Secretary of State may prescribe, travel expenses of families and transportation of effects of United States representatives and other personnel in going to and returning from their post of duty; allowances for living quarters, including heat, fuel, and light, as authorized by section 5912 of Title 5; cost-of-living allowances for personnel stationed abroad under such rules and regulations as the Secretary of State may prescribe; communications services; stenographic reporting, translating, and other services, by contract; hire of passenger motor vehicles and other local transportation; rent of offices; printing and binding without regard to section 501 of Title 44; allowances and expenses as provided in section 287r of this title, and allowances and expenses equivalent to those provided in section 1131(3) of this title; the lease or rental (for periods not exceeding ten years) of living quarters for the use of the representative of the United States to the United Nations referred to in subsection (a) of section 287 of this title, the cost of installation and use of telephones in the same manner as telephone service is provided for use of the Foreign Service pursuant to section 679 of Title 31, and unusual expenses similar to those authorized by section 5913 of Title 5, incident to the operation and maintenance of such living quarters; and such other expenses as may be authorized by the Secretary of State. [all without regard to section 5 of Title 41.]

* * * * * * *

§ 1047. Acquisition of real property.

The Secretary may, in the name of the United States, acquire such real property as may be necessary for the operation and maintenance of the Institute and [without regard to section 5 of Title 41,] such other property and equipment as may be necessary for its operation and maintenance.

* * * * * * *

TITLE 29.—LABOR

§ 671. National Institute for Occupational Safety and Health.

(a) * * *

(e) Additional authority of Director.

In addition to any authority vested in the Institute by other provisions of this section, the Director, in carrying out the functions of the Institute, is authorized to—

(1) * * *

(7) enter into contracts, grants or other arrangements, or modifications thereof to carry out the provisions of this section, and such contracts or modifications thereof may be entered into without performance or other bonds; [and without regard to section 5 of Title 41, or any other provision of law relating to competitive bidding;]

* * * * * * *

TITLE 30.—MINERAL LANDS AND MINING

* * * * * * *

§ 556. Administration.

In carrying out the provisions of section 553 of this title the Secretary of the Interior is authorized—

(a) * * *

(b) Employment of equipment.

to hire, with or without personal services, work animals and animal-drawn and motor-propelled vehicles and equipment, at rates to be approved by the Secretary of the Interior. [and without regard to the provisions of section 5 of title 41.]

* * * * * * *

TITLE 38.—VETERANS' BENEFITS

* * * * * * *

Subchapter III.—Administrative Provisions

§ 1820. Powers of Administrator.

(a) * * *

(b) The powers granted by this section may be exercised by the Administrator without regard to any other provision of law not enacted expressly in limitation of this section, which otherwise would govern the expenditure of public funds; however, [secton 5 of title 41] *the Federal Acquisition Act of 1977* shall apply to any contract for services or supplies on account of any property acquired pursuant to this section. [if the amount of such contract exceeds $1,000.]

* * * * * * *

§ 5002. Construction and repair of buildings.

The construction of new hospitals, domiciliaries and out-patient dispensary facilities, or the replacement, extension, alteration, remodeling, or repairs of all such facilities shall be done in such manner as the President may determine. The President may require the architectural, engineering, constructing, or other forces of any of the departments of the Government to do or assist in such work. [And the President may employ individuals and agences not connected with the Government, if in the opinion of the President such is desirable, at such compensation as the President may consider reasonable.]

* * * * * * *

§ 5012. Authority to procure and dispose of property and to negotiate for common services.

(a) The Administrator may lease for a term not exceeding three years lands or buildings, or parts or parcels thereof, belonging to the United States and under the Administrator's control. [Any lease made pursuant to this subsection to any public or nonprofit organization may be made without regard to the provisions of section 3709 of the Revised Statutes (41 U.S.C. 5).] Notwithstanding section 321 of the Act entitled "An Act making appropriations for the legislative branch

of the Government for the fiscal year endng June 30, 1933, and for other purposes," approved June 30, 1932 (40 U.S.C. 303b), or any other provision of law, a lease made pursuant to this subsection to any public or nonprofit organization may provide for the maintenance, protecton, or restoration, by the lessee, of the property leased, as a part or all of the consideration for the lease. Prior to the execution of any such lease, the Administrator shall give appropriate public notice of the Administrator's intention to do so in the newspaper of the community in which the lands or buildings to be leased are located. The proceeds from such leases, less expenses for maintenance, operation, and repair of buildings leased for living quarters, shall be covered into the Treasury of the United States as miscellaneous receipts.

(b) * * *

[(c) The Administrator may procure laundry services, and other common services as specifically approved by the Administrator from nonprofit, tax-exempt educational, medical or community institutions, without regard to the requirements of section 302(c) of the Federal Property and Administrative Services Act of 1949, as amended (41 U.S.C. 252(c)), whenever such services are not reasonably available from private commercial sources. Notwithstanding this exclusion, the provisions of section 304 of that Act shall apply to procurement authorized by this subsection.]

* * * * * * *

TITLE 41.—PUBLIC CONTRACTS

* * * * * * *

§ 6a. Advertisements for proposals for purchases and contracts for supplies of services for Government departments; limited to particular agencies under specified circumstances.

* * * * * * *

[Section 5 of this title shall not be construed to apply under any appropriation Act to the following departments and independent offices under the circumstances specified herein:

[(a) American Battle Monuments Commission—to any leases in foreign countries for office or garage space.

[(b)—(e) Repealed. Oct. 31, 1951, ch. 654, § 1 (107), 65 Stat. 705.

[(f) The Bureau of Interparliamentary Union for Promotion of International Arbitration—to stenographic reporting services by contract if deemed necessary.

[(g) Repealed. Oct. 31, 1951, ch. 654, § 1 (107), 65 Stat. 705.

[(h) Department of State—when the purchase or service relates to the packing or personal and household effects of Diplomatic, Consular, and Foreign Service officers and clerks for foreign shipment.

[(i) Repealed. Oct. 31, 1951, ch. 654, § 1 (107), 65 Stat. 705.

[(j) The International Committee of Aerial Legal Experts—to stenographic and other service by contract as deemed necessary.]

* * * * * * *

§ 6a–1. Same; Architect of the Capitol.

On and after July 27, 1965, the purchase of supplies and equipment and the procurement of services for all branches under the Architect of the Capitol may be made in the open market [without compliance with section 5 of this title] in the manner common among businessmen, when the aggregate amount of the purchase of the service does not exceed $10,000 in any instance.

* * * * * * *

§ 6b. Same; miscellaneous exceptions.

(a) Control of insects, pests, and grass diseases.

Materials and equipment for the control of incipient or emergency outbreaks of insects, pests, or grass diseases, including grasshoppers, Mormon crickets, and chinch bugs, may be procured with any sums appropriated to carry out the provisions of sections 148 to 148e of Title 7 [without regard to the provisions of section 5 of this title] and the transportation thereof may be under such conditions and means as shall be determined by the Secretary of Agriculture to be most advantageous.

* * * * * * *

§ 45. Same; effective date; exception as to representations with respect to minimum wages.

[Sections 35 to 45 of this title shall apply to all contracts entered into pursuant to invitations for bids issued on or after ninety days from June 30, 1936: *Provided, however*, That the provisions] *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.

* * * * * * *

TITLE 42.—THE PUBLIC HEALTH AND WELFARE

§ 263d. Program of control.

(a) * * *

(b) Powers of Secretary.

In carry out the purposes of subsection (a) of this section, the Secretary is authorized to—

(1) (A) collect and make available, through publications and other appropriate means, the results of, and other information concerning, research and studies relating to the nature and extent of the hazards and control of electronic product radiation; and (B) make such recommendations relating to such hazards and control as he considers appropriate;

(2) make grants to public and private agencies, organizations, and institutions, and to individuals for the purposes stated in paragraphs (2), (4), and (5) of subsection (a) of this section;

(3) contract with public or private agencies, institutions, and organizations, and with individuals, without regard to section 529 of Title 31 [and section 5 of Title 41]; and

(4) procure[(by negotiation or otherwise)] electronic products for research and testing purposes, and sell or otherwise dispose of such products.

* * * * * * *

§ 1521. Housing and Home Finance Administrator's powers respecting defense housing.

In order to provide housing for persons engaged in national-defense activities, and their families, and living quarters for single persons so engaged, in those areas or localities in which the President shall find that an acute shortage of housing exists or impends which would impede national-defense activities and that such housing would not be provided by private capital when needed, the Housing and Home Finance Administrator (hereinafter referred to as the "Administrator") is authorized:

(a) * * *

(b) By contract or otherwise (without) regard to section 1339 of Title 10, [section 5 of Title 41] and section 40a of Ttitle 40, or any Federal, State, or municipal laws, ordinances, rules, or regulations relating to plans and specifications or forms of contract, the approval thereof or the submission of estimates therefor) prior to the approval of title by the Attorney General to make surveys and investigations, plan, design, construct, remodel, extend, repair, or demolish structures, buildings, improvements, and community facilities, on lands or interests in lands acquired under the provisions of subsection (a) of this section or on other lands of the United States which may be available (transfers of which for this purpose by the Federal agency having jurisdiction thereof are authorized notwithstanding any other provisions of law), provide proper approaches thereto, utilities, and transportation facilities, and procure necessary materials, supplies, articles, equipment, machinery, and do all things necessary in connection therewith to carry out the purposes of this subchapter: [*Provided*, That the cost-plus-a-percentage-of-cost system of contracting shall not be used but this proviso shall not be construed to prevent the use of the cost-plus-a-fixed-fee form of contract and so far as is consistent with emergency needs, contracts shall be subject to section 5 of Title 41:] *Provided, That the cost plus a percentage of cost system shall not be used. Provided*, That the cost per permanent family-dwelling unit shall not exceed an average of $3,750 for all types of construction for those units located within the continental United States nor an average of $4,250 for those located elsewhere (exclusive of Alaska), and the cost of no family-dwelling unit shall exceed $4,500 within the continental United States or $4,750 elsewhere, except in the Territory of Alaska, where the cost shall not exceed $7,500, exclusive of expenses of administration, land acquisition, public utilities, and community facilities, and the aggregate cost of community facilities shall not exceed 3 per centum of the total cost of all projects: *Provided further*, That where the Administrator shall consider that there is no reasonable prospect of disposing of such housing to meet a need extending beyond the emergency he shall construct temporary units: *Provided further*, That all items of cost with respect to each such family dwelling unit shall be separately estimated with a view toward economy, and no movable

equipment shall be installed in such units, unless the Administrator shall, in any particular case, deem such installation to be in the public interest.

* * * * * * *

§ 1532. Housing and Home Finance Administrator's powers respecting defense public works; definition of "private agency."

Whenever the President finds that in any area or locality an acute shortage of public works or equipment for public works necessary to the health, safety, or welfare of persons engaged in national-defense activities exists or impends which would impede national-defense activities, and that such public works or equipment cannot otherwise be provided when needed, or could not be provided without the imposition of an increased excessive tax burden or an unusual or excessive increase in the debt limit of the taxing or borrowing authority in which such shortage exists, the Housing and Home Finance Administrator is authorized, with the approval of the President, in order to relieve such shortage—

(a) * * *

(b) By contract or otherwise (without regard to section 1339 of Title 10, [section 5 of Title 41,] section 40a of Title 40, or any Federal, State, or municipal laws, ordinances, rules, or regulations relating to plans and specifications or forms of contract, the approval thereof or the submission of estimates therefor), prior to the approval of title by the Attorney General if necessary, to plan, design, construct, remodel, extend, repair, or lease public works, and to demolish structures, buildings, and improvements, on lands or interests in lands acquired under the provisions of subsection (a) of this section or on other lands of the United States which may be available (transfers of which for this purpose by the Federal agency having jurisdiction thereof are authorized notwithstanding any other provisions of law), provide proper approaches thereto, utilities, and transportation facilities, and procure necessary materials, supplies, articles, equipment, and machinery, and do all things in connection therewith to carry out the purposes of this subchapter[.]*: Provided, That the cost plus a percentage of cost system shall not be used* .

* * * * * * *

§ 1592h. Conditions and requirements as to contracts; utilization of existing facilities; disposition of facilities constructed by United States.

In carrying out this subchapter—

[(a) notwithstanding any other provisions of this subchapter, so far as is consistent with emergency needs, contracts shall be subject to section 5 of Title 41;]

(b) [the cost-plus-a-percentage-of-cost system of contracting shall not be used, but contracts may be made on a cost-plus-a-fixed-fee basis: *Provided*, That the fixed fee shall not exceed 6 per centum of the estimated cost;] *the fixed-fee under a contract on a cost-plus-a-fixed-fee basis shall not exceed 6 per centum of the estimated cost;*

* * * * * * *

SUBCHAPTER I.—AIR POLLUTION PREVENTION AND CONTROL

* * * * * * *

§ 1857b. Research, investigations, training, and other activities.

(a) * * *

(b) Availability of information and recommendations; cooperative activities; research grants, etc.; contract; training; fellowships; collection and dissemination of basic data on chemical, physical and biological effects of air quality; process, method and device development.

In carrying out the provisions of the preceding subsection the Administrator is authorized to—

(1) * * *

(4) contract with public or private agencies, institutions, and organizations, and with individuals, without regard to section 529 of Title 31 [and section 5 of Title 41].

* * * * * * *

§ 1857b–1. Research relating to fuels and vehicles.

(a) * * *

(2) provide for Federal grants to public or nonprofit agencies, institutions, and organizations and to individuals, and contracts with public or private agencies, institutions, or persons, for payment of (A) part of the cost of acquiring, constructing, or otherwise securing for research and development purposes, new or improved devices or methods having industrywide application of preventing or controlling discharges into the air of various types of pollutants; (B) part of the cost of programs to develop low emission alternatives to the present internal combustion engine; (C) the cost to purchase vehicles and vehicle engines, or portions thereof, for research, development, and testing purposes; and (D) carrying out the other provisions of this section, without regard to section 520 of Title 31 [and section 5 of Title 41]; *Provided*, That research or demonstration contracts awarded pursuant to this subsection (including contracts for construction) may be made in accordance with, and subject to the limitations provided with respect to research contracts of the military departments in, section 2353 of Title 10, except that the determination, approval, and certification required thereby shall be made by the Secretary: *Provided further*, That no grant may be made under this paragraph in excess of $1,500,000;

* * * * * * *

§ 2051. Research assistance; fields covered; conditions.

(a) * * *

[(c) The Commission may (1) make arrangements pursuant to this section, without regard to the provisions of section 5 of Title 41, 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; (2)

make partial and advance payments under such arrangements; and (3) make available for use in connection therewith such of its equipment and facilities as it may deem desirable.]

(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.

* * * * * * *

SUBCHAPTER IV.—PRODUCTION OF SPECIAL NUCLEAR MATERIAL

§ 2061. Production facilities.

(a) * * *

(b) Operation of Commission's facilities.

The Commission is authorized and directed to produce or to provide for the production of special nuclear material in its own production facilities. To the extent deemed necessary, the Commission is authorized to make, or to continue in effect, contracts with persons obligating them to produce special nuclear material in facilities owned by the Commission. The Commission is also authorized to enter into research and development contracts authorizing the contractor to produce special nuclear material in facilities owned by the Commission to the extent that the production of such special nuclear material may be incident to the conduct of research and development activities under such contracts. [Any contract entered into under this section shall contain provisions (1) prohibiting the contractor from subcontracting any part of the work he is obligated to perform under the contract, except as authorized by the Commission, and (2) obligating the contractor (A) to make such reports pertaining to activities under the contract to the Commission as the Commission may require, (B) to submit to inspection by employees of the Commission of all such activities, and (C) to comply with all safety and security regulations which may be prescribed by the Commission. Any contract made under the provisions of this subsection may be made without regard to the provisions of section 5 of Title 41, 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 such contracts.]

* * * * * * *

§ 2063. Acquisition of production facilities.

The Commission is authorized to purchase any interest in facilities for the production of special nuclear materials, or in real property on which such facilities are located [without regard to the provisions of section 5 of Title 41 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]. The Commission is further authorized to requisition, condemn, or otherwise acquire any interest in such produc-

tion facilities, or to condemn or otherwise acquire such real property, and just compensation shall be made therefor.

* * * * * * *

§ 2075. Acquisition of special nuclear material; payments; just compensation.

The Commission is authorized, to the extent it deems necessary to effectuate the provisions of this chapter, to purchase without regard to the limitations in section 2074 of this title or any guaranteed purchase prices established pursuant to section 2076 of this title, and to take, requisition, condemn, or otherwise acquire any special nuclear material or any interest therein. [Any contract of purchase made under this section may be made without regard to the provisions of section 5 of Title 41, 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.] Just compensation shall be made for any right, property, or interest in property taken, requisitioned, or condemned under this section.

* * * * * * *

§ 2096. Acquisition of source material; payments.

The Commission is authorized and directed, to the extent it deems necessary to effectuate the provisions of this chapter—

(a) * * *
(b) * * *
(c) * * *

[Any purchase made under this section may be made without regard to the provisions of section 5 of Title 41, 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 advanced payments may be made under contract for such purposes.] The Commission may establish guaranteed prices for all source material delivered to it within a specified time. Just compensation shall be made for any right, property, or interest in property taken, requisitioned, condemned, or otherwise acquired under this section.

* * * * * * *

§ 4372. Office of Environmental Quality.

(a) * * *

(c) Authority of Director to contract.

The Director is authorized to contract with public or private agencies, institutions, and organizations and with individuals without regard to section 529 of Title 31 [and section 5 of Title 41] in carrying out his functions.

* * * * * * *

§ 6009. Evaluation System.

(a) * * *

(d) Grants and contracts; exception.

The Secretary, in consultation with the National Advisory Council on Services and Facilities for the Developmentally Disabled, may

make grants to public and private nonprofit entities and may enter into contracts with individuals and public and nonprofit private entities to assist in developing the evaluation to be developed under subsection (a) of this section, except that such a grant or contract may not be entered into with entities or individuals who have any financial or other direct interest in any of the programs to be evaluated under such a system. [Contracts may be entered into under this subsection without regard to section 529 of Title 31 and section 5 of Title 41.]

* * * * * * *

§ 286d. Authority of Director of National Cancer Institute.

(a) The Director of the National Cancer Institute (after consultation with the National Cancer Advisory Board), in carrying out his functions in administering the National Cancer Program and without regard to any other provision of this chapter, is authorized—

(1) * * *

(7) to enter into such contracts, leases, cooperative agreements, or other transactions [without regard to section 529 of Title 31 and section 5 of Title 41], as may be necessary in the conduct of his functions, with any public agency, or with any person, firm, association, corporation, or educational institution;

* * * * * * *

§ 287b. National heart, blood vessel, lung, and blood diseases and blood resources.

(a) * * *

(c) Director of the Institute; functions.

In carrying out the Program, the Director of the Institute, under policies established by the Director of the National Institutes of Health and after consultation with the Council and without regard to any other provision of this chapter, may—

(3) enter into such contracts, leases, cooperative agreements, or other transactions [without regard to section 529 of Title 31 and section 5 of Title 41] as may be necessary in the conduct of his functions, with any public agency, or with any person, firm, association, corporation, or educational institution.

TITLE 46.—SHIPPING

* * * * * * *

§ 1193. Competitive bidding; opening bids.

[(a) No contract for the building of a new vessel, or for the reconditioning or reconstruction of any other vessel, shall be made by the Secretary of Commerce with any private shipbuilder, except after due advertisement and upon sealed competitive bids.]

(*a*) [(b)] All contracts for the construction, reconditioning, or reconstruction of a vessel or vessels by a private shipbuilder under authority of this subchapter shall be subject to all the provisions and requirements prescribed in subchapter V of this chapter with respect to contracts with a private shipbuilder for the construction of vessels under authority of said subchapter.

(b) [(c)] All bids required by the Secretary of Commerce [for the construction, reconstruction, or reconditioning of vessels, and] or the chartering of the Secretary's vessels hereinafter provided for, shall be opened at the time, hour, and place stated in the advertisement for bids, and all interested persons, including representatives of the press, shall be permitted to attend, and the results of such bidding shall be publicly announced.

* * * * * * *

TITLE 49.—TRANSPORTATION

* * * * * * *

§ 1638. Contracts with public or private agencies; appointment of personnel; procurement of services.

(a) (1) In exercising the authority granted under this chapter, the Secretary is authorized to enter into agreements and to contract with public or private agencies, institutions, organizations, corporations, and individuals, without regard to section 529 of Title 31 [and section 5 of Title 4].

(2) In awarding contracts in connection with research and development and demonstration projects under this chapter, the Secretary shall give priority to proposals which will increase employment in labor areas (as those areas are described by the Secretary of Labor in title 41 of the Code of Federal Regulations)—

(A) which are experiencing a rate of unemployment of 9 per centum or more of the area's work force, or a rate of unemployment of 150 per centum or more of the federally determined unemployment rate for the entire United States; or

(B) which have experienced a 1 per centum increase in unemployment, as determined by the Secretary of Labor, of the available work force as a result of the termination or reduction of a federally financed or supported program and such increase in unemployment continues to exist.

Nothing in this paragraph shall be construed to require that any contract awarded under this chapter must be wholly performed in any one labor area.

[(3) Except as provided in paragraph (2) of this subsection, the private agencies, institutions, organizations, corporations, and individuals with which the Secretary enters into agreements or contracts to carry out research and development under this chapter shall, to the maximum extent practicable, be geographically distributed throughout the United States.]

[(4) Each agreement or contract entered into under this chapter under other than competitive bidding procedures, as determined by the Secretary, shall provide that the Secretary and the Comptroller General of the United States, or any of their duly authorized representatives, may, for the purpose of audit and examination, have access to any books, documents, papers, and records of the parties to such agreement or contract which are pertinent to the operations or activities under such agreement or contract.]

* * * * * *

B. Repeals:

UNITED STATES CODE

TITLE 10.—ARMED FORCES

[Chapter 135.—ENCOURAGEMENT OF AVIATION

[§ 2271. Design competitions: advertisement; selection of winner.

[(a) To encourage the development of aviation and to improve the efficiency of aeronautical war material for the Army, Navy, Air Force, and Marine Corps, the Secretary of each military department, before procuring new designs of aircraft, aircraft parts, or aeronautical accessories, shall invite the submission of new designs thereof in competition, as follows.

[(b) An invitation for the submission of a design shall be made by advertisement in not less than three leading aeronautical journals for a period of 30 days, and in such other manner as the Secretary of the military department concerned considers advisable. Such an advertisement shall specify a time within which designs and prices may be submitted. This time may not be less than 60 days after the expiration of the 30-day advertising period. Each submission shall be sealed and shall contain the design submitted, a statement of the price for which the design or any part of it would be sold to the United States, and a graduated scale of prices for which the designer is willing to construct all or any part of a designed item. The submission shall be kept sealed until the expiration of the specified time. No design mailed after that time may be considered.

[(c) Each advertisement under subsection (b) shall state in general terms the kind of aircraft, aircraft parts, or aeronautical accessories to be developed and the approximate quantity required. The department concerned shall furnish to each applicant identical detailed information as to the conditions of the competition and the features and characteristics to be developed in the design, listing specifically the measures of merit, expressed in percentages, that are to be applied in determining the merits of the design. These measures of merit apply throughout the competition.

[(d) Each design submitted under subsection (b) shall be referred to a board appointed by the Secretary of the military department concerned. The board shall appraise each design as soon as practicable and report the winners to the Secretary. If the Secretary approves the board's report, he shall fix the time and place of a public an-

nouncement of the results and notify each competitor. If the Secretary does not approve it, the papers may be returned to the board for revision, or he may choose the winners, as he elects. The decision of the Secretary is final and conclusive. The announcement of the results of the competition shall state the percentages awarded to each feature or characteristic of each of the designs submitted and the price named for each design and each feature thereof, if separable.

[(e) If, within 10 days after the announcement of the results of a competition under subsection (d), a competitor makes a reasonable showing in writing to the Secretary of the military department concerned that an error was made in determining the merits of designs submitted and that he was thereby deprived of an award, the Secretary shall at once refer the matter to a board of arbitration for determination. The board of arbitration shall be composed of three skilled aeronautical engineers, one of whom shall be selected by the Secretary, one by the claimant, and the third by the other members. No person may be a member of a board of arbitration if he served on the board of appraisal that judged the competition out of which the arbitration arose. The findings of the board are conclusive if approved by the Secretary. In a competition, three competitors, or less, who have the highest figures of merit may be selected as winners.]

[§ 2272. Design competitions; rejection or purchase of designs; contracts; conditions.

[(a) If the Secretary of the military department concerned determines that a winner of a design competition under section 2271 of this title is, or can become within a reasonable time, able and equipped to furnish or construct all or part of any designed item, he may contract with that winner for furnishing or constructing it at a reasonable price, but not more than the price submitted with the design on terms that he considers most advantageous to the United States. However, if the Secretary determines that the winner will not be able to furnish all or part of any designed item, he may buy the design, or a separable part of it, at a fair and reasonable price, but not more than the price submitted with the design.

[(b) If the Secretary of the military department concerned determines that none of the designs submitted in a competition is of sufficient merit to justify procurement of a designed item, he need not accept or pay for them.

[(c) If the Secretary of the military department concerned determines that the designs submitted by two or more competitors are of equal merit, or that features in the designs of one competitor are superior to the corresponding features in the designs of another competitor and that the superior features of one design may be substituted for the inferior features of another, he may divide the contracts for furnishing the item equitably among those competitors that submitted designs of equal merit, or he may combine features of superior excellence of different designs in such manner as he determines to be in the best interest of the United States. Payment may be made accordingly to the several competitors at fair and reasonable prices and the contract for the item may be awarded to the competitor or competitors having the highest figures of merit in the competition.

[(d) If the Secretary of the military department concerned cannot contract with a winner in a design competition for furnishing or constructing all or part of a designed item, or if he cannot agree with a winner for the purchase of a design at a reasonable price, he may retain the design and advertise according to law for proposals for furnishing or constructing the item. After all proposals are submitted the Secretary may contract with the lowest responsible bidder for furnishing the item, on terms that he considers in the best interest of the United States. However, the Secretary may reject all bids and advertise for other bids with the same or different specifications.

[(e) Each seller of designs and each contractor furnishing or constructing aircraft, aircraft parts, or aeronautical accessories under this section shall, if the Secretary of the military department concerned requests it, release claims against the United States arising out of the sale or contract. The release shall be in the form, and shall contain the terms, prescribed by the Secretary.

[(f) No contract may be awarded under this section—

[(1) to an individual who is not a citizen of the United States;

[(2) to a corporation unless 75 percent of its capital stock is owned by, and all its directors are, citizens of the United States; or

[(3) to an individual or a corporation that does not have a manufacturing plant within the United States.

[However, the Secretary of the military department concerned may contract with any domestic corporation whose stock is listed on a stock exchange, unless he knows that a majority of its stock is owned or controlled by aliens.]

[§ 2273. Right of United States to design; right of designer to patent; right to sue United States.

[(a) Any executive or military department of the United States may construct or have constructed according to the winning design, and may use, any aircraft, aircraft part, or aeronautical accessory, after payment is completed under a contract made under section 2272 of this title, or after payment for or purchase of the winning design, or a separable part thereof, for that item under that section. An item so constructed may be sold according to law as condemned material. In neither case may any further compensation be paid to the winner of the competition. However, the winner may apply for a patent on any feature of the designed item that was originated by him, and, if the patent is granted, he has exclusive rights under it against all persons except the United States or its vendee under this subsection.

[(b) Any person who believes that—

[(1) a design developed by him after July 2, 1926, relating to aircraft or an aircraft component, is being used; or

[(2) an article embodying a design developed by him after July 2, 1926, relating to aircraft or an aircraft component, is being used or manufactured;

[by or for the United States without just compensation to him from the United States or any other source may, within four years from the date of that use or manufacture, sue in the Court of Claims to recover reasonable and entire compensation.]

[§ 2274. Procurement for experimental purposes.

[(a) The Secretary of a military department may buy designs, aircraft, aircraft parts, and aeronautical accessories that he considers necessary for experimental purposes in the development of the best kinds of items for the Army, Navy, Air Force, or Marine Corps, as the case may be. Purchases under this subsection may be made abroad or in the United States or the Territories, Commonwealths, and possessions, with or without competition and by contract or otherwise.

[(b) If, as a result of a purchase under subsection (a), a new or suitable design considered to be the best kind for the Army, Navy, Air Force, or Marine Corps, as the case may be, is developed, the Secretary of the military department concerned may contract for procurement of the item in quantity. Contracts under this subsection are subject to sections 2272(f) and 2279 of this title but are not subject to sections 2271 (a)—(d) and 2272(a) of this title.]

[§ 2275. Contracts; review of decisions.

[The Secretary of a military department may award a contract for aircraft, aircraft parts, or aeronautical accessories under this chapter to the person whom he finds to be the lowest responsible bidder who can satisfactorily perform the work to the best advantage of the United States. Except for review by the President or a Federal court, or as otherwise provided by the contract, the decision of the Secretary is not reviewable as to—

[(1) the award of the contract;

[(2) the interpretation of the contract; or

[(3) the application and administration of the contract.]

[§ 2276. Inspection and audit of plant and books of contractor; criminal provisions.

[(a) The manufacturing plant and books of a contractor furnishing or constructing aircraft, aircraft parts, or aeronautical accessories for a military department under this chapter, or that part of the plant which is used for that purpose, are subject at all times to inspection and audit by a person designated by the head of any executive department.

[(b) Any committee of Congress may inspect audits and reports of inspection made under subsection (a).

[(c) Whoever, by collusion, understanding, or arrangement, deprives or attempts to deprive the United States of the benefit of a full and free competition under this chapter or of a full and free audit, so far as necessary to disclose the cost of executing the contract, of the books of a person carrying out a contract under this chapter shall be fined not more than $20,000 or imprisoned for not more than five years, or both.]

[§ 2278. Purchase of sample aircraft.

[The Secretary of the Army or the Secretary of the Air Force may buy a sample aircraft from an unsuccessful bidder in a competition held by his department and requiring the submission of sample aircraft. However, not more than one sample aircraft may be bought from each of the first, second, and third of those bidders in order of merit, at prices not more than 75, 60, and 50 percent, respectively, of

the cost of developing and manufacturing the sample, as determined by the Secretary of the military department concerned.]

[§ 2279. Aircraft: restrictions on alien employees of contractor.

[Unless the Secretary of the military department concerned first consents in writing, an alien employed by a person who contracts under this chapter to furnish or construct aircraft, aircraft parts, or aeronautical accessories for the United States may not have access to the plans or specifications for the contracted items or to the work under construction, and may not participate in the trials under the contract.]

[Chapter 137.—PROCUREMENT GENERALLY

[§ 2302. Definitions.

[In this chapter—

[(1) "Head of an agency" means the Secretary, the Under Secretary, or any Assistant Secretary, of the Army, Navy, or Air Force; the Secretary of the Treasury; or the Administrator of the National Aeronautics and Space Administration.

[(2) "Negotiate" means make without formal advertising.

[(3) "Formal advertising" means advertising as prescribed by section 2305 of this title.]

[§ 2303. Applicability of chapter.

[(a) This chapter applies to the purchase, and contract to purchase, by any of the following agencies, for its use or otherwise, of all property named in subsection (b), and all services, for which payment is to be made from appropriated funds:

[(1) The Department of the Army.
[(2) The Department of the Navy.
[(3) The Department of the Air Force.
[(4) The Coast Guard.
[(5) The National Aeronautics and Space Administration.

[(b) This chapter does not cover land. It covers all other property including—

[(1) public works;
[(2) buildings;
[(3) facilities;
[(4) vessels;
[(5) floating equipment;
[(6) aircraft;

[(7) parts;
[(8) accessories;
[(9) equipment; and
[(10) machine tools.

[(c) The provisions of this chapter that apply to the procurement of property apply also to contracts for its installation or alteration.]

[§ 2304. Purchases and contracts: formal advertising; exceptions.

[(a) Purchases of and contracts for property or services covered by this chapter shall be made by formal advertising in all cases in which the use of such method is feasible and practicable under the existing conditions and circumstances. If use of such method is not feasible and practicable, the head of an agency, subject to the requirements for determinations and findings in section 2310, may negotiate such a purchase or contract, if—

[(1) it is determined that such action is necessary in the public interest during a national emergency declared by Congress or the President;

[(2) the public exigency will not permit the delay incident to advertising;

[(3) the aggregate amount involved is not more than $10,000;

[(4) the purchase or contract is for personal or professional services;

[(5) the purchase or contract is for any service by a university, college, or other educational institution;

[(6) the purchase or contract is for property or services to be procured and used outside the United States and the Territories. Commonwealths, and possessions;

[(7) the purchase or contract is for medicine or medical supplies;

[(8) the purchase or contract is for property for authorized resale;

[(9) the purchase or contract is for perishable or nonperishable subsistence supplies;

[(10) the purchase or contract is for property or services for which it is impracticable to obtain competition;

[(11) the purchase or contract is for property or services that he determines to be for experimental, developmental, or research work, or for making or furnishing property for experiment, test, development, or research;

[(12) the purchase or contract is for property or services whose procurement he determines should not be publicly disclosed because of their character, ingredients, or components.

[(13) the purchase or contract is for equipment that he determines to be technical equipment whose standardization and the interchangeability of whose parts are necessary in the public interest and whose procurement by negotiation is necessary to assure that standardization and interchangeability;

[(14) the purchase or contract is for technical or special property that he determines to require a substantial initial investment or an extended period of preparation for manufacture, and for which he determines that formal advertising would be likely

to result in additional cost to the Government by reason of duplication of investment or would result in duplication of necessary preparation which would unduly delay the procurement of the property;

[(15) the purchase or contract is for property or services for which he determines that the bid prices received after formal advertising are unreasonable as to all or part of the requirements, or were not independently reached in open competition, and for which (A) he has notified each responsible bidder of intention to negotiate and given him reasonable opportunity to negotiate; (B) the negotiated price is lower than the lowest rejected bid of any responsible bidder, as determined by the head of the agency; and (C) the negotiated price is the lowest negotiated price offered by any responsible supplier;

[(16) he determines that (A) it is in the interest of national defense to have a plant, mine, or other facility, or a producer, manufacturer, or other supplier, available for furnishing property or services in case of a national emergency; or (B) the interest of industrial mobilization in case of such an emergency, or the interest of national defense in maintaining active engineering, research, and development, would otherwise be subserved; or

[(17) negotiation of the purchase or contract is otherwise authorized by law.

[(b) The data respecting the negotiation of each purchase or contract under clauses (1) and (7)–(17) of subsection (a) shall be kept by the contracting agency for six years after the date of final payment on the contract.

[(c) This section does not authorize—

[(1) the negotiation of a contract to construct or repair any building, road, sidewalk, sewer main, or similar item, unless—

[(A) it is made under clauses (1)–(3), (10)–(12), or (15) of subsection (a); or

[(B) it is to be performed outside the United States; or

[(2) the erection, repair, or furnishing of any public building or public improvement.

[(d) Whenever the head of the agency determines it to be practicable, such advance publicity as he considers suitable with regard to the property involved and other relevant considerations shall be given for a period of at least 15 days before making a purchase of or contract for property, or a service, under clause (7) or (8) of subsection (a) involving more than $10,000.

[(e) A report shall be made to Congress, on May 19 and November 19 of each year, of the purchases and contracts made under clauses (11) and (16) of subsection (a) during the period since the date of the last report. The report shall—

[(1) name each contractor;

[(2) state the amount of each contract; and

[(3) describe, with consideration of the national security, the property and services covered by each contract.

[(f) For the purposes of the following laws, purchases or contracts negotiated under this section shall be treated as if they were made with formal advertising:

[(1) Sections 35–45 of title 41.
[(2) Sections 276a 276a 5 of title 40.
[(3) Sections 324 and 325a of title 40.

[(g) In all negotiated procurements in excess of $10,000 in which rates or prices are not fixed by law or regulation and in which time of delivery will permit, proposals, including price, shall be solicited from the maximum number of qualified sources consistent with the nature and requirements of the supplies or services to be procured, and written or oral discussions shall be conducted with all responsible offerors who submit proposals within a competitive range, price, and other factors considered: *Provided, however*, That the requirements of this subsection with respect to written or oral discussions need not be applied to procurements in implementation of authorized set-aside programs or to procurements where it can be clearly demonstrated from the existence of adequate competition or accurate prior cost experience with the product, that acceptance of an initial proposal without discussion would result in fair and reasonable prices and where the request for proposals notifies all offerors of the possibility that award may be made without discussion.

[(h) Except in a case where the Secretary of Defense determines that military requirements necessitate specification of container sizes, no contract for the carriage of Government property in other than Government-owned cargo containers shall require carriage of such property in cargo containers of any stated length, height, or width.]

[§ 2305. Formal advertisements for bids; time; opening; award; rejection.

[(a) Whenever formal advertising is required under section 2304 of this title, the advertisement shall be made a sufficient time before the purchase or contract. The specifications and invitations for bids shall permit such free and full competition as is consistent with the procurement of the property and services needed by the agency concerned. Except in a case where the Secretary of Defense determines that military requirements necessitate specification of container sizes, no advertisement or invitation to bid for the carriage of Government property in other than Government-owned cargo containers shall specify carriage of such property in cargo containers of any stated length, height, or width.

[(b) The specifications in invitations for bids must contain the necessary language and attachments, and must be sufficiently descriptive in language and attachments, to permit full and free competition. If the specifications in an invitation for bids do not carry the necessary descriptive language and attachments, or if those attachments are not accessible to all competent and reliable bidders, the invitation is invalid and no award may be made.

[(c) Bids shall be opened publicly at the time and place stated in in the advertisement. Awards shall be made with reasonable promptness by giving written notice to the responsible bidder whose bid conforms to the invitation and will be the most advantageous to the United States, price and other factors considered. However, all bids may be rejected if the head of the agency determines that rejection is in the public interest.

[(d) If the head of the agency considers that any bid received after formal advertising evidences a violation of the antitrust laws, he shall refer the bid to the Attorney General for appropriate action.]

[§ 2306. Kinds of contracts.

[(a) The cost-plus-a-percentage-of-cost system of contracting may not be used. Subject to this limitation and subject to subsections (b)—(f), the head of an agency may in negotiating contracts under section 2304 of this title, make any kind of contract that he considers will promote the best interests of the United States.

[(b) Each contract negotiated under section 2304 of this title shall contain a warranty, determined to be suitable by the head of the agency, that the contractor has employed or retained no person or selling agency to solicit or obtain the contract under an understanding or agreement for a commission percentage, brokerage, or contingent fee, except a bona fide employee or established commercial or selling agency maintained by him to obtain business. If a contractor breaks such a warranty the United States may annul the contract without liability or may deduct the commission, percentage, brokerage, or contingent fee from the contract price or consideration.

[(c) No cost contract, cost-plus-a-fixed-fee contract, or incentive contract may be made under section 2304 of this title, unless the head of the agency determines that such a contract is likely to be less costly to the United States than any other kind of contract or that it is impracticable to obtain property or services of the kind or quality required except under such a contract.

[(d) The fee for performing a cost-plus-a-fixed-fee contract for experimental, developmental, or research work may not be more than 15 percent of the estimated cost of the contract, not including the fee. The fee for performing a cost-plus-a-fixed-fee contract for architectural or engineering services for a public work or utility plus the cost of those services to the contractor may not be more than 6 percent of the estimated cost of that work or project, not including fees. The fee for performing any other cost-plus-a-fixed-fee contract may not be more than 10 percent of the estimated cost of the contract, not including the fee. Determinations under this subsection of the estimated costs of a contract or project shall be made by the head of the agency at the time the contract is made.

[(e) Each cost contract and each cost-plus-a-fixed-fee contract shall provide for notice to the agency by the contractor before the making, under the prime contract, of—

[(1) a cost-plus-a-fixed-fee subcontract; or

[(2) a fixed-price subcontract or purchase order involving more than $25,000 or 5 percent of the estimated cost of the prime contract.

[(f) A prime contractor or any subcontractor shall be required to submit cost or pricing data under the circumstances listed below, and shall be required to certify that, to the best of his knowledge and belief, the cost or pricing data he submitted was accurate, complete and current—

[(1) Prior to the award of any negotiated prime contract under this title where the price is expected to exceed $100,000;

[(2) Prior to the pricing of any contract change or modification for which the price adjustment is expected to exceed $100,000, or such lesser amount as may be prescribed by the head of the agency;

[(3) Prior to the award of a subcontract at any tier, where the prime contractor and each higher tier subcontractor have been required to furnish such a certificate, if the price of such subcontract is expected to exceed $100,000; or

[(4) Prior to the pricing of any contract change or modification to a subcontract covered by (3) above, for which the price adjustment is expected to exceed $100,000, or such lesser amount as may be prescribed by the head of the agency.

[Any prime contract or change or modification thereto under which such certificate is 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 head of the agency that such price was increased because the contractor or any subcontractor required to furnish such a certificate, furnished cost or pricing data which, as of a date agreed upon between the parties (which date shall be as close to the date of agreement on the negotiated price as is practicable), was inaccurate, incomplete, or noncurrent: *Provided*, That the requirements of this subsection need not be applied to contracts or subcontracts where the price negotiated is based on adequate price competition, established catalog or market prices of commercial items sold in substantial quantities to the general public, prices set by law or regulation or, in exceptional cases where the head of the agency determines that the requirements of this subsection may be waived and states in writing his reasons for such determination.

[For the purpose of evaluating the accuracy, completeness, and currency of cost or pricing data required to be submitted by this subsection, any authorized representative of the head of the agency who is an employee of the United States Government shall have the right, until the expiration of three years after final payment under the contract or subcontract, to examine all books, records, documents, and other data of the contractor or subcontractor related to the negotiation, pricing, or performance of the contract or subcontract.

[(g) (1) The head of an agency may enter into contracts for periods of not more than five years for the following types of services (and items of supply related to such services) to be performed outside the forty-eight contiguous States and the District of Columbia for which funds would otherwise be available for obligation only within the fiscal year for which appropriated—

[(A) operation, maintenance, and support of facilities and installations;

[(B) maintenance or modification of aircraft, ships, vehicles, and other highly complex military equipment;

[(C) specalized training necessitating high quality instructor skills (for example, pilot and aircrew members; foreign language training); and

[(D) base services (for example, ground maintenance; in-plane refueling; bus transportation; refuse collection and disposal); whenever he finds that:

[(i) there will be a continuing requirement for the services consonant with current plans for the proposed contract period;

[(ii) the furnishing of such services will require a substantial initial investment in plant or equipment, or the incurrence of substantial contingent liabilities for the assembly, training, or transportation of a specialized work force; and

[(iii) the use of such a contract will promote the best interests of the United States by encouraging effective competition and promoting economies in operation.

[(2) In entering into such contracts, the head of the agency shall be guided by the following principles:

[(A) the portion of the cost of any plant or equipment amortized as a cost of contract performance should not exceed the ratio between the period of contract performance and the anticipated useful commercial life of such plant or equipment. Useful commercial life, for this purpose, means the commercial utility of the facilities rather than the physical life thereof, with due consideration given to such factors as location of facilities, specialized nature thereof, and obsolescence.

[(B) consideration shall be given to the desirability of obtaining an option to renew the contract for a reasonable period not to exceed three years, at prices not to include charges for plant, equipment and other nonrecurring costs, already amortized.

[(C) consideration shall be given to the desirability of reserving in the agency the right, upon payment of the amortized portion of the cost of the plan tor equipment, to take title thereto under appropriate circumstances.

[(3) In the event funds are not made available for the continuation of such a contract into a subsequent fiscal year, the contract shall be canceled or terminated, and the costs of cancellation or termination may be paid from:

[(A) appropriations originally available for the performance of the contract concerned;

[(B) appropriations currently available for procurement of the type of services concerned, and not otherwise obligated; or

[(C) funds appropriated for those payments.]

[§ 2307. Advance payments.

[(a) The head of any agency may—

[(1) make advance, partial, progress, or other payments under contracts for property or services made by the agency; and

[(2) insert in bid solicitations for procurement of property or services a provision limiting to small business concerns advance or progress payments.

[(b) Payments made under subsection (a) may not exceed the unpaid contract price.

[(c) Advance payments made under subsection (a) may be made only if the contractor gives adequate security and after a determination by the head of the agency that to do so would be in the pub-

lic interest. Such security may be in the form of a lien in favor of the United States on the property contracted for, on the balance in an account in which such payments are deposited, and on such of the property acquired for performance of the contract as the parties may agree. This lien is paramount to any other liens.

[(d) Payments under subsection (a) in the case of any contract, other than partial, progress, or other payments specifically provided for in such contract at the time such contract was initially entered into, may not exceed $25,000,000 unless the Committees on Armed Services of the Senate and the House of Representatives have been notified in writing of such proposed payments and 60 days of continuous session of Congress have expired following the date on which such notice was transmitted to such Committees and neither House of Congress has adopted, within such 60-day period, a resolution disapproving such payments. For purposes of this section, the continuity of a session of Congress is broken only by an adjournment of the Congress sine die, and the days on which either House is not in session because of an adjournment of more than 3 days to a day certain are excluded in the computation of such 60-day period.]

[§ 2308. Assignment and delegation of procurement functions and responsibilities.

[Subject to section 2311 of this title, to facilitate the procurement of property and services covered by this chapter by each agency named in section 2303 of this title for any other agency, and to facilitate joint procurement by those agencies—

[(1) the head of an agency may, within his agency, delegate functions and assign responsibilities relating to procurement;

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

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

[§ 2309. Allocation of appropriations.

[(a) Appropriations available for procurement by an agency named in section 2303 of this title may, through administrative allotment, be made available for obligation for procurement by any other agency in amounts authorized by the head of the alloting agency and without transfer of funds on the books of the Department of the Treasury.

[(b) A disbursing officer of the allotting agency may make any disbursement chargeable to an allotment under subsection (a) upon a voucher certified by an officer or civilian employee of the procuring agency.]

[§ 2310. Determinations and decisions.

[(a) Determinations and decisions required to be made under this chapter by the head of an agency may be made for an individual purchase or contract or for a class of purchases or contracts. Such a determination or decision is final.

[(b) Each determination or decision under clauses (11)—(16) of section 2304(a), section 2306(c), section 2306(g)(1), section 2307

(c), or section 2313(c) of this title and a decision to negotiate contracts under clauses (2), (7), (8), (10), (12), or for property or supplies under clause (11) of section 2304(a), shall be based on a written finding by the person making the determination or decision, which finding shall set out facts and circumstances that (1) are clearly illustrative of the conditions described in clauses (11)—(16) of section 2304(a), (2) clearly indicate why the type of contract selected under section 2306(c) is likely to be less costly than any other type or that it is impracticable to obtain property or services of the kind or quality required except under such a contract kind or quality required except under such a contract, (3) support the findings required by section 2306(g)(1), (4) clearly indicate why advance payments under section 2307(c) would be in the public interest, (5) clearly indicate why the application of section 2313(b) to a contract of subcontract with a foreign contractor or foreign subcontractor would not be in the public interest, or (6) clearly and convincingly establish with respect to the use of clauses (2), (7), (8), (10), (12), and for property or supplies under clause (11) of section 2304(a), that formal advertising would not have been feasible and practicable. Such a finding is final and shall be kept available in the agency for at least six years after the date of the determination or decision. A copy of the finding shall be submitted to the General Accounting Office with each contract to which it applies.]

[§ 2311. Delegation.

[The head of an agency may delegate, subject to his direction, to any other officer or official of that agency, any power under this chapter except the power to make determinations and decisions (1) under clauses (11)—(16) of section 2304(a) of this title, and (2) authorizing contracts in excess of three years under section 2306(g) of this title. However, the power to make a determination or decision under section 2304(a)(11) of this title may be delegated to any other officer or official of that agency who is responsible for procurement and only for contracts requiring the expenditure of not more than $100,000.]

[§ 2312. Remission of liquidated damages.

[Upon the recommendation of the head of an agency, the Comptroller General may remit all or part, as he considers just and equitable, of any liquidated damages assessed for delay in performing a contract, made by that agency, that provides, for such damages.]

[§ 2313. Examination of books and records of contractor.

[(a) An agency named in section 2303 of this title is entitled, through an authorized representative, to inspect the plant and audit the books and records of—

[(1) a contractor performing a cost or cost-plus-a-fixed-fee contract made by that agency under this chapter; and

[(2) a subcontractor performing any subcontract under a cost or cost-plus-a-fixed-fee contract made by that agency under this chapter.

[(b) Except as provided in subsection (c), each contract negotiated under this chapter shall provide that the Comptroller General and

his representatives are entitled, until the expiration of three years after final payment, to examine any books, documents, papers, or records of the contractor, or any of his subcontractors, that directly pertain to, and involve transactions relating to, the contract or subcontract.

[(c) Subsection (b) does not apply to a contract or subcontract with a foreign contractor or foreign subcontractor if the head of the agency determines, with the concurrence of the Comptroller General or his designee, that the application of that subsection to the contract or subcontract would not 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.]

[§ 2314. Laws inapplicable to agencies named in secton 2303 of this title.

[Sections 5, 6, 6a, and 13 of title 41 do not apply to the procurement of property or services by the agencies named in section 2303 of this title.]

* * * * * * *

[§ 4535. Exceptional subsistence supplies: purchase without advertising.

[Exceptional articles of subsistence supplies that are for members of the Army, and for which they are to pay regardless of condition upon arrival, may, under regulations to be prescribed by the Secretary of the Army, be bought on the open market without advertising.]

* * * * * * *

[§ 7522. Contracts for research.

[(a) The Secretary of the Navy and, by direction of the Secretary, the Chief of Naval Research and the chiefs of bureaus may, without advertising, make contracts or amendments or modifications of contracts for services and materials necessary to conduct research and to make or secure reports, tests, models, or apparatus. A contractor supplying such services or materials need not be required to furnish a bond.

[(b) Section 529 of title 31 does not apply to advance, progress, or other payments made with respect to a contract under this section.

[(c) This section does not authorize the use of the cost-plus-a-percentage-of-cost system of contracting.]

* * * * * * *

[§ 9535. Exceptional subsistence supplies: purchases without advertising.

[Exceptional articles of subsistence supplies that are for members of the Air Force, and for which they are to pay regardless of condition upon arrival, may, under regulations to be prescribed by the Secretary of the Air Force, be bought on the open market without advertising.]

* * * * * * *

TITLE 15.—COMMERCE AND TRADE

§ 637. Additional powers.

(a) * * *

[(e) Notice and publication of procurement actions; exceptions.

[It shall be the duty of the Secretary of Commerce, and he is empowered, to obtain notice of all proposed defense procurement actions of $10,0000 and above, and all civilian procurement actions of $5,000 and above, from any Federal department, establishment, or agency engaged in procurement of supplies and services in the United States; and to publicize such notices in the daily publicaiton "United States Department of Commerce Synopsis of the United States Government Proposed Procurement, Sales, and Contract Awards", immediately after the necessity for the procurement is established; except that nothing herein shall require publication of such notices with respect to those procurements (1) which for security reasons are of a classified nature, or (2) which involve perishable subsistence supplies, or (3) which are for utility service and the procuring agency in accordance with applicable law has predetermined the utility concern to whom the award will be made, or (4) which are of such unusual and compelling emergency that the Government would be seriously injured if bids or offers were permitted to be made more than 15 days after the issuance of the invitation for bids or solication for proposals, or (5) which are made by an order placed under an existing contract, or (6) which are made from another Government department or agency, or a mandatory source of supply, or (7) which are for personal or professional services, or (8) which are for services from educational institutions, or (9) in which only foreign sources are to be solicited, or (10) for which it is determined in writing by the procuring agency, with the concurrence of the Administrator, that advance publicity is not appropriate or reasonable.]

* * * * * * *

TITLE 16.—CONSERVATION

[§ 833f. Purchase of supplies and services.

[Notwithstanding any other provision of law, all purchases and contracts made by the Bureau or the Secretary of the Army for supplies or for services, except for personal service, shall be made after advertising, in such manner and at such times, sufficiently in advance of opening bids, as the Bureau or Secretary of the Army, as the case

may be, shall determine to be adequate to insure notice and opportunity for competition. Such advertisement shall not be required, however, when (1) an emergency requires immediate delivery of the supplies or performance of the services; or (2) repair parts, accessories, supplemental equipment, or services are required for supplies or services previously furnished or contracted for; or (3) the aggregate amount involved in any purchase of supplies or procurement of services does not exceed $500; in which cases such purchase of supplies or procurement of services may be made in the open market in the manner common among businessmen. In comparing bids and in making awards, the Bureau or the Secretary of the Army, as the case may be, may consider such factors as relative quality and adaptability of supplies or services, the bidder's financial responsibility, skill, experience, record of integrity in dealing, and ability to furnish repairs and maintenance services, the time of delivery or performance offered, and whether the bidder has complied with the specification.]

* * * * * * *

TITLE 25.—INDIANS

[§ 96. Copies of contracts furnished to General Accounting Office before payment.

[Copies of all contracts made by the Commissioner of Indian Affairs, or any other officer of the Government for the Indian Service, shall be furnished to the General Accounting Office before any payment shall be made thereon.]

[§ 97. Proposals or bids for contracts to be preserved.

[In all lettings of contracts in connection with the Indian Service, the proposals or bids received shall be filed and preserved; and an abstract of all bids or proposals received for the supplies or services embraced in any contract shall be attached to, and filed with, the said contract when the same is filed in the General Accounting Office.]

* * * * * * *

TITLE 40.—PUBLIC BUILDINGS, PROPERTY, AND WORKS

§ 474. Congress, departments, agencies, corporations, and persons exempted from provisions.

The authority conferred by this Act shall be in addition and paramount to any authority conferred by any other law and shall not be subject to the provisions of any law inconsistent herewith, except as provided by the Office of Federal Procurement Policy Act, and except that sections 486(b) and 487(c) of this title shall not be applicable to any Government corporation or agency which is subject to the Government Corporation Control Act.

Nothing in this Act shall impair or affect any authority of—

(1) * * *

[(3) any executive agency named in the Armed Services Procurement Act of 1947, and the head thereof, with respect to the administration of said Act;]

* * * * * * *

[(8) the Secretary of the Army, the Secretary of the Navy, and the Secretary of the Air Force with respect to the administration of section 1171(b) of Appendix to Title 50;]

* * * * * * *

[(10) the Secretary of Agriculture, Farm Credit Administration, or any farm credit board under section 640*l*(b) of Title 12, with respect to the acquisition or disposal of property;]

* * * * * * *

[(19) for such period of time as the President may specify, any other authority of any executive agency which the President determines within one year after the effective date of said chapters should, in the public interest, stand unimpaired by said chapters;]

* * * * * * *

§ 609. Architectural or engineering services.

[(a) Employment by Administrator.

[The Administrator, whenever he determines it to be necessary, is authorized to employ, by contract or otherwise, and without regard to chapter 51 and subchapter III of chapter 53 of Title 5, or to the civil service laws, rules, and regulations, or to section 5 of Title 41, the services of established architectural or engineering corporations, firms, or individuals, to the extent he may require such services for any public building authorized to be constructed or altered under this chapter.

[(b) Employment on permanent basis.

[No corporation, firm, or individual shall be employed under authority of subsection (a) of this section on a permanent basis.]

* * * * * * *

TITLE 41.—PUBLIC CONTRACTS

[§ 13. Contracts limited to one year.

[Except as otherwise provided, it shall not be lawful for any of the executive departments to make contracts for stationery or other supplies for a longer term than one year from the time the contract is made.]

* * * * * * *

[§ 24. Contracts for transportation of moneys, bullion, coin, and securities.

[Whenever it is practicable contracts for the transportation of moneys, bullion, coin, notes, bonds, and other securities of the United States, and paper shall be let to the lowest responsible bidder therefor, after notice to all parties having means of transportation.]

* * * * * * *

[§ 251. Declaration of purpose of this chapter.

[The purpose of this chapter is to facilitate the procurement of property and services.]

[§ 252. Purchases and contracts for property.

[(a) Applicability of chapter; delegation of authority.

[Executive agencies shall make purchases and contracts for property and services in accordance with the provisions of this chapter

and implementing regulations of the Administrator; but this chapter does not apply—

[(1) to the Department of Defense, the Coast Guard, and the National Aeronautics and Space Administration; or

[(2) when this chapter is made inapplicable pursuant to section 474 of Title 40 or any other law, but when this chapter is made inapplicable by any such provision of law, sections 5 and 8 of this title shall be applicable in the absence of authority conferred by statute to procure without advertising or without regard to said section 5 of this title.

[(b) Small business concerns; share of business; advance publicity on negotiated purchases and contracts for property.

[It is the declared policy of the Congress that a fair proportion of the total purchase and contracts for property and services for the Government shall be placed with small business concerns. Whenever it is proposed to make a contract or purchase in excess of $10,000 by negotiation and without advertising, pursuant to the authority of paragraph (7) or (8) of subsection (c) of this section, suitable advance publicity, as determined by the agency head with due regard to the type of property involved and other relevant considerations, shall be given for a period of at least fifteen days, wherever practicable, as determined by the agency head.

[(c) Negotiated purchases and contracts for property; conditions.

[All purchases and contracts for property and services shall be made by advertising, as provided in section 253 of this title, except that such purchases and contracts may be negotiated by the agency head without advertising if—

[(1) determined to be necessary in the public interest during the period of a national emergency declared by the President or by the Congress;

[(2) the public exigency will not admit of the delay incident to advertising;

[(3) the aggregate amount involved does not exceed $10,000;

[(4) for personal or professional services;

[(5) for any service to be rendered by any university, college, or other educational institution;

[(6) the property or services are to be procured and used outside the limits of the United States and its possessions;

[(7) for medicines or medical property;

[(8) for property purchased for authorized resale;

[(9) for perishable or nonperishable subsistence supplies;

[(10) for property or services for which it is impracticable to secure competition;

[(11) the agency head determines that the purchase or contract is for experimental, developmental, or research work, or for the manufacture or furnishing of property for experimentation, development, research, or test;

[(12) for property or services as to which the agency head determines that the character, ingredients, or components thereof are such that the purchase or contract should not be publicly disclosed;

[(13) for equipment which the agency head determines to be technical equipment, and as to which he determines that the procurement thereof without advertising is necessary in special situations or in particular localities in order to assure standardization of equipment and interchangeability of parts and that such standardization and interchangeability is necessary in the public interest;

[(14) for property or services as to which the agency head determines that bid prices after advertising therefor are not reasonable (either as to all or as to some part of the requirements) or have not been independently arrived at in open competition: *Provided*, That no negotiated purchase or contract may be entered into under this paragraph after the rejection of all or some of the bids received unless (A) notification of the intention to negotiate and reasonable opportunity to negotiate shall have been given by the agency head to each responsible bidder and (B) the negotiated price is the lowest negotiated price offered by any responsible supplier; or

[(15) otherwise authorized by law, except that section 254 of this title shall apply to purchases and contracts made without advertising under this paragraph.

[(d) Bids in violation of antitrust laws.

[If in the opinion of the agency head bids received after advertising evidence any violation of the antitrust laws he shall refer such bids to the Attorney General for appropriate action.

[(e) Exceptions to section.

[This section shall not be construed to (A) authorize the erection, repair, or furnishing of any public building or public improvement, but such authorization shall be required in the same manner as heretofore, or (B) permit any contract for the construction or repair of buildings, roads, sidewalks, sewers, mains, or similar items to be negotiated without advertising as required by section 253 of this title, unless such contract is to be performed outside the continental United States or unless negotiation of such contract is authorized by the provisions of paragraphs (1)—(3), (10)—(12), or (14) of subsection (c) of this section.

[(f) Carriage of cargo; specification of container size.

[No contract for the carriage of Government property in other than Government-owned cargo containers shall require carriage of such property in cargo containers of any stated length, height, or width.]

[§ 253. Advertising requirements.

[Whenever advertising is required—

[(a) The advertisement for bids shall be made a sufficient time previous to the purchase or contract, and specifications and invitations for bids shall permit such full and free competition as is consistent with the procurement of types of property and services necessary to meet the requirements of the agency concerned. No advertisement or invitation to bid for the carriage of Government property in other than Government-owned cargo containers shall specify carriage of such property in cargo containers of any stated length, height, or width.

[(b) All bids shall be publicly opened at the time and place stated in the advertisement. Award shall be made with reasonable promptness by written notice to that responsible bidder whose bid, conforming to the invitation for bids, will be most advantageous to the Government, price and other factors considered: *Provided*, That all bids may be rejected when the agency head determines that it is in the public interest so to do.]

[§ 254. Negotiated contracts.

[(a) Requirements.

[Except as provided in subsection (b) of this section, contracts negotiated pursuant to section 252(c) of this title may be of any type which in the opinion of the agency head will promote the best interests of the Government. Every contract negotiated pursuant to section 252(c) of this title shall contain a suitable warranty, as determined by the agency head, by the contractor that no person or selling agency has been employed or retained to solicit or secure such contract upon an agreement or understanding for 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, for the breach or violation of which warranty the Government shall have the right to annul such contract without liability or in its discretion to deduct from the contract price or consideration the full amount of such commission, percentage, brokerage, or contingent fee.

[(b) Barred contracts; fee limitation; determination of use; advance notification.

[The cost-plus-a-percentage-of-cost system of contracting shall not be used, and in the case of a cost-plus-a-fixed-fee contract the fee shall not exceed 10 per centum of the estimated cost of the contract, exclusive of the fee, as determined by the agency head at the time of entering into such contract (except that a fee not in excess of 15 per centum of such estimated cost is authorized in any such contract for experimental, developmental, or research work and that a fee inclusive of the contractor's costs and not in excess of 6 per centum of the estimated cost, exclusive of fees, as determined by the agency head at the time of entering into the contract of the project to which such fee is applicable is authorized in contracts for architectural or engineering services relating to any public works or utility project). Neither a cost nor a cost-plus-a-fixed-fee contract nor an incentive-type contract shall be used unless the agency head determines that such method of contracting is likely to be less costly than other methods or that it is impractical to secure property or services of the kind or quality required without the use of a cost or cost-plus-a-fixed-fee contract or an incentive-type contract. All cost and cost-plus-a-fixed-fee contracts shall provide for advance notification by the contractor to the procuring agency of any subcontract thereunder on a cost-plus-a-fixed-fee basis and of any fixed-price subcontract or purchase order which exceeds in dollar amount either $25,000 or 5 per centum of the total estimated cost of the prime contract; and a procuring agency, through any authorized representative thereof, shall have the right to inspect the plans and to audit the books and records of any prime

contractor or subcontractor engaged in the performance of a cost or cost-plus-a-fixed-fee contract.

[(c) Examination of books, records, etc., of contractors; time limitation; exemptions; exceptional conditions; reports to Congress.

[All contracts negotiated without advertising pursuant to authority contained in this act shall include a clause to the effect that the Comptroller General of the United States or any of his duly authorized representatives shall until the expiration of three years after final payment have access to and the right to examine any directly pertinent books, documents, papers, and records of the contractor or any of his subcontractors engaged in the performance of and involving transactions related to such contracts or subcontracts. Under regulations to be prescribed by the Administrator, however, such clause may be omitted from contracts with foreign contractors or foreign subcontractors if the agency head determines, with the concurrence of the Comptroller General of the United States or his designee, that the omission will serve the best interests of the United States. However, the concurrence of the Comptroller General of the United States or his designee is not required for the omission of such clause—

[(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 agency head 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 the omission of the clause.

[If the clause is omitted based on a determination under clause (2) a written report shall be furnished to the Congress. The power of the agency head to make the determination specified in the preceding sentences shall not be delegable.]

[§ 254a. Cost-type research and development contracts with educational institutions.

[On and after September 5, 1962, provision may be made in cost-type research and development contracts (including grants) with universities, colleges, or other educational institutions for payment of reimbursable indirect costs on the basis of predetermined fixed-percentage rates applied to the total, or an element thereof, of the reimbursable direct costs incurred.]

[§ 255. Advance or other payments; restrictions; conditions.

[(a) Any executive agency may—

[(1) make advance, partial, progress or other payments under contracts for property or services made by the agency; and

[(2) insert in bid solicitations for procurement of property or services a provision limiting to small business concerns advance or progress payments.

[(b) Payments made under subsection (a) of this section may not exceed the unpaid contract price.

[(c) Advance payments under subsection (a) of this section 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 bein 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 of the property acquired for performance of the contract as the parties may agree. This lien shall be paramount to all other liens.]

[§ 256a. Waiver of liquidated damages.

[Whenever any contract made on behalf of the Government by the head of any Federal Agency, or by officers authorized by him so to do, includes a provision for liquidated damages for delay, the Comptroller General upon recommendation of such head is authorized and empowered to remit the whole or any part of such damages as in his discretion may be just and equitable.]

[§ 257. Administrative determinations.

[(a) Conclusiveness; delegation of powers.

[The determinations and decisions provided in this chapter to be made by the Administrator or other agency head may be made with respect to individual purchases and contracts or with respect to classes of purchases or contracts, and shall be final. Except as provided in subsection (b) of this section, and except as provided in section 486(d) of Title 40 with respect to the Administrator, the agency head is authorized to delegate his powers provided by this chapter, including the making of such determinations and decisions, in his discretion and subject to his direction, to any other officer or officers or officials of the agency.

[(b) Nondelegable powers; powers delegable to certain persons.

[The power of the agency head to make the determinations or decisions specified in paragraphs (12) and (13) of section 252(c) of this title shall not be delegable, and the power to make the determinations or decisions specified in paragraph (11) of section 252(c) of this title shall be delegable only to a chief officer responsible for procurement and only with respect to contracts which will not require the expenditure of more than $25,000.

[(c) Basis of determinations; finding conclusive; preservation of findings; copy.

[Each determination or decision required by paragraphs (11)–(13), or (14) of section 252(c), by section 254 or by section 255(c) of this title shall be based upon written findings made by the official making such determination, which findings shall be final and shall be available within the agency for a period of at least six years following the date of the determination. A copy of the findings shall be submitted to the General Accounting Office with the contract.

[(d) Preservation of data.

[In any case where any purchase or contract is negotiated pursuant to the provisions of section 252(c) of this title, except in a case covered by paragraphs (2)–(5), or (6) of section 252(c) of this title, the data with respect to the negotiation shall be preserved in the files of the agency for a period of six years following final payment on such contract.]

[§ 258. Laws applicable to contracts.

[No purchase or contract shall be exempt from sections 35 to 45 of this title, or from sections 276a to 276a–5 of Title 40, solely by reason of having been entered into pursuant to section 252(c) of this title without advertising, and the provisions of sections 276a to 276a–5, 324 and 325a of Title 40, if otherwise applicable, shall apply to such purchases and contracts.]

[§ 260. Laws not applicable to contracts.

[Sections 5, 8, and 13 of this title shall not apply to the procurement of property or services made by an executive agency pursuant to this chapter. Any provision of law which authorizes an executive agency (other than an executive agency which is exempted from the provisions of this title by section 252(a) of this title), to procure any property or services without advertising or without regard to said section 5 of this title shall be construed to authorize the procurement of such property or services pursuant to section 252(c)(15) of this title without regard to the advertising requirements of sections 252(c) and 253 of this title.]

* * * * * * *

TITLE 42.—THE PUBLIC HEALTH AND WELFARE

§ 242m. General provisions respecting sections 242b, 242c, 242k, and 242l of this title concerning general authority of Secretary, National Center and other centers for Health Services Research, National Center for Health Statistics, and International Cooperation.

(a) * * *

[(f) Contracts without regard to section 529 of Title 31 and section 5 of Title 41.

[Contracts may be entered into under section 242b, 242c, or 242k of title without regard to section 529 of Title 31 and section 5 of Title 41.]

* * * * * * *

[§ 292f. Contracts.

[Contracts authorized by this subchapter may be entered into without regard to section 529 of Title 31 and section 5 of Title 41.]

* * * * * * *

PART C.—SUDDEN INFANT DEATH SYNDROME

§ 300c–11. Sudden infant death syndrome counseling, information, educational, and statistical programs.

(a) * * *

(b) Grants and contracts for projects; applications: approval by Secretary, form, contents; payments: advances or reimbursement, intervals, and conditions; provisions of section 529 of Title 31 and section 5 of Title 41 inapplicable to contracts; authorization of appropriations.

(1) * * *

[(4) Contracts under this subsection may be entered into without regard to section 529 of Title 31 and section 5 of Title 41.]

* * * * * * *

§ 300c–22. Blood-separation centers.

(a) * * *

[(d) Nonapplicability of statutory provisions to contracts.

[Contracts may be entered into under subsection (a) of this section without regard to section 529 of Title 31 and section 5 of Title 41.]

* * * * * * *

§ 300d–5. General provisions respecting grants and contracts.

(a) * * *

[(d) Prohibitions and restrictions inapplicable.

[Contracts may be entered into under this subchapter with regard to section 529 of Title 31 and section 5 of Title 41.]

* * * * * * *

§ 300e–2. Grants and contracts for feasibility surveys.

(a) * * *

[(g) Government contract requirements lifted.

[Contracts may be entered into under this section without regard to section 529 of Title 31 and section 5 of Title 41.]

* * * * * * *

§ 300e–3. Grants, contracts, and loan guarantees for planning and for initial development costs.

(a) * * *

[(h) Government contract requirements lifted.

[Contracts may be entered into under this section without regard to section 529 of Title 31 and section 5 of Title 41.]

* * * * * * *

§ 1480. Administrative powers of Secretary.

In carrying out the provisions of this subchapter the Secretary shall have the power to—

[(a) Service and supply contracts.

[make contracts for services and supplies without regard to the provisions of section 5 of Title 41, when the aggregate amount involved is less than $300;]

(b) * * *

* * * * * * *

§ 2295. Acquisition of nuclear materials.

(a) * * *

[(e) Certification by Commission.

[Any contract made under this section may be made without regard to section 5 of Title 41, 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.]

* * * * * * *

PART C.—GENERAL PROVISIONS

§ 4081. Services by insurance industry; contracts, agreements, or other arrangements.

(a) * * *

[(b) Any such contracts, agreements, or other arrangements may be entered into without regard to the provisions of section 5 of Title 41 or any other provision of law requiring competitive bidding.]

* * * * * * *

TITLE 50.—WAR AND NATIONAL DEFENSE

[§ 403c. Same; procurement authority.

[(a) In the performance of its functions the Central Intelligence Agency is authorized to exercise the authorities contained in sections 151(c) (1)–(6), (10), (12), (15), (17), 155 and 159 of Title 41.

[(b) In the exercise of the authorities granted in subsection (a) of this section, the term "Agency head" shall mean the Director, the Deputy Director, or the Executive of the Agency.

[(c) The determinations and decisions provided in subsection (a) of this section to be made by the Agency head may be made with respect to individual purchases and contracts or with respect to classes of purchases or contracts, and shall be final. Except as provided in subsection (d) of this section, the Agency head is authorized to delegate his powers provided in this section, including the making of such determinations and decisions, in his discretion and subject to his direction, to any other officer or officers or officials of the Agency.

[(d) The power of the Agency head to make the determinations or decisions specified in sections 151(c) (12), (15), and 154(a) of Title 41 shall not be delegable. Each determination or decision required by sections 151(c) (12), (15), 153, or 154(a) of Title 41, shall be based upon written findings made by the official making such determinations, which findings shall be final and shall be available within the Agency for a period of at least six years following the date of the determination.]

* * * * * * *

PUBLIC LAW 90-500

(82 Stat. 849)

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.

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

[SEC. 404. No funds authorized for appropriation for the use of the Armed Forces of the United States under the provisions of this Act or the provisions of any other law shall be available for the purchase, lease, rental, or other acquisition of multipassenger motor vehicles (buses) other than multipassenger motor vehicles (buses) manufactured in the United States, except as may be authorized by regulations promulgated by the Secretary of Defense solely to insure that compliance with this prohibition will not result in either an uneconomical procurement action or one which would adversely affect the national interests of the United States.]

XIII. Additional Views of Senator Lee Metcalf

INTRODUCTION

I agree with the committee majority that Federal acquisitions policy needs improvement in order to obtain more efficient and economical purchases of goods and services by the Federal Government. However, the committee should not have approved S. 1264. It is not the panacea its sponsors claim it to be.

Since the Department of Defense represents the largest single dollar volume of Federal acquisitions, most of my comments are focused on that agency.

S. 1264 has been attractively packaged and promoted. It is represented as reform legislation which will save public funds by increasing reliance on competition in Federal acquisitions. On the assumption that a competitive market would provide the necessary incentives and constraints, S. 1264 goes a long way toward dismantling or rendering ineffective many of the most important safeguards developed over many years to insure that public funds are spent wisely and economically in Federal procurements and that private parties are not unfairly enriched in their contracts for Government work.

It is tempting to believe that competition can be relied upon to protect the taxpayer's interest in Government procurements. However, the record shows that this is an unrealistic and naive premise on which to base Federal acquisition policy. The result of adopting this idea will be an unprecendented windfall to large Government contractors who have long advocated—despite all the facts—that Government business is competitive and that procurement safeguards are not necessary.

Proponents of this legislation argue that its enactment would result in greater competition in the acquisition process. Even if competition alone could be relied upon to correct deficiencies in the procurement process, S. 1264 does nothing to increase effective competition.

COMPETITION

In general, of the items procured by the Federal Government, only common items such as food and clothing are bought on a truly competitive basis. For the remainder, Government procurement is heavily concentrated in a relatively few large companies. This is best illustrated in the area of defense procurement. For example, each year more than two-thirds of the Department of Defense work has gone to just 100 companies. Further, most defense procurement is placed on a noncompetitive basis. In fiscal year 1976 only about $3.2 billion (or 8 percent) out of a total of $40.7 billion in defense prime contracts was awarded on a truly competitive, sealed bid basis. Under present law, only formal advertising with sealed bids is legally rec-

ognized as competition. All other Government acquisitions are, strictly speaking, negotiated procurements.

Defense procurement is largely noncompetitive because few firms have the resources to develop the technical and financial abilities necessary to perform multimillion dollar defense contracts. In addition, most defense work requires special equipment and expertise. Factors such as a contractor's prior experience and workload capacity oftentimes preclude effective competition.

S. 1264 will not alter the nature of the items being procured or the type of facilities, resources and expertise required to manufacture these items. Yet the proponents of this bill engage in semantics to convey the idea that there is more competition than really exists. They do this by counting as competition a contract method called competitive negotiation. Under present practice, this is where two or three generally large firms vie for a contract. While this is preferable to procurement from a sole source, the extent of competition obtained in these cases is rarely adequate to ensure a reasonable price to the Government. Currently, this type of contracting is not considered to be competitive because technical or engineering factors rather than price often influence the contract award.

It should be recalled that the most notable procurement disasters in recent history, programs such as the C–5A, F–111, or TFX, and the DD–963 destroyer, all started life as competitive negotiations. Without belaboring the point, it should be perfectly obvious that the procurement form used in these disasters does absolutely nothing to protect the taxpayers throughout the life of a contract.

It is worth considering the definition of competition the authors of S. 1264 have in mind when they established the competitive negotiation method as one of the preferred means of Federal contracting. It provides that solicitations will be made to a "*sufficient number* of *qualified sources* so as to obtain *effective competition.*" (Emphasis added.) None of the underlined terms are defined, and no other guidance is given to procuring agencies as to the number of sources whose offers should be solicited.

One provision of the bill related to the competitive negotiation method insures that there will be no discussion of final price until after the successful contractor has been selected for contract award. Thus, although labeled "competition," the price would be negotiated on a sole-source basis. This largely nullifies the effects of competition and weakens the Government's bargaining position. Another provision of the bill allows agencies to accept unilaterally an initial offer without discussing it or any competing offers, and without explaining their reasons. Competition appears to be the exception rather than the rule under the competitive negotiation method of contracting envisioned in S. 1264.

NONCOMPETITIVE PROCUREMENT

Perhaps more important than the endorsement of the competitive negotiation method is the fact that the bill removes the statutory constraints on noncompetitive procurement. This would provide wide latitude for abuse.

S. 1264 repeals the existing statute (10 U.S.C. 2304) which limits noncompetitive procurements to 17 specific exceptions. In its place, section 304 of S. 1264 allows noncompetitive source selection whenever the agency head [1] determines that it is in the best interests of the Government to enter into a noncompetitive contract. The record shows that Federal agencies cannot be relied upon to use such authority wisely. The GAO recently issued a report (B–160725, September 15, 1977) sharply critical of agency use of noncompetitive contracts. In a survey of five civilian procurement offices, the GAO found that over half of all contract awards were made without any competition. The GAO's sampling of background documentation for these noncompetitive awards demonstrated the ingrained nature of this practice.

Specifically, the GAO found that many noncompetitive procurements were unjustified because agency personnel:

Concluded, without seeking other firms, that only one firm had sufficient capability and experience to do the job;

Placed unjustified time constraints on procurement offices which mandated the award of contracts without competition;

Awarded noncompetititive contracts merely to obligate available funds at the end of the fiscal year before the funds would be returned to the Department of the Treasury;

Solicited contractors before notifying the procurement offices of their requirements; and

Failed to publish their requirements in the Commerce Business Daily before awarding contracts.

The GAO also concluded that "sole source determinations are frequently based on program office personnel preference for a particular firm or company rather than the assurance that only one firm can satisfy the agency's needs." Finally, the GAO report points out that despite the fact that agencies require high-level approval of decisions to procure goods or services without competition, this safeguard has been largely ineffective in procuring most of an agency's requirements on a competitive basis.

In my opinion, S. 1264 does nothing to correct the problems identified by the GAO. On the contrary, the bill's provisions loosen requirements for noncompetitive procurement, thereby paving the way for more abuses of the type reported by the GAO. For example, section 507(a) would make it possible to justify exemptions from formally advertised competition for entire classes of contracts, rather than on a case-by-case basis.

An intended safeguard (subsection 304(a)(2)(A)) is unacceptably weak. It requires 30-day advance notice of intent to award a noncompetitive contract. Other potential sources who demonstrate the ability to meet the requirements for the work to be performed are then allowed to compete for this award. This safeguard is probably useless. It does not allow an adequate time for potential competitors to demonstrate their ability to meet the requirements, nor does it define how a competitor could demonstrate its ability or to whose satisfaction this ability would have to be demonstrated.

Finally, the subsection ignores one common reality of life: Any potential contractor would know that, if the agency has publicized its

[1] See also "Delegation of Authority," p. 125.

desire to award a noncompetitive contract to a preferred source, there is little chance that the agency would look kindly on the entry of another potential competitor. And, since section 303(a) allows the Government to accept "an initial offer * * * without discussion when it is clear that the public need would be satisfied on fair and reasonable terms without such discussions," the agency could execute its contract with the original preferred source without the inconvenience of being forced to consider alternatives. Thus, section 304(a)(2)(A) provides no real guarantee of increased competition.

Sections 203(a) and 503(a) allow the Government to reject all bids or offers, cancel an invitation for bids, or cancel a request for proposal whenever it is determined "for cogent and compelling reasons, that it is in the government's best interest to do so." One problem with these sections is the fact that the authors cannot seem to decide who should exercise this authority. Under 203, the authority is granted to agency heads, while 503 appears to grant somewhat broader authority to contracting officers.

More serious, though, is the substance of these provisions. They are an open invitation to the most flagrant sort of favoritism in contractor selection. They would allow the Government to cancel and redo a competition whenever a favored contractor were underbid by a competitor. I agree that there must be some mechanism to protect the Government's interests by allowing it to reject obviously unacceptable bids, but there must also be some guidelines to assure that this power cannot be used arbitrarily or to give preferential treatment.

For the reasons outlined above, it is naive to believe that S. 1264 will encourage true competition or create effective competition for the procurements of most Federal agencies. Nonetheless, the bill removes existing Government procurement safeguards as if the bill itself miraculously changes the situation to the point that safeguards are not necessary.

GOVERNMENT PROCUREMENT SAFEGUARDS

Over a period of many years the Congress has found it necessary to enact legislation to safeguard the public interest in Government procurements. These safeguards are the results of past abuses which have demonstrated that ineffective competition and the goodwill of large Government contractors do not protect the taxpayers' interest. Large Government contractors, their highly paid lobbyists and their supporters in Government have ardently opposed these procurement safeguards, and have encouraged lax application of them.

They insist that Government business is competitive, despite facts to the contrary. They have sought and obtained loopholes wherever possible. They have sought to divide and conquer by arguing against one safeguard on the basis of the existence of another safeguard, and then have shamelessly reversed their arguments when it fits their needs. Repeatedly, large Government contractors have found it convenient to oppose safeguards on the basis that they are harmful to small business. Of course, these larger contractors have been willing to avail themselves of loopholes enacted for smaller companies.

Senator Proxmire emphasized in his testimony before the subcommittee which is considered S. 1264 that lax application of existing safeguards is the underlying cause of procurement problems:

> Hundreds of millions of taxpayer dollars are being lost, given away and literally stolen each year because Government officials from the President down to procurement officers in the Department of Defense are either failing to exercise their legal responsibilities under the law or violating the spirit and letter of the law.

Commenting on procedural reform in general, Senator Proxmire said later in his testimony just cited:

> We in Congress can pressure the executive branch to change their regulations and we can pass new laws until we are blue in our Capitol face. Our efforts will be worthless so long as procurement abusers go unpunished.

The abuses to which Senator Proxmire referred would not be corrected, but would be in large part sanctified by S. 1264.

PROPOSED REPEAL OF TRUTH-IN-NEGOTIATIONS

S. 1264 repeals the Truth-in-Negotiations Act (10 U.S.C. 2306(f)) and substitutes for it different legislation, the intent of which is not clear. The Truth-in-Negotiations Act, which became law in 1962, requires contractors to support their proposals for noncompetitive contracts and subcontracts over $100,000 with detailed cost or pricing data and requires company officials to certify the accuracy, completeness, and currency of this data. This legislation was designed to prevent Government contractors from having an unfair advantage in negotiations with the Government on noncompetitive Government work. The act protects the public interest by making it possible for the Government to review and evaluate the contractor's proposal based on a detailed breakdown of his projected costs. This is necessary and appropriate in circumstances where the natural forces of the marketplace are not present to restrain contractors from charging whatever price they want.

The Truth-in-Negotiations Act requires in clear, unambiguous terms that both prime contractors and subcontractors submit price data and cost breakdowns for certain noncompetitive procurements. Moreover, the Truth-in-Negotiations Act explicitly requires contractors submitting such data to certify that the data are accurate, complete, and current. Government procurement regulations, over a period of 15 years, have been developed to implement the law and today there is general agreement in the Government agencies and among contractors as to which procurements require the submission of cost and pricing data.

Despite the clarity of the Truth-in-Negotiations Act and the general agreement on how it is to be implemented, S. 1264 repeals it and substitutes language much less clear and perhaps different in intent. For example:

> S. 1264 requires price data from subcontractors "where evaluation of a subcontract price is necessary to insure the reasonableness of the prime contract price" and cost data from subcontractors where the subcontract "forms part of a negotiated prime contract price or higher tier subcontract price." This may be the same requirement as contained in the Truth-in-Negotiations Act,

but it certainly is not as clear with regard to the circumstances in which subcontractors are required to furnish cost or pricing data.

The Truth-in-Negotiations Act clearly requires that the price to the Government be reduced in those cases where this price was higher than it should have been as the result of inaccurate, incomplete or noncurrent data from either the prime contractor or a subcontractor. S. 1264 is not clear as to whether defective subcontactor data may be cause for price reductions. Again, it is not clear whether the authors of S. 1264 intend a change. But contractors will no doubt argue that since the words are different, the intent must also be different.

S. 1264 deletes the existing statutory requirement for contractors to certify that the cost or pricing data submitted or identified to the Government is, to the best of their knowledge, accurate, current, and complete. The contractor's certificate is of critical importance under the Truth-in-Negotiations Act. Without it there may not be a legal basis to recover for excess prices in the event it is subsequently determined that the contractor's data was not accurate, current, and complete. Contractors should not be allowed to give the Government cost information without certifying it. All citizens must certify documents such as tax returns, and are subject to penalties for making false claims. We must require no less of contractors who seek to do Government business.

Both the Truth-in-Negotiations Act and S. 1264 exempt contractors and subcontractors from submitting cost data in circumstances where there is adequate price competition. However, S. 1264 goes a step further and exempts the submission of cost data in cases where there has been a *recent*, *comparable*, *competitive*, aquisition. (Emphasis added.) It is apparent that this is a loophole to exempt from submitting detailed cost data contractors selected for award in competitive negotiated procurements. Since competitive negotiated procurements need not be price competitive, this can be a significant weakening of the Government's ability to ascertain the reasonableness of prices for many nonprice-competitive procurements.

These examples are of great concern to me. If the authors of S. 1264 do not in fact contemplate any change in the substance of the Truth-in-Negotiations Act, I see no reason to replace it with the language of Section 305, particularly when what is being changed is a law which has been long opposed by contractors and often not vigorously enforced by Government officials. If section 305 of S. 1264 were to become law, the differences in language between it and the Truth-in-Negotiations Act would would be used by contractors to avoid submitting cost and pricing data, and by some Government officials to look the other way.

The Truth-in-Negotiations Act is a good law. It is needed as much or more today than it was 15 years ago. I vigorously oppose its repeal.

REPEAL OF CONGRESSIONAL ACCESS TO RECORDS

Section 306 establishes the right of executive agencies and, in most circumstances, the General Accounting Office, to inspect the plants and records of Government contractors and subcontractors. However, I

must point out that the law which section 306 replaces, repealed by S. 1264, provides that "Any committee of Congress may inspect audits and reports of inspection" (10 U.S.C. 2276). I sharply disagree with the apparent intent of the committee to deny itself, and other congressional committees, the right to review that work of contract auditors and the cost claims submitted by contractors.

Section 306 retreats from current law in another significant way. Current law makes it a felony to interfere with Government audits; S. 1264 does not.

Another provision of section 306 further restricts the ability of the Government to review and control contractor costs. Subsection (c) stipulates that "inspections and examinations by executive agencies * * * shall be conducted only when necessary to insure contract performance and/or *to evaluate the accuracy, completeness, and currency of data submitted or identified pursuant to section 305.*" (Emphasis added). As I pointed out earlier, the data submitted under section 305 will be sharply limited. This provision would virtually abolish Government cost controls by prohibiting Government auditors from undertaking any examination of books and records of contractors exempted from submission of data by the gaping loopholes in section 305.

PROPOSED REPEAL OF MANAGEMENT EFFICIENCY PROGRAMS

Section 509 of S. 1264 renders ineffective many of the other existing Government procurement safeguards for a potentially large group of Government contractors involving many millions of dollars of public funds. This section authorizes agency heads to exempt, from certain procurement safeguards, companies or portions of companies which do predominantly commercial or competitive Government business, and which have less than $10 million in costs annually on Government contracts where the contract prices were based on estimated or actual costs. Companies which meet these complex criteria could be exempted from: Government reviews of management and procurement systems; cost accounting standards; renegotiation of excess profits; the need to make advance agreements for independent research and development and bid and proposal activities; and audits for reasonableness of indirect overhead costs.

The philosophy behind this section is deceptively appealing. S. 1264's sponsors argue that companies engaged primarily in commercial or competitive Government business will operate with maximum efficiency and procurement safeguards are not needed. However, there is much in this section which is subject to abuse and interpretation. A company doing hundreds of millions of dollars of business with the Government could be exempted from safeguards under this section provided its contracts with the Government are labeled as "competitive." As I already have noted, S. 1264 takes some significant liberties in labeling as "competitive" some procurements which are not competitive in any meaningful sense of the word.

The simple existence of a predominantly commercial environment does not automatically mean that a company woud operate at maximum efficiency. The procurement policy established by section 509 of S. 1264 is a considerable expansion of an already existing Department of Defense program known as Contractor's Weighted Average Share

in Cost Risk, or CWAS, which exempts certain contractors from audits for reasonableness of some indirect overhead costs. The CWAS program has been explicitly rejected by the second largest Government procuring agency, NASA, on the grounds that it is an unsound program.

GENERAL ACCOUNTING OFFICE FINDINGS

The General Accounting Office has exhaustively reviewed the CWAS program, and has found the program to be seriously deficient. Based upon its findings, the GAO testified in opposition to section 509 of S. 1264, and noted well the problems which have resulted:

> It is our opinion that although a contractor's business operations may consist of 75 percent or more commercial and competitive Government contracts, there is no assurance that the other 25 percent or less of Government contracts is being conducted in a manner to protect the Government's interest. Like any mechanical approach the formula gives an appearance of control which may have no relationship to quality and effectiveness of the contractor's operations. Our opinion is based on the following.
>
> Regarding agency management, procurement system, and property reviews, on March 8, 1976, we issued a report to the Congress entitled, "Second GAO Report on Need for Better Control Over Government-Furnished Material Provided to Defense Overhaul and Repair Contractors (PSAD–76–78). We found that the Air Force did not have adequate control over more than $200 million of material given to overhaul and repair contractors every year. We found one case of apparent misuse of $2.5 million of Government-furnished material. We recommend increased surveillance by Government property administrators when the contractor is doing commercial and Government work at the same location.
>
> On December 27, 1976, we issued a report to the Congress entitled, "Administration or Repair Contracts Needs Improvement" (PSAD–76–179). We found that a number of contractors who were awarded contracts for repair and overhaul of Government equipment ordered and received about $2.2 million of Government-furnished material during 1974 and 1975. These contractors were responsible for keeping accounting records of this material. In some cases we could not determine from the contractors' records how the material was actually used. We recommended increased property reviews by the General Services Administration.
>
> In regard to determinations of the reasonableness of indirect costs, on March 9, 1977, we issued a report to the Joint Committee on Defense Production entitled, "Increased Costs to Government under the Department of Defense Program to Reduce Audits' (PSAD–77–80). We found that even though contractors met the CWAS conditions for eliminating agency reviews of the reasonableness of indirect costs, there was no guarantee that contractors were effectively controlling such costs. For example, because of CWAS, the reasonableness of a contractor's expenses for use of private aircraft that exceeded equivalent commercial travel costs by $733,000 in a 2-year period could not be questioned. At another CWAS qualified plant location, the reasonableness of

automatic data processing equipment leasing costs amounting to $12.4 million could not be questioned. At another plant of the same contractor that was non-CWAS qualified, however, the Defense auditors questioned the reasonableness of excess lease costs over ownership costs. The costs of ownership would have amounted to $561,000 less than the $3.3 million in lease costs.

On May 19, 1977, we issued a report to the Congress entitled, "Contractor Pension Plan Costs More—Control Could Save Department of Defense Millions (PSAD–77–100). We pointed out that nine Department of Defense contractors had over $100 million in questionable pension plan costs that were or will be charged to the Government as indirect expense. These charges resulted from—

Unrealistic actuarial assumptions used in computing annual pension plan contributions;

Inequitable allocation of pension plan costs to Government contracts;

Questionable changes in actuarial cost methods that increased charges to the Government; and

Inadequate Department of Defense audits of contractor pension charges to Government contracts.

Although the Department of Defense had obtained some fairly large reductions in improper charges to the Government for pension plan costs, in May 1975 the Department suspended its requirement for conducting pension plan reviews at contractor locations that were CWAS-qualified. In response to our recommendation for reinstatement and strengthening of its pension plan reviews, the Department advised that an evaluation of the CWAS program is underway and our recommendation will be considered.

It is also important to note that while both the Defense CWAS program and section 509(b) provide for relieving qualified contractor profit centers from any Government questioning as to the reasonableness of indirect overhead costs, the Government auditors can and should review the allocation and allowability of such costs to Government contracts. In many cases, we believe little additional audit work is required to determine the reasonableness of costs over that required to evaluate allocation to and allowability of such costs under Government contracts.

I agree with the GAO that the Government should abandon existing procurement safeguards in this and other areas.

COST ACCOUNTING STANDARDS

Cost accounting standards are an important safeguard of the Federal procurement process. They provide consistency in cost accounting and establish a common basis for measuring costs and profits. Yet S. 1264 would allow procurement agencies to waive the requirements of cost accounting standards. This is clearly inconsistent with the intent of Congress in passing Public Law 91–379 which set up the Cost Accounting Standards Board (CASB) as an agency of the Congress. This was done so that this Board and its important work would

not be subject to the improper influence large defense contractors often have been able to bring to bear on the Defense Department.

The Cost Accounting Standards Board has reserved to itself the authority to exempt contractors from its requirements and to waive the requirements. The Board has resisted pressures to delegate its exemption and waiver authority to agencies of the executive branch. Congress has supported the Board in this regard.

S. 1264 would do what both the Cost Accounting Standards Board and the Congress have declined to do in the past. It would delegate to procuring agencies authority to exempt certain contractors from cost accounting standards. This would be a serious mistake in that it would signal a retreat by Congress from the principle of integrity in the accounting for public funds.

The Subcommittee on Reports, Accounting and Management, of which I am chairman, has conducted substantial oversight of the CASB, and held public hearings regarding its activities. We have unanimously endorsed the development of uniform accounting standards, and Congress has mandated that the CASB establish such standards. I strongly believe that the CASB has exercised its exemption authority generously, and that the benefits of uniform cost accounting standards should not be broadly superseded by section 509 of S. 1264.

Section 509 also would allow agency heads to exempt contractors from the Renegotiation Act. This act was passed to enable recovery of excessive profits by defense contractors. There are many, including myself, who believe it is essential as a matter of public policy to have a statutory requirement for review of a contractor's Government business to insure that it is not making excessive profits at the taxpayers' expense.

S. 1264 disregards the expert opinions of organizations such as the GAO, NASA, and the Cost Accounting Standards Board in matters pertinent to the need for procurement safeguards. This is a mistake which we will long regret if S. 1264 is enacted into law.

DELEGATION OF AUTHORITY

Many people believe that raising the level at which executive branch decisions are made can provide some measure of protection from outside influence in the decisionmaking process because senior officials may be less subject to narrow interests and because the higher level of review gives increased visibility to the decisionmaking process. People who are under the impression that the requirements levied in S. 1264 can provide this type of protection would do well to read section 601 of the bill, which renders meaningless requirements for high level review.

Section 601 authorizes agency heads to "delegate any authority under this Act, provided that such delegation is made in accordance with regulations established by the Administrator for Federal Procurement Policy." I do not believe that Congress should enact legislation which permits the delegation of significant authority such as that envisioned by S. 1264. Under this bill, there are few practical limitations as to the extent to which decisionmaking authority may be dele-

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gated. There is only one specified type of decision (authorizing the award of a contract notwithstanding a protest pending before the Comptroller General) which may not be delegated below the level of Assistant Secretary. Other types of decisions, according to the bill, "shall be maintained at the highest organizational level practicable in order to protect the integrity of the acquisition process consistent with the nature and size of the acquisition." As with many other limitations in S. 1264, this provision is too vague to be effective.

Earlier in this report, I discussed several sections of the bill where "agency heads" or "an agency" is authorized to grant exceptions or waive requirements of this bill. These provisions allow agency heads to award contracts on a noncompetitive basis and to waive the requirements of existing procurement safeguards such as cost accounting standards and the Renegotiation Act. It is only when provisions such as these are considered in conjunction with section 601 that the true dimensions of these loopholes become fully apparent. Under section 601, the authority to make these important decisions may be delegated to officials far below the level of agency head, thus defeating the intent to promote high level oversight of procurements.

OFFICE OF FEDERAL PROCUREMENT POLICY

S. 1264 would grant significant new authority to the Office of Federal Procurement Policy (OFPP), without effective guidelines as to how that authority should be used. Much of this new power would be at the expense of Congress.

Perhaps the most significant new duty would be the authority to issue an entirely new procurement regulation, to replace the current Armed Services Procurement Regulation (ASPR) and Federal Procurement Regulation (FPR). The bill also authorizes OFPP to: review and revise the new procuremnt regulation; determine the adequacy of agency compliance with S. 1264; establish a program to reduce the use of detailed product specifications; define criteria to determine when and under what circumstances alternative contracting techniques will be issued; issue exemptions to the requirement for submission by contractors of cost and pricing data; issue regulations governing executive agency inspection and oversight of contractor production programs; define simplified procedures for small purchases; authorize, on a case-by-case basis, the issuance of contracts covering periods longer than five years; review minority business participation in government contracting; and decide what responsibilities under S. 1264 may be delegated by agency heads to subordinates.

This granting of authority to OFPP will result in a substantial diminution of congressional authority. Many of the OFPP regulations will replace longstanding procurement law repealed by this legislation. I believe that Congress should become more active in reviewing and controlling Federal spending decisions, rather than retreating from its present position.

SUMMARY

I genuinely wish that I could have concluded this discussion by saying that I found much in the bill of which I could approve, and that my objections could be corrected with only minor revisions. However,

this is not possible. After carefully reviewing S. 1264, I have been forced to conclude that it is seriously flawed.

My concern about S. 1264 is that many of its provisions are based on the belief that there will exist a competitive marketplace for most Federal procurement and that, therefore, existing Government procurement safeguards can be removed. S. 1264 does nothing to promote increased competition in Federal procurement. Yet it removes many of the existing Government procurement safeguards as if by legislative fiat we could cause competition to exist where it previously has not.

Instead of promoting efficient Government procurement, S. 1264 will guarantee steadily decreasing efficiency and steadily increasing Federal acquisitions costs.

I appreciate the efforts of the conscientious Members who have, no doubt, sincerely tried in S. 1264 to reform a very complicated body of acquisitions law. There is probably no body of Federal law which is so outdated and more subject to abuse. However, the bill approved by the committee is filled with loopholes and should not be enacted by the Senate.

LEE METCALF.

XIV. Text of S. 1264 As Reported

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 effective 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 availability 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

(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, 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) The 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 incured, 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 any agency by an individual or organization solely 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 simplied 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 practicable 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) Solicitation 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 effective competition by—

(1) setting forth the agency need 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 justifiaction 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 offeror(s).

(b) When awards 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, except 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 advantageous 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 a 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 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 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 regulation, 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 thereof, 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 contract 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 subcontractors 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 the 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(c) 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 property 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 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 application 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.

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(c) The waiver provided for 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 acquisitions 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 Procurement, 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 earliest 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 a 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.CC. 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) ofthe 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 ", and 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) o fthe 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 svstem 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 66 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(c) of the EURATOM Cooperation Act of 1958 (72 Stat. 1085; 42 U.S.C. 2295 (c)); 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.

APPENDIX A

EXECUTIVE OFFICE OF THE PRESIDENT,
OFFICE OF MANAGEMENT AND BUDGET,
Washington, D.C., October 28, 1977.

Hon. ABRAHAM RIBICOFF,
Chairman, Committee on Government Affairs, U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: The Office of Management and Budget has reviewed the October 25, 1977, committee print of S. 1264, the proposed Federal Acquisition Act of 1977, and wishes to provide the following comments.

The current draft is a significant improvement over the bill as originally introduced, and reflects very favorably the efforts of the Federal Spending Practices Subcommittee and its staff in analyzing and accommodating the diverse view and testimony of the many agencies, professional and industrial groups, and other parties affected.

While several executive agencies are still reviewing the committee print and may wish to suggest further changes, we believe that the many improvements in detailed language now will make the bill workable, and that it can readily be implemented through regulations to be issued by the Office of Federal Procurement Policy.

While we believe that S. 1264, as amended, is generally a sound bill, we do have two reservations:

1. For reasons set forth in detail in comments submitted to your committee by the Department of Justice, we consider title VII of the bill to be unconstitutional. Title VII proposes to vest in the Comptroller General the authority to decide protested solicitations and contract awards, and would be an unconstitutional delegation to a legislative officer of authority reserved to the Executive by the Constitution. Because of this serious concern, we recommend that title VII be deleted.

2. There should be a provision in the bill permitting the waiver of its requirements for the purpose of negotiating contracts with foreign governments and international organizations pursuant to international agreements entered into by the United States. Numerous cooperative programs are unduly impeded because of the reluctance or inability of foreign entities to accept contractual requirements, particularly in the cost accounting area, which were developed with U.S. contractors and methods in mind.

Subject to the above, the administration supports S. 1264, and we look forward to its early enactment.

If I or my staff can be of further assistance, please do not hesitate to call on me or Mr. Lester Fettig, Administrator for Federal Procurement Policy.

Sincerely,

JAMES T. MCINTYRE, Jr., *Acting Director.*

APPENDIX B

COMPTROLLER GENERAL OF THE UNITED STATES,
Washington, D.C., October 27, 1977.

Hon. LAWTON CHILES,
Chairman, Subcommittee on Federal Spending Practices and Open Government, Committee on Governmental Affairs, U.S. Senate.

DEAR MR. CHAIRMAN: We have reviewed the October 25, 1977, version of S. 1264, the Federal Acquisition Act of 1977.

We note that section 509(c) (3) and (5) would still permit waivers, under certain conditions, of the provisions of the Cost Accounting Standards Act and the Renegotiation Act. As you know, we believe that the responsibility for granting waivers to cost accounting standards should be left with the Cost Accounting Standards Board and waivers to the Renegotiation Act should be left with the Congress which is now reconsidering amendments to the act.

We have the following comments on two additional sections of the bill:

Section 505 should provide that progress payments shall not exceed costs incurred and paid for by the contractor. In two cases in the past year, we found that progress payments had exceeded costs incurred by substantial amounts. This, in effect, resulted in interest-free loans by the Government to the contractors involved.

Section 306(c) provides that inspections and examinations of contractor plants and records by executive agencies "shall be conducted only when necessary to insure contract performance and/or to evaluate the accuracy, completeness, and currency of data submitted or identified pursuant to section 305." We urge that the words "efficient and economical" be added before the words "contract performance." This would preclude questioning the legal basis for should-cost studies by executive agencies.

I understand that the provisions of title VII of the bill were discussed with members of your staff by our General Counsel.

Sincerely yours,

ROBERT F. KELLER,
Acting Comptroller General of the United States.

APPENDIX C

CONGRESSIONAL BUDGET OFFICE,
U.S. CONGRESS,
Washington, D.C., October 17, 1977.

Hon. LAWTON CHILES,
Chairman, Subcommittee on Federal Spending Practices and Open Government, Committee on Governmental Affairs, U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: Pursuant to section 403 of the Congressional Budget Act of 1974, the Congressional Budget Office has reviewed S. 1264, the Federal Acquisition Act of 1977, as ordered reported by the subcommittee on October 3, 1977.

Based on this review, it appears that this legislation as a whole will not significantly alter the amount of Government spending. However, some of its provisions—such as the emphasis on fixed price contracts (eliminating the need for some audits) and increased competition—could reduce expenditures, while the requirement that the Government pay interest on any bills due a contractor which are more than 30 days late could increase Federal expenditures.

Should the subcommittee so desire, we would be pleased to provide further details on this estimate.

Sincerely,

ALICE M. RIVLIN, *Director.*