

for procurement

S 15998

CONGRESSIONAL RECORD — SENATE

November 11, 1983

MESSAGES FROM THE HOUSE

At 1:06 p.m., a message from the House of Representatives, delivered by Ms. Goetz, one of its reading clerks, announced that the House disagrees to the amendments of the Senate to the joint resolution (H.J. Res. 413), making further continuing appropriations for the fiscal year 1984; it agrees to the conference asked by the Senate on the disagreeing votes of the two Houses thereon, and appoints Mr. WHITTEN, Mr. BOLAND, Mr. NATCHER, Mr. SMITH of Iowa, Mr. ADDABBO, Mr. LONG of Maryland, Mr. YATES, Mr. ROYBAL, Mr. BEVILL, Mr. DIXON, Mr. FAZIO, Mr. HEFNER, Mr. CONTE, Mr. MCDADE, Mr. EDWARDS of Alabama, Mr. MILLER of Ohio, Mr. KEMP, and Mr. O'BRIEN as managers of the conference on the part of the House.

The message also announced that the House has passed the following joint resolution, in which it requests the concurrence of the Senate:

H.J. Res. 20. Joint resolution designating November 13, 1983, as "National Retired Teachers Day".

The message further announced that the House has agreed to the following concurrent resolution, in which it requests the concurrence of the Senate:

H. Con. Res. 214. Concurrent resolution authorizing the Rotunda of the Capitol to be used for a ceremony on November 16, 1983, commemorating the 20th anniversary of the death of President John Fitzgerald Kennedy.

ORDER OF PROCEDURE

Mr. BAKER. Mr. President, the first evidence of the grogginess of my mind and the fatigue still accumulated in my body is I should have yielded so the minority leader could be recognized before we admitted that messenger. I apologize to him for that. But I have nothing further at this moment and I yield now.

RECOGNITION OF THE MINORITY LEADER

The ACTING PRESIDENT pro tempore. Under the previous order, the Democratic leader is recognized.

Mr. BYRD. Mr. President, the majority leader is not the only Senator or person in this Chamber who is groggy. I can understand. He is very thoughtful to offer an apology. He does not owe me any.

ORDER OF BUSINESS

Mr. BYRD. Mr. President, I yield to the majority leader any time I have remaining so that we can transact routine morning business.

Mr. BAKER. I thank the Senator.

Mr. President, I ask unanimous consent that the time remaining to the two leaders be aggregated with the time remaining for morning business under the same terms and conditions.

The ACTING PRESIDENT pro tempore. Without objection, it is so ordered.

Mr. BAKER. Mr. President, there are a number of things that appear cleared on this side of the aisle for action by unanimous consent.

First, Mr. President, I would propose to go to S. 338, if the minority leader is prepared to do that at this time.

Mr. BYRD. Mr. President, we are so prepared.

Mr. BAKER. I thank the minority leader.

COMPETITION IN CONTRACTING ACT OF 1983

Mr. BAKER. Mr. President, I ask the Chair to lay before the Senate Calendar Order No. 265, S. 338.

The ACTING PRESIDENT pro tempore. The clerk will report.

The legislative clerk read as follows:

A bill (S. 338) to revise the procedures for soliciting and evaluating bids and proposals for Government contracts and awarding such contracts, and for other purposes.

The ACTING PRESIDENT pro tempore. Is there objection to the request of the majority leader?

There being no objection, the Senate proceeded to consider the bill, which had been reported from the Committee on Governmental Affairs, with amendments, as follows:

On page 4, line 18, after "such", insert "unusual and compelling";

On page 5, line 1, strike "any agreement with", and insert "any international agreement or treaty between the United States Government and";

On page 5, line 15, strike ", for", through and including line 18, and insert the following: using noncompetitive procedures unless—

"(1) in the case of any contract other than a small purchase, a notice has been published with respect to such contract pursuant to section 313 and all bids, proposals, and quotations received in response to such notice have been considered by such executive agency; and

"(2) in the case of any contract exceeding \$100,000, the use of such procedures is approved by the head of the organizational element of such executive agency which has the responsibility to enter into such contract or by a designee of the head of such organizational element who is higher in such organizational element than the contracting officer issuing the solicitation with respect to such contract";

On page 10, line 5, strike "(a)", and insert "(A)";

On page 11, line 2, strike "(c)", through and including line 3, and insert "(c)";

On page 11, line 4, strike "enter into", and insert "solicit bids, proposals, or quotations for";

On page 11, line 6, strike "the maximum", through and including "309(c)" on line 8, and insert "\$10,000";

On page 11, line 10, strike "(1)";

On page 11, line 15, after "award", insert "if there is likely to be any subcontract under such contract";

On page 11, strike line 18, through and including line 22, and insert the following:

"(2) The Secretary of Commerce shall publish promptly in the Commerce Business Daily each notice required by paragraph (1).

"(3) Whenever an executive agency is required by paragraph (1)(A) to furnish a

notice of a solicitation to the Secretary of Commerce, such executive agency may not—

"(A) issue such solicitation earlier than fifteen days after the date on which such notice is published by the Secretary of Commerce; or

"(B) establish a deadline for the submission of bids, proposals, or quotations in response to such solicitation that is earlier than thirty days after the date on which such solicitation is issued.

On page 12, line 11, strike "(1)";

On page 12, line 11, after "shall", insert "include";

On page 12, strike line 13, through and including line 18 on page 13, and insert the following:

"(1) a description of the property or services to be contracted for, which description is not unnecessarily restrictive of competition;

"(2) the name and address of the officer or employee of the executive agency who may be contacted for the purpose of obtaining a copy of the solicitation;

"(3) a statement that any person may submit a bid, proposal, or quotation which shall be considered by the executive agency; and

"(4) in the case of a procurement using noncompetitive procedures, a statement of the reason justifying the use of noncompetitive procedures and the identity of the intended source.

"(c)(1) A notice is not required under subsection (a)(1) if the notice would disclose the executive agency's needs and the disclosure of such needs would compromise the national security.

"(2) The requirements of subsection (a)(1)(A) do not apply—

"(A) to any procurement under conditions described in clause (2), (3), (4), or (5) of section 303(e); and

"(B) in the case of any procurement for which the head of the executive agency carrying out such procurement makes a determination in writing, with the concurrence of the Administrator of the Small Business Administration, that it is not appropriate or reasonable to publish a notice before issuing a solicitation.

On page 16, line 15, strike "\$500,000", and insert "\$100,000";

On page 16, line 19, strike "\$500,000", and insert "\$100,000";

On page 17, line 2, strike "\$500,000", and insert "\$100,000";

On page 17, line 6, strike "\$500,000", and insert "\$100,000";

On page 24, line 11, after "such", insert "unusual and compelling";

On page 25, line 4, strike "any agreement with", and insert "any international agreement or treaty between the United States Government and";

On page 26, line 15, strike ", for", through and including line 17, and insert the following: using noncompetitive procedures unless—

"(1) in the case of any contract other than a small purchase, a notice has been published with respect to such contract pursuant to section 2305(c) of this title and all bids, proposals, and quotations received in response to such notice have been considered by such head of an agency; and

"(2) in the case of any contract exceeding \$100,000, the use of such procedures is approved by the head of the organizational element of such agency which has the responsibility to enter into such contract or by a designee of the head of such organizational element who is higher in such organizational element than the contracting offi-

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United States
of America

Congressional Record

PROCEEDINGS AND DEBATES OF THE 98th CONGRESS, FIRST SESSION

Vol. 129

WASHINGTON, FRIDAY, NOVEMBER 11, 1983

No. 155

Senate

(Legislative day of Monday, November 7, 1983)

The Senate met at 1 p.m., on the expiration of the recess, and was called to order by the Honorable THAD COCHRAN, a Senator from the State of Mississippi.

PRAYER

The Chaplain, the Reverend Richard C. Halverson, D.D., offered the following prayer:

Let us pray.

God of grace and glory, we remember with profound gratitude the awful price which has been paid for the incalculable privileges we enjoy in this land. We thank Thee for the blessings of freedom and plenty unmatched by any other nation in history.

We thank Thee for the splendid tradition of dedication and sacrifice which has characterized the allegiance and loyalty of America beginning with our Founding Fathers who pledged their lives, their fortunes and their sacred honor.

We thank Thee for the patriotism of millions of heroic men and women who at the cost of their lives upheld that tradition and preserved our Republic. We abhor the wars which have been so costly in the finest and best of American life, but we honor their memory and we pray for Thy special grace for all who mourn the loss of a loved one in conflict. May we who reap the immeasurable benefits of their sacrifice remain true to that for which our patriots gave their all. We pray in the name of Him Who gave His life to redeem us all. Amen.

APPOINTMENT OF ACTING PRESIDENT PRO TEMPORE

The PRESIDING OFFICER. The clerk will please read a communication to the Senate from the President pro tempore (Mr. THURMOND).

The legislative clerk read the following letter:

U.S. SENATE,
PRESIDENT PRO TEMPORE,
Washington, D.C., November 11, 1983.

To the Senate:

Under the provisions of rule I, section 3, of the Standing Rules of the Senate, I hereby appoint the Honorable THAD COCHRAN, a Senator from the State of Mississippi, to perform the duties of the Chair.

STROM THURMOND,
President pro tempore.

Mr. COCHRAN thereupon assumed the chair as Acting President pro tempore.

RECOGNITION OF THE MAJORITY LEADER

The ACTING PRESIDENT pro tempore. Under the previous order, the majority leader is recognized.

Mr. BAKER. I thank the Chair.

ORDER OF PROCEDURE

Mr. BAKER. Mr. President, I report to the Senate that the conferees on the continuing resolution are meeting; that the estimate I have received from the House side is that it will be late afternoon before they expect to be able to act. And, of course, we cannot act until after the House does.

So what I would propose to do today, if the minority leader agrees, is to put us in the time for the transaction of routine morning business, do some routine matters, and then go out until 3 p.m. We will have a further report at that time.

ORDER FOR ROUTINE MORNING BUSINESS

Mr. BAKER. Mr. President, I ask unanimous consent that, after the two leaders have utilized or yielded back their time under the standing order, there be a period for the transaction of routine morning business of not more than 30 minutes in length in which Senators may speak for not more than 5 minutes each, with the exception of the minority and majority leaders who may require more time

than that to deal with calendar items and other routine business.

The ACTING PRESIDENT pro tempore. Is there objection? Without objection, it is so ordered.

Mr. BAKER. Mr. President, may I explain that if there is a desire for more time for morning business, of course, we will provide that. And if there is anything we have today, I am afraid it is time. I will try from time to time to notify Members of progress on the conference report both through our hotline and with statements on the floor if we are in session.

Mr. PELL. Will the Senator yield?

Mr. BAKER. Yes, I yield.

Mr. PELL. For those of us who are anxious to leave town, is it your view there will be a rollcall vote on the conference report or will you seek to avoid such a vote?

Mr. BAKER. Mr. President, of those who are anxious to leave town, I have already put my name at the head of the list. My family is already in Tennessee and I would like to join them.

My serious answer to any friend and colleague from Rhode Island is that I do not expect to ask for a rollcall vote. Of course, we cannot guarantee there will not be one because any Senator has the constitutional opportunity to demand the yeas and nays. But I do not plan to ask for a rollcall on final passage or on any other votes associated with the final disposition of the conference report. But, once again, I warn Senators who may be listening in their offices that that is not a guarantee.

I thank the Senator from Rhode Island for making the inquiry.

Mr. PELL. I thank the majority leader for his response.

Mr. BAKER. Mr. President, there is a messenger at the door from the House of Representatives. I yield so the Chair can admit her.

● This "bullet" symbol identifies statements or insertions which are not spoken by the Member on the floor.

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cer issuing the solicitation with respect to such contract.

On page 31, strike lines 19 and 20, and insert "subsection";

On page 31, line 21, strike "enter into", and insert "solicit bids, proposals, or quotations for";

On page 31, line 24, strike "the maximum", through and including "title" on page 32, line 1, and insert "\$10,000";

On page 32, line 5, strike "the", through and including "title" on line 7, and insert "\$10,000";

On page 32, line 9, after "award", insert "if there is likely to be any subcontract under such contract";

On page 32, strike line 11, through and including line 15, and insert the following:

"(B) The Secretary of Commerce shall publish promptly in the Commerce Business Daily each notice required by subparagraph (A) of this paragraph.

"(C) Whenever a head of an agency is required by subparagraph (A)(i) of this paragraph to furnish a notice of a solicitation to the Secretary of Commerce, such head of an agency may not—

"(i) issue such solicitation earlier than fifteen days after the date on which such notice is published by the Secretary of Commerce; or

"(ii) establish a deadline for the submission of bids, proposals, or quotations in response to such solicitation that is earlier than thirty days after the date on which such solicitation is issued.

On page 33, line 5, strike "(A)";

On page 33, line 6, after "shall," insert "include";

On page 33, strike line 7, through and including line 8 on page 34, and insert the following:

"(A) a description of the property or services to be contracted for, which description is not unnecessarily restrictive of competition;

"(B) the name and address of the officer or employee of the agency who may be contacted for the purpose of obtaining a copy of the solicitation;

"(C) a statement that any person may submit a bid, proposal, or quotation which shall be considered by the agency; and

"(D) in the case of a procurement using noncompetitive procedures, a statement of the reason justifying the use of noncompetitive procedures and the identity of the intended source.

"(3)(A) A notice is not required under paragraph (1)(A) of this subsection if the notice would disclose the agency's needs and the disclosure of such needs would compromise the national security.

"(B) The requirements of paragraph (1)(A)(i) of this subsection do not apply—

"(i) to any procurement under conditions described in clause (2), (3), (4), or (5) of section 2304(e) of this title; and

"(ii) in the case of any procurement for which the head of the agency carrying out such procurement makes a determination in writing, with the concurrence of the Administrator of the Small Business Administration, that it is not appropriate or reasonable to publish a notice before issuing a solicitation."; and

On page 38, line 10, strike "500,000", and insert "\$100,000";

On page 38, line 12, strike "and";

On page 38, after line 17, insert the following:

(iv) by striking out "\$500,000" each place it appears in clauses (B), (C), and (D) and inserting in lieu thereof "\$100,000; and

On page 43, strike line 7, through and including line 10;

On page 43, line 11, strike "V", and insert "IV";

On page 43, line 12, strike "501", and insert "401";

And which has been reported from the Committee on Armed Services, with amendments as follows:

On page 22, line 7, strike "and", and insert "or";

On page 22, line 15, strike the comma, and insert "or";

On page 22, line 15, strike "or quotations";

On page 22, line 18, strike "award", through and including "in the" on line 19, and insert "provide for the";

On page 22, line 21, strike "of such", and insert "under this title using competitive procedures but excluding a particular source for that";

On page 22, line 25, after "increase", insert "or maintain";

On page 23, line 2, strike "or";

On page 23, line 4, strike "emergency" and insert the following: emergency, or (3) be in the interest of national defense in establishing or maintaining an essential research capability to be provided by an educational or other nonprofit institution or a research and development center funded by the United States.

On page 23, line 19, after "other", insert "price-related";

On page 23, line 19, strike "considered";

On page 24, line 6, strike "and", and insert "or";

On page 24, line 13, strike "involved in", and insert "associated with";

On page 24, line 16, strike "maintain", through and including "mobilization;" on line 18, and insert the following:

(A) maintain a facility, producer, manufacturer, or other supplier available for furnishing property or services in case of a national emergency, (B) achieve industrial mobilization in the case of such an emergency, or (C) establish or maintain an essential research capability to be provided by an educational or other nonprofit institution or a research and development center funded by the United States;

On page 25, line 6, after "government", insert "or international organization";

On page 25, line 12 strike "provides", insert "authorizes or requires";

On page 25, line 14, after "agency or", insert "from";

On page 25, line 14, after "source; or", insert "the agency's need is for a brand-name commercial item for authorized resale; or";

On page 25, after line 19, insert the following:

"(f) For the purposes of applying section 2304(e)(1) hereof: (A) property or services shall be considered to be available from a source if such source has the capability to produce the property or deliver the service in accordance with the Government's specifications and delivery schedule, and (B) in the case of the procurement of technical or special property which has required a substantial initial investment or an extended period of preparation for manufacture, and where it is likely that production by a source other than the original source would 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, the property may be deemed to be available only from the initial source and may be procured through noncompetitive procedures.

On page 26, line 16, strike "(f)", and insert "(g)";

On page 26, after line 18, insert the following:

"(1) the use of such procedures has been justified in writing;"

On page 26, strike line 21, through "purchase," on line 22, and insert "(2)";

On page 26, line 24, strike ",", and insert "or";

On page 26, beginning on line 24, strike "and quotations";

On page 27, line 3, strike "(2)", and insert "(3)";

On page 27, after line 10, insert the following:

"(h) For the purposes of the following laws, purchases or contracts made under this chapter using other than sealed bid procedures shall be treated as if they were made with sealed bid procedures:

"(1) Sections 35-45 of title 41.

"(2) Sections 276a-5 of title 40."

"§ 2305. Solicitation, evaluation, and award procedures; notice requirements

On page 28, line 16, after "shall", insert "at a minimum";

On page 28, line 24, after "to", insert "each of";

On page 29, line 15, after "based", insert "solely";

On page 30, line 1, after "States," insert "solely";

On page 30, line 13, strike the period, and insert the following:

where it can be clearly demonstrated from the existence of effective competition or accurate prior cost experience with the product or service that acceptance of an initial proposal without discussions would result in fair and reasonable prices.

On page 31, line 7, after "States," insert "solely";

On page 31, line 14, strike "received under sealed bid procedures", and insert "or proposal";

On page 31, line 15, after "bid", insert "or proposal";

On page 31, line 21, strike "a", and insert "the";

On page 31, line 22, strike the comma, and insert "or";

On page 31, line 22, strike "or quotations";

On page 31, line 23, after "price", insert "expected to";

On page 31, line 24, strike "exceeding", and insert "exceed";

On page 32, line 4, strike "a", and insert "the";

On page 33, line 1, after "of", insert "all";

On page 33, line 2, strike "bids," and insert "bids or";

On page 33, line 2, strike "or quotations";

On page 34, line 9, strike "a", and insert "an accurate";

On page 34, line 16, strike the comma and insert "or";

On page 34, line 16, strike "or quotation";

On page 35, line 23, strike "the", through and including line 26, and insert the following:

"(i) the notice would disclose the agency's needs and the disclosure of such needs would compromise the national security; or

"(ii) the proposed noncompetitive procurement would result from acceptance of an unsolicited research proposal that demonstrates a unique or innovative research concept and the publication of any notice of such unsolicited research proposal would disclose the originality of thought or innovativeness of the proposed research or proprietary data associated with the proposal.

On page 34, line 9, after "the", insert "contract";

On page 43, line 14, strike "one hundred and eighty" and insert "two hundred and seventy".

So as to make the bill read:

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Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Competition in Contracting Act of 1983".

TITLE I—AMENDMENTS TO FEDERAL PROPERTY AND ADMINISTRATIVE SERVICES ACT OF 1949

COMPETITIVE AND NONCOMPETITIVE PROCEDURES

Sec. 101. (a) Title III of the Federal Property and Administrative Services Act of 1949 (41 U.S.C. 251 et seq.) is amended—

(1) by striking out section 303 (41 U.S.C. 253) and the heading of such section and inserting in lieu thereof the following:

"COMPETITION REQUIREMENTS

"Sec. 303. (a) Except as provided in subsection (e) or otherwise authorized by law, executive agencies shall use competitive procedures in making contracts for property and services. Executive agencies shall use advance procurement planning and market research and shall prepare specifications in such a manner as is necessary to obtain effective competition with due regard to the nature of the property or services to be acquired. Executive agencies shall use the competitive procedure or combination of competitive procedures that is best suited under the circumstances of the procurement action and shall specify its needs and solicit bids, proposals, or quotations in a manner designed to achieve effective competition for the contract.

"(b) An executive agency may award a contract under this title in the procurement of property or services in order to establish or maintain any alternative source or sources of supply of such property or services if the executive agency determines that to do so would (1) increase competition and would likely result in reduced overall costs for such procurement, or for any anticipated procurement, of such property or services, or (2) be in the interest of industrial mobilization in case of a national emergency.

"(c) Procurement regulations shall include special simplified procedures and forms for small purchases to facilitate making small purchases efficiently and economically.

"(d) For other than small purchases, an executive agency, when using competitive procedures—

"(1) shall solicit sealed bids when—

"(A) time permits the solicitation, submission, and evaluation of sealed bids;

"(B) the award will be made on the basis of price and other factors considered;

"(C) it is not necessary to conduct discussions with the responding sources about their bids; and

"(D) there is a reasonable expectation of receiving more than one sealed bid;

"(2) shall request competitive proposals when sealed bids are not required under clause (1) of this subsection.

"(e) An executive agency may use noncompetitive procedures only when—

"(1) the property and services needed by the Government are available from only one source and no other type of property or services will satisfy the needs of the executive agency;

"(2) the executive agency's need for the property or services is of such unusual and compelling urgency that the Government would be seriously injured by the delay involved in using competitive procedures;

"(3) it is necessary to award the contract to a particular source or sources in order to maintain an essential industrial capability in the United States or to achieve national industrial mobilization;

"(4) the terms of any international agreement or treaty between the United States

Government and a foreign government, or the directions of any foreign government reimbursing the executive agency for the cost of the procurement of the property or services for such government, have the effect of requiring the use of noncompetitive procedures;

"(5) a statute provides that the procurement be made through another executive agency or a specified source; or

"(6) the disclosure of the executive agency's needs to more than one source would compromise the national security.

"(f) An executive agency may not award a contract using noncompetitive procedures unless—

"(1) in the case of any contract other than a small purchase, a notice has been published with respect to such contract pursuant to section 313 and all bids, proposals, and quotations received in response to such notice have been considered by such executive agency; and

"(2) in the case of any contract exceeding \$100,000, the use of such procedures is approved by the head of the organizational element of such executive agency which has the responsibility to enter into such contract or by a designee of the head of such organizational element who is higher in such organizational element than the contracting officer issuing the solicitation with respect to such contract.;"

(2) by adding at the end of section 309 (41 U.S.C. 259) the following new subsections:

"(b) The term 'executive agency' has the same meaning as provided in section 4(a) of the Office of Federal Procurement Policy Act (41 U.S.C. 403(a)), except that such term does not include the departments or establishments specified in section 2303(a) of title 10, United States Code.

"(c) The term 'competitive procedures' means procedures under which an executive agency enters into a contract after soliciting sealed bids or competitive proposals from more than one source that is capable of satisfying the needs of the executive agency.

"(d) The term 'noncompetitive procedures' means procedures other than competitive procedures.

"(e) The term 'small purchase' means any purchase or contract which does not exceed \$25,000. A proposed procurement shall not be divided into several procurements primarily for the purpose of using the small purchase procedures.;" and

(3) by adding at the end thereof the following new sections:

"SOLICITATION REQUIREMENTS

"Sec. 311. (a)(1) Each solicitation under this title shall include specifications which—

"(A) consistent with the needs of the executive agency, permit effective competition; and

"(B) include restrictive provisions or conditions only to the extent necessary to satisfy such needs or as authorized by law.

"(2) For the purposes of paragraph (1), the type of specification included in any solicitation shall depend on the nature of the needs of the executive agency and the market available to satisfy such needs. Subject to such needs, specifications may be stated in terms of—

"(A) function so that a variety of products or services may qualify;

"(B) performance, including specifications of the range of acceptable characteristics or of the minimum acceptable standards; or

"(C) design requirements.

"(b) Each solicitation for sealed bids or competitive proposals other than for small purchases shall include, in addition to the specifications described in subsection (a)—

"(1) a statement of—

"(A) all significant factors, including price, which the executive agency reasonably expects to consider in evaluating sealed bids or competitive proposals; and

"(B) the relative importance assigned to those factors;

"(2) in the case of sealed bids—

"(A) a statement that sealed bids will be evaluated without discussions with the bidders; and

"(B) the time and place for the opening of the sealed bids; and

"(3) in the case of competitive proposals—

"(A) a statement that the proposals are intended to be evaluated with, and awards made after, discussions with the offerors but might be evaluated and awarded without discussions with the offerors; and

"(B) the time and place for submission of proposals.

"EVALUATION AND AWARD

"Sec. 312. (a) An executive agency shall evaluate sealed bids and competitive proposals based on the factors specified in the solicitation.

"(b) All sealed bids or competitive proposals received in response to a solicitation may be rejected if the head of the executive agency determines that such action is in the public interest.

"(c) Sealed bids shall be opened publicly at the time and place stated in the solicitation. The executive agency shall evaluate the bids without discussions with the bidders and shall, except as provided in subsection (b), award a contract with reasonable promptness to the responsible bidder whose bid conforms to the solicitation and is most advantageous to the United States, considering the price and the other factors included in the solicitation under section 311(b)(1). The award of a contract shall be made by transmitting written notice of the award to the successful bidder.

"(d)(1) The executive agency shall evaluate competitive proposals and may award a contract—

"(A) after discussions conducted with the offerors at any time after receipt of the proposals and prior to the award of the contract; or

"(B) without discussions with the offerors beyond discussions conducted for the purpose of minor clarification.

"(2) In the case of award of a contract under paragraph (1)(A), the executive agency shall conduct, before such award, written or oral discussions with all responsible offerors who submit proposals within a competitive range, price and other evaluation factors considered.

"(3) In the case of award of a contract under paragraph (1)(B), the executive agency shall award the contract based on the proposals as received (and as clarified, if necessary, in discussions conducted for the purpose of minor clarification).

"(4) The executive agency shall, except as otherwise provided in subsection (b), award a contract with reasonable promptness to the responsible offeror whose proposal is most advantageous to the United States, considering price and the other factors included in the solicitation under section 311(b)(1). The executive agency shall award the contract by transmitting written notice of the award to such offeror and shall promptly notify all other offerors of the rejection of their proposals.

"(e) If the head of an executive agency considers that any bid received under sealed bid procedures evidences a violation of the antitrust laws, he shall refer the bid to the Attorney General for appropriate action.

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PROCUREMENT NOTICE

"Sec. 313. (a)(1) Except as provided in subsection (c)—

"(A) an executive agency intending to solicit bids, proposals, or quotations for a contract for property or services at a price exceeding \$10,000 shall furnish for publication by the Secretary of Commerce a notice described in subsection (b); and

"(B) an executive agency awarding a contract for property or services at a price exceeding \$10,000 shall furnish for publication by the Secretary of Commerce a notice announcing such award if there is likely to be any subcontract under such contract.

"(2) The Secretary of Commerce shall publish promptly in the Commerce Business Daily each notice required by paragraph (1).

"(3) Whenever an executive agency is required by paragraph (1)(A) to furnish a notice of a solicitation to the Secretary of Commerce, such executive agency may not—

"(A) issue such solicitation earlier than fifteen days after the date on which such notice is published by the Secretary of Commerce; or

"(B) establish a deadline for the submission of bids, proposals, or quotations in response to such solicitation that is earlier than thirty days after the date on which such solicitation is issued.

"(b) Each notice required by subsection (a)(1)(A) shall include—

"(1) a description of the property or services to be contracted for, which description is not unnecessarily restrictive of competition;

"(2) the name and address of the officer or employee of the executive agency who may be contacted for the purpose of obtaining a copy of the solicitation;

"(3) a statement that any person may submit a bid, proposal, or quotation which shall be considered by the executive agency; and

"(4) in the case of a procurement using noncompetitive procedures, a statement of the reason justifying the use of noncompetitive procedures and the identity of the intended source.

"(c)(1) A notice is not required under subsection (a)(1) if the notice would disclose the executive agency's needs and the disclosure of such needs would compromise the national security.

"(2) The requirements of subsection (a)(1)(A) do not apply—

"(A) to any procurement under conditions described in clause (2), (3), (4), or (5) of section 303(e); and

"(B) in the case of any procurement for which the head of the executive agency carrying out such procurement makes a determination in writing, with the concurrence of the Administrator of the Small Business Administration, that it is not appropriate or reasonable to publish a notice before issuing a solicitation.

RECORD REQUIREMENTS

"Sec. 314. (a) Each executive agency shall establish and maintain for a period of five years a record, by fiscal year, of the procurements, other than small purchases, in such fiscal year in which—

"(1) noncompetitive procedures were used; and

"(2) only one bid or proposal was received after competitive procedures were used.

"(b) The record established under subsection (a) shall include, with respect to each procurement—

"(1) information identifying the source to whom the contract was awarded;

"(2) the property or services obtained by the Government under the procurement;

"(3) the total cost of the procurement;

"(4) the reason under section 303(e) for the use of noncompetitive procedures; and

"(5) the position of the officers or employees of the executive agency who required and approved the use of noncompetitive procedures in such procurement.

"(e) The information included in the record established and maintained under subsection (a) shall be transmitted to the Federal Procurement Data Center referred to in section 6(d)(5) of the Office of Federal Procurement Policy Act (41 U.S.C. 405(d)(5))."

(b) The table of contents of such Act is amended—

(1) by striking out the item relating to section 303 and inserting in lieu thereof the following:

"Sec. 303. Competition requirements";

and

(2) by inserting after the item relating to section 310 the following new items:

"Sec. 311. Solicitation requirements.

"Sec. 312. Evaluation of bids; awards.

"Sec. 313. Procurement notice.

"Sec. 314. Record requirements."

COST AND PRICING DATA

Sec. 102. Section 304 of the Federal Property and Administrative Services Act of 1949 (41 U.S.C. 254) is amended by adding at the end thereof the following new subsection:

"(d)(1) 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—

"(A) prior to the award of any prime contract under this title using other than sealed bid procedures where the price is expected to exceed \$100,000;

"(B) 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;

"(C) 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

"(D) prior to the pricing of any contract change or modification to a subcontract covered by clause (C), 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.

"(2) Any prime contract or change or modification thereto under which a certificate is required under paragraph (1) 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 executive 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 price as is practicable), was inaccurate, incomplete, or noncurrent.

"(3) 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 proposal for the contract, the discus-

sions conducted on the proposal under this chapter, pricing, or performance of the contract or subcontract.

"(4) The requirements of this subsection need not be applied to contracts or subcontracts where the price 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 executive agency determines that the requirements of this subsection may be waived and states in writing his reasons for such determination."

CONFORMING AMENDMENTS

Sec. 103. (a) Title III of the Federal Property and Administrative Services Act of 1949 (41 U.S.C. 251 et seq.) is amended—

(1) in section 302 (41 U.S.C. 252)—

(A) by striking out the second sentence in subsection (b);

(B) by striking out subsections (c) and (d); and

(C) by redesignating subsections (e) and (f) as subsections (c) and (d), respectively;

(2) by striking out the heading of section 304 and inserting in lieu thereof the following:

"CONTRACT REQUIREMENTS";

(3) in section 304 (41 U.S.C. 254)—

(A) by striking out "negotiated pursuant to section 302(c)" in the first sentence of subsection (a) and inserting in lieu thereof "awarded using other than sealed bid procedures";

(B) by striking out "negotiated pursuant to section 302(c)" in the second sentence of subsection (a) and inserting in lieu thereof "awarded after using other than sealed bid procedures"; and

(C) by striking out "negotiated without advertising pursuant to authority contained in this Act" in the first sentence of subsection (c) and inserting in lieu thereof "awarded after using other than sealed bid procedures";

(4) in section 307 (41 U.S.C. 257)—

(A) by striking out "Except as provided in subsection (b), and except" in the second sentence of subsection (a) and inserting in lieu thereof "Except";

(B) by striking out subsection (b);

(C) by striking out "by paragraphs (11), (13), or (14) of section 302(c)," in subsection (c);

(D) by redesignating subsection (c) as subsection (b); and

(E) by striking out subsection (d);

(5) by striking out "entered into pursuant to section 302(c) without advertising," in section 308 and inserting in lieu thereof "made or awarded after using other than sealed bid procedures"; and

(6) by striking out "section 302(c)(15) of this title without regard to the advertising requirements of sections 302(c) and 303," in section 310 and inserting in lieu thereof "the provisions of this title relating to other than sealed bid procedures."

(b) The table of contents of such Act is amended by striking out the item relating to section 304 and inserting in lieu thereof the following:

"Sec. 304. Contract requirements."

**TITLE II—AMENDMENTS TO TITLE 10,
UNITED STATES CODE****COMPETITIVE AND NONCOMPETITIVE
PROCEDURES**

Sec. 201. (a) Chapter 137 of title 10, United States Code, is amended—

(1) in section 2302—

(A) by inserting "the Secretary, any Deputy Secretary, any Under Secretary, or

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any Assistant Secretary of Defense;" after "means" in clause (1);

(B) by striking out clauses (2) and (3) of section 2302 and inserting in lieu thereof the following:

"(2) 'Agency' means any department or establishment specified in section 2303(a) of this title.

"(3) 'Competitive procedures' means procedures under which the head of an agency enters into a contract after soliciting sealed bids or competitive proposals from more than one source that is capable of satisfying the needs of the agency.

"(4) 'Noncompetitive procedures' means procedures other than competitive procedures.

"(5) 'Small purchase' means any purchase or contract which does not exceed \$25,000. A proposed procurement shall not be divided into several procurements primarily for the purpose of using small purchase procedures."

(2) in section 2303(a)—

(A) by redesignating clauses (1), (2), (3), (4), and (5) as clauses (2), (3), (4), (5), and (6), respectively; and

(B) by inserting before clause (2) (as redesignated by subclause (A)) the following:

"(1) The Department of Defense."

(3) by striking out sections 2304 and 2305 and inserting in lieu thereof the following:

"§ 2304. Competition requirements

"(a) Except as provided in subsection (e) of this section or otherwise authorized by law, the head of an agency shall use competitive procedures in making contracts for property or services. The head of an agency shall use advance procurement planning and market research and shall prepare specifications in such a manner as is necessary to obtain effective competition with due regard to the nature of the property or services to be acquired. The head of an agency shall use the competitive procedure or combination of competitive procedures that is best suited under the circumstances of the procurement action and shall specify the needs of the agency and solicit bids or proposals in a manner designed to achieve effective competition for the contract.

"(b) The head of an agency may provide for the procurement of property or services in order to establish or maintain any alternative source or sources of supply under this title using competitive procedures but excluding a particular source for that property or services if such head of an agency determines that to do so would (1) increase or maintain competition and would likely result in reduced overall costs for such procurement, or for any anticipated procurement, of property or services, (2) be in the interest of industrial mobilization in case of a national emergency, or (3) be in the interest of national defense in establishing or maintaining an essential research capability to be provided by an educational or other nonprofit institution or a research and development center funded by the United States.

"(c) Procurement regulations shall include special simplified procedures and forms for small purchases to facilitate making small purchases efficiently and economically.

"(d) For other than small purchases, the head of an agency, when using competitive procedures—

"(1) shall solicit sealed bids when—

"(A) time permits the solicitation, submission, and evaluation of sealed bids;

"(B) the award will be made on the basis of price and other price-related factors;

"(C) it is not necessary to conduct discussions with the responding sources about their bids; and

"(D) there is reasonable expectation of receiving more than one sealed bid;

"(2) shall request competitive proposals from responding sources when sealed bids are not required under clause (1) of this subsection.

"(e) The head of an agency may use noncompetitive procedures only when—

"(1) the property or services needed by the Government are available from only one source and no other type of property or services will satisfy the needs of the agency;

"(2) the agency's need for the property or services is of such unusual and compelling urgency that the Government would be seriously injured by the delay associated with using competitive procedures;

"(3) it is necessary to award the contract to a particular source or sources in order to (A) maintain a facility, producer, manufacturer, or other supplier available for furnishing property or services in case of a national emergency, (B) achieve industrial mobilization in the case of such an emergency, or (C) establish or maintain an essential research capability to be provided by an educational or other nonprofit institution or a research and development center funded by the United States;

"(4) the terms of any international agreement or treaty between the United States Government and a foreign government or international organization, or the directions of any foreign government reimbursing the agency for the cost of the procurement of the property or services for such government, have the effect of requiring the use of noncompetitive procedures;

"(5) a statute authorizes or requires that the procurement be made through another agency or from a specified source; or the agency's need is for a brand-name commercial item for authorized resale; or

"(6) the disclosure of the agency's needs to more than one source would compromise the national security.

"(f) For the purposes of applying section 2304(e)(1) hereof: (A) property or services shall be considered to be available from a source if such source has the capability to produce the property or deliver the service in accordance with the Government's specifications and delivery schedule, and (B) in the case of the procurement of technical or special property which has required a substantial initial investment or an extended period of preparation for manufacture, and where it is likely that production by a source other than the original source would 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, the property may be deemed to be available only from the initial source and may be procured through noncompetitive procedures.

"(g) The head of an agency may not award a contract using noncompetitive procedures unless—

"(1) the use of such procedures has been justified in writing;

"(2) a notice has been published with respect to such contract pursuant to section 2305 (c) of this title and all bids or proposals received in response to such notice have been considered by such head of an agency; and

"(3) in the case of any contract exceeding \$100,000, the use of such procedures is approved by the head of the organizational element of such agency which has the responsibility to enter into such contract or by a designee of the head of such organizational element who is higher in such organizational element than the contracting officer issuing the solicitation with respect to such contract.

"(h) For the purposes of the following laws, purchases or contracts made under

this chapter using other than sealed bid procedures shall be treated as if they were made with sealed bid procedures:

"(1) Sections 35-45 of title 41.

"(2) Sections 276a-276a-5 of title 40."

"§ 2305. Solicitation, evaluation, and award procedures; notice requirements

"(a)(1)(A) Each solicitation under this title shall include specifications which—

"(i) consistent with the needs of the agency, permit effective competition; and

"(ii) include restrictive provisions or conditions only to the extent necessary to satisfy such needs or as authorized by law.

"(B) For the purposes of subparagraph (A) of this paragraph, the type of specification included in any solicitation shall depend on the nature of the needs of the agency and the market available to satisfy such needs. Subject to such needs, specifications may be stated in terms of—

"(i) function so that a variety of products or services may qualify;

"(ii) performance, including specifications of the range of acceptable characteristics or of the minimum acceptable standards; or

"(iii) design requirements.

"(2) Each solicitation for sealed bids or competitive proposals other than for small purchases shall at a minimum include, in addition to the specifications described in paragraph (1) of this subsection—

"(A) a statement of—

"(i) all significant factors, including price, which the executive agency reasonably expects to consider in evaluating sealed bids or competitive proposals; and

"(ii) the relative importance assigned to each of those factors;

"(B) in the case of sealed bids—

"(i) a statement that sealed bids will be evaluated without discussions with the bidders; and

"(ii) the time and place for the opening of the sealed bids; and

"(C) in the case of competitive proposals—

"(i) a statement that the proposals are intended to be evaluated with, and awards made after, discussions with the offerors but might be evaluated and awarded without discussions with the offerors; and

"(ii) the time and place for submission of proposals.

"(b)(1) The head of an agency shall evaluate sealed bids and competitive proposals based solely on the factors specified in the solicitation.

"(2) All sealed bids or competitive proposals received in response to a solicitation may be rejected if the head of an agency determines that such action is in the public interest.

"(3) Sealed bids shall be opened publicly at the time and place stated in the solicitation. The head of an agency shall evaluate the bids without discussions with the bidders and shall, except as provided in paragraph (2) of this subsection, award a contract with reasonable promptness to the responsible bidder whose bid conforms to the solicitation and is most advantageous to the United States, solely considering the price and the other factors included in the solicitation under subsection (a)(2)(A) of this section. The award of a contract shall be made by transmitting written notice of the award to the successful bidder.

"(4)(A) The head of an agency shall evaluate competitive proposals and may award a contract—

"(i) after discussions conducted with the offerors at any time after receipt of the proposals and prior to the award of the contract; or

"(ii) without discussions with the offerors beyond discussions conducted for the pur-

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pose of minor clarification where it can be clearly demonstrated from the existence of effective competition or accurate prior cost experience with the product or service that acceptance of an initial proposal without discussions would result in fair and reasonable prices.

"(B) In the case of award of a contract under subparagraph (A)(i) of this paragraph, the head of an agency shall conduct, before such award, written or oral discussions with all responsible offerors who submit proposals within a competitive range, price and other evaluation factors considered.

"(C) In the case of award of a contract under subparagraph (A)(ii) of this paragraph, the head of an agency shall award the contract based on the proposals received (and as clarified, if necessary, in discussions conducted for the purpose of minor clarification).

"(D) The head of an agency shall, except as provided in paragraph (2) of this subsection, award a contract with reasonable promptness to the responsible offeror whose proposal is most advantageous to the United States, solely considering price and other factors included in the solicitation under subsection (a)(2)(A) of this section. The head of the agency shall award the contract by transmitting written notice of the award to such offeror and shall promptly notify all other offerors of the rejection of their proposals.

"(5) If the head of an agency considers that any bid or proposal evidences a violation of the antitrust laws, he shall refer the bid or proposal to the Attorney General for appropriate action.

"(c)(1)(A) Except as provided in paragraph (3) of this subsection—

"(i) the head of an agency intending to solicit bids or, proposals for a contract for property or services at a price expected to exceed \$10,000 shall furnish for publication by the Secretary of Commerce a notice described in paragraph (2) of this subsection; and

"(ii) the head of an agency awarding a contract for property or services at a price exceeding \$10,000 shall furnish for publication by the Secretary of Commerce a notice announcing such award if there is likely to be any subcontract under such contract.

"(B) The Secretary of Commerce shall publish promptly in the Commerce Business Daily each notice required by subparagraph (A) of this paragraph.

"(C) Whenever a head of an agency is required by subparagraph (A)(i) of this paragraph to furnish a notice of a solicitation to the Secretary of Commerce, such head of an agency may not—

"(i) issue such solicitation earlier than fifteen days after the date on which such notice is published by the Secretary of Commerce; or

"(ii) establish a deadline for the submission of all bids or proposals in response to such solicitation that is earlier than thirty days after the date on which such solicitation is issued.

"(2) Each notice required by paragraph (1)(A)(i) of this subsection shall include—

"(A) an accurate description of the property or services to be contracted for, which description is not unnecessarily restrictive of competition;

"(B) the name and address of the officer or employee of the agency who may be contacted for the purpose of obtaining a copy of the solicitation;

"(C) a statement that any person may submit a bid or proposal which shall be considered by the agency; and

"(D) in the case of a procurement using noncompetitive procedures, a statement of

the reason justifying the use of noncompetitive procedures and the identity of the intended source.

"(3)(A) A notice is not required under paragraph (1)(A) of this subsection if—

"(i) the notice would disclose the agency's needs and the disclosure of such needs would compromise the national security; or

"(ii) the proposed noncompetitive procurement would result from acceptance of an unsolicited research proposal that demonstrates a unique or innovative research concept and the publication of any notice of such unsolicited research proposal would disclose the originality of thought or innovativeness of the proposed research or proprietary data associated with the proposal.

"(B) The requirements of paragraph (1)(A)(i) of this subsection do not apply—

"(i) to any procurement under conditions described in clause (2), (3), (4), or (5) of section 2304(e) of this title; and

"(ii) in the case of any procurement for which the head of the agency carrying out such procurement makes a determination in writing, with the concurrence of the Administrator of the Small Business Administration, that it is not appropriate or reasonable to publish a notice before issuing a solicitation."; and

(4) by adding at the end thereof the following new section:

"§ 2316. Record requirements

"(a) Each head of an agency shall establish and maintain for a period of five years a record, by fiscal year, of the procurements, other than small purchases, in such fiscal year in which—

"(1) noncompetitive procedures were used; and

"(2) only one bid or proposal was received after competitive procedures were used.

"(b) The record established under subsection (a) of this section shall include, with respect to each procurement—

"(1) information identifying the source to whom the contract was awarded;

"(2) the property or services obtained by the Government under the procurement;

"(3) the total cost of the procurement;

"(4) the reason under section 2304(e) of this title for the use of noncompetitive procedures; and

"(5) the position of the officers or employees of the agency who required and approved the use of noncompetitive procedures in such procurement.

"(c) The information included in the record established and maintained under subsection (a) shall be transmitted to the Federal Procurement Data Center referred to in section 6(d)(5) of the Office of Federal Procurement Policy Act (41 U.S.C. 405(d)(5))."

(b) The table of sections at the beginning of such chapter is amended—

(1) by striking out the items relating to sections 2304 and 2305 and inserting in lieu thereof the following:

"2304. Competition requirements.

"2305. Solicitation, evaluation, and award procedures; notice requirements.";

and

(2) by adding at the end thereof the following new item:

"2316. Record requirements."

CONFORMING AMENDMENTS

Sec. 202. Chapter 137 of title 10, United States Code, is amended—

(1) in section 2306—

(A) by striking out "may, in negotiating contracts under section 2304," in the second sentence of subsection (a) and inserting in lieu thereof "may in awarding contracts

after using other than sealed bid procedures";

(B) by striking out "negotiated under section 2304" in the first sentence of subsection (b) and inserting in lieu thereof "awarded after using other than sealed bid procedures";

(C) by striking out "section 2304 of this title," in subsection (c) and inserting in lieu thereof "this chapter";

(D) in subsection (f)(1)—

(i) by striking out clause (A) and inserting in lieu thereof the following:

"(1) prior to the award of any prime contract under this title after using other than sealed bid procedures where the contract price is expected to exceed \$100,000;";

(ii) by striking out "negotiated" each place it appears in the second paragraph;

(iii) by striking out "negotiation," in the third paragraph and inserting in lieu thereof "proposal for the contract, the discussions conducted on the proposal under this title,"; and

(iv) by striking out "\$500,000" each place it appears in clauses (B), (C), and (D) and inserting in lieu thereof "\$100,000; and

(E) by adding at the end thereof the following new subsection:

"(i) Except in a case in which the Secretary of Defense determines that military requirements necessitate the 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.";

(2) by striking out subsection (b) of section 2310 and inserting in lieu thereof the following:

"(b) Each determination or decision under section 2306(c), section 2306(g)(1), section 2307(c), or section 2313(c) of this title 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) 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, (2) support the findings required by section 2306(g)(1), (3) clearly indicate why advance payments under section 2307(c) would be in the public interest, or (4) clearly indicate why the application of section 2313(b) to a contract or subcontract with a foreign contractor or foreign subcontractor would not be in the public interest. 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.";

(3) by striking out section 2311 and inserting in lieu thereof the following: "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."; and

(4) by striking out "negotiated" in the second sentence of section 2313(b) and inserting in lieu thereof "awarded after using other than sealed bid procedures".

TITLE III—ADVOCATE FOR COMPETITION; ANNUAL REPORT ON COMPETITION

DEFINITION

Sec. 301. For the purposes of this title, the term "executive agency" has the same meaning as provided in section 4(a) of the Office of Federal Procurement Policy Act (41 U.S.C. 403(a)).

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ADVOCATE FOR COMPETITION

SEC. 302. (a)(1) There is established in each executive agency an advocate for competition.

(2) Each head of an executive agency shall—

(A) designate for each executive agency one officer or employee serving in a position authorized for such executive agency on the date of enactment of this Act to serve as the advocate for competition;

(B) relieve such officer or employee of all duties and responsibilities that are inconsistent with the duties and responsibilities of the advocate for competition; and

(C) provide such officer or employee with such staff or assistance as may be necessary to carry out the duties and responsibilities of the advocate for competition.

(b)(1) The advocate for competition shall promote competition in the procurement of property and services.

(2) The advocate for competition in an executive agency shall—

(A) review the purchasing and contracting activities of the executive agency;

(B) identify and report to the head of the executive agency—

(i) opportunities to achieve competition on the basis of price and other significant factors in the purchases and contracts of the executive agency;

(ii) solicitations and proposed solicitations which include unnecessarily detailed specifications or unnecessarily restrictive statements of need which may reduce competition in the procurement activities of the executive agency; and

(iii) any other condition or action which has the effect of unnecessarily restricting competition in the procurement actions of the executive agency; and

(C) prepare and transmit to the head of the executive agency an annual report describing his activities under this section.

ANNUAL REPORT

SEC. 303. (a) Not later than September 30 of each of 1983, 1984, 1985, and 1986, each head of an executive agency shall transmit to the Committee on Governmental Affairs of the Senate and the Committee on Government Operations of the House of Representatives an annual report including the information specified in subsection (b).

(b) Each report transmitted under subsection (a) shall include—

(1) a specific description of all actions that the head of the executive agency intends to take during the next fiscal year to—

(A) increase competition for contracts with the executive agency on the basis of price and other significant factors; and

(B) reduce the number and dollar value of contracts entered into by the executive agency after soliciting bids or proposals from, or evaluating bids or proposals with discussions with, only one source; and

(2) a summary of the activities and accomplishments of the advocates for competition of the executive agency during the fiscal year in which the report is transmitted.

TITLE IV—APPLICABILITY

SEC. 401. The amendments made by this Act shall apply with respect to any solicitations for bids or proposals issued on or after the date two hundred and seventy days after the date of the enactment of this Act.

Mr. BAKER. Mr. President, I ask unanimous consent that the amendments be considered and agreed to en bloc.

The ACTING PRESIDENT pro tempore. Without objection, it is so ordered.

Without objection, the amendments are agreed to en bloc.

AMENDMENT NO. 2803

(Purpose: To make conforming amendments)

Mr. BAKER. Mr. President, I send an amendment to the desk on behalf of the distinguished Senator from Maine (Mr. COHEN) and I ask that it be stated by the clerk.

The ACTING PRESIDENT pro tempore. The clerk will report.

The legislative clerk read as follows:

The Senator from Tennessee (Mr. BAKER) for Mr. COHEN, proposes an amendment numbered 2803.

Mr. BAKER. Mr. President, I ask unanimous consent that further reading of the amendment be dispensed with.

The ACTING PRESIDENT pro tempore. Without objection, it is so ordered.

The amendment is as follows:

On page 2, line 17, strike out "and" and insert in lieu thereof "or".

On page 3, line 4, beginning with "proposals," strike out all through "quotations" on line 5, and insert in lieu thereof "or proposals".

On page 3, line 7, beginning with "award" strike out all through "in the" on line 8, and insert in lieu thereof "provide for the".

On page 3, line 10, strike out "of such", and insert in lieu thereof "under this title using competitive procedures but excluding a particular source for that".

On page 3, line 11, insert "or maintain" after "increase".

On page 3, line 14, strike out "or".

On page 3, line 15, insert "or (3) be in the interest of national defense in establishing or maintaining an essential research capability to be provided by an educational or other nonprofit institution or a research and development center funded by the United States" before the period.

On page 4, line 2, strike out "factors considered", and insert in lieu thereof "price-related factors".

On page 4, line 13, strike out "and", and insert in lieu thereof "or".

On page 4, line 20, strike out "involved in", and insert in lieu thereof "associated with".

On page 4, line 22, beginning with "maintain" strike out all through line 24, and insert in lieu thereof "(A) maintain a facility, producer, manufacturer, or other supplier available for furnishing property or services in case of a national emergency, (B) achieve industrial mobilization in the case of such an emergency, or (C) establish or maintain an essential research capability to be provided by an educational or other nonprofit institution or a research and development center funded by the United States".

On page 5, line 3, insert "or international organization" before the comma.

On page 5, line 9, strike out "provides", and insert in lieu thereof "authorizes or requires".

On page 5, line 10, insert "from" after "or".

On page 5, line 11, insert "the agency's need is for a brand-name commercial item for authorized resale; or" after "or".

On page 5, between lines 14 and 15, insert the following:

"(f) For the purposes of applying subsection (e)(1)—

"(1) property or services shall be considered to be available from a source if such source has the capability to produce the property or deliver the service in accordance with the Government's specifications and delivery schedule; and

"(2) in the case of the procurement of technical or special property which has required a substantial initial investment or an extended period of preparation for manufacture, and where it is likely that production by a source other than the original source would 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, the property may be deemed to be available only from the initial source and may be procured through noncompetitive procedures.

On page 5, line 15, strike out "(f)", and insert in lieu thereof "(g)".

On page 5, between lines 18 and 19, insert the following:

"(1) the use of such procedures has been justified in writing;

On page 5, beginning with line 19, strike out all through "purchase," on line 20, and insert in lieu thereof "(2)".

On page 5, line 22, strike out "proposals, and quotations", and insert thereof "or proposals".

On page 6, line 1, strike out "(2)", and insert in lieu thereof "(3)".

On page 6, line 8, strike out the close quotation marks and the semicolon.

On page 6, between lines 8 and 9, insert the following:

"(h) For the purposes of the following laws, purchases or contracts made under this title using other than sealed bid procedures shall be treated as if they were made with sealed bid procedures:

"(1) The Act entitled 'An Act to provide conditions for the purchase of supplies and the making of contracts by the United States, and for other purposes', approved June 30, 1936 (commonly referred to as the 'Walsh-Healey Act') (41 U.S.C. 35-45).

"(2) The Act entitled 'An Act relating to the rate of wages for laborers and mechanics employed on public buildings of the United States and the District of Columbia by contractors and subcontractors, and for other purposes', approved March 3, 1931 (commonly referred to as the 'Davis-Bacon Act') (40 U.S.C. 276a-276a-5)."

On page 8, line 2, insert "at a minimum" after "shall".

On page 8, line 10, insert "each of" before "those".

On page 9, line 3, insert "solely" after "based".

On page 9, line 15, insert "solely" before "considering".

On page 10, line 3, insert "where it can be clearly demonstrated from the existence of effective competition or accurate prior cost experience with the product or service that acceptance of an initial proposal without discussions would result in fair and reasonable prices" before the period.

On page 10, line 23, strike out "received under sealed bid procedures", and insert in lieu thereof "or proposal".

On page 10, line 24, insert "or proposal" after "bid".

On page 11, line 5, strike out "proposals, or quotations" and insert in lieu thereof "or proposals".

On page 11, line 6, strike out "exceeding", and insert in lieu thereof "expected to exceed".

On page 12, line 8, strike out "bids, proposals, or quotations", and insert in lieu thereof "all bids or proposals".

On page 13, line 19, strike out "a", and insert in lieu thereof "an accurate".

On page 14, strike out lines 9 through 11, and insert in lieu thereof the following:

if—

"(A) the notice would disclose the executive agency's needs and the disclosure of

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such needs would compromise the national security; or

"(B) the proposed noncompetitive procurement would result from acceptance of an unsolicited research proposal that demonstrates a unique or innovative research concept and the publication of any notice of such unsolicited research proposal would disclose the originality of thought or innovativeness of the proposed research or proprietary data associated with the proposal.

On page 18, line 15, insert "contract" before "price".

On page 18, beginning with line 21, strike out all through line 24, and insert in lieu thereof the following:

(B) by striking out subsections (c), (d), and (e) and insert in lieu thereof the following:

"(c)(1) This title does not (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 using other than sealed bid procedures under section 303(d)(1), if the conditions set forth in section 303(d)(1) apply or the contract is to be performed outside the United States.

"(2) Section 303(d)(1) does not require the use of sealed bid procedures in cases in which section 204(e) of title 23, United States Code, applies"; and

(C) by redesignating subsection (f) as subsection (d);

The ACTING PRESIDENT pro tempore. The question is on agreeing to the amendment.

The amendment (No. 2603) was agreed to.

AMENDMENT NO. 2604

(Purpose: To remove from the bill certain provisions enacted into law after the bill was reported to the Senate)

Mr. BYRD. Mr. President, I send an amendment to the desk in behalf of Mr. LEVIN and ask that it be stated.

The ACTING PRESIDENT pro tempore. The clerk will report.

The legislative clerk read as follows:

The Senator from West Virginia (Mr. BYRD), for Mr. LEVIN, proposes an amendment numbered 2604.

Mr. BYRD. Mr. President, I ask unanimous consent that further reading of the amendment be dispensed with.

The ACTING PRESIDENT pro tempore. Without objection, it is so ordered.

The amendment is as follows:

On page 5, line 24, strike out "agency; and" and insert in lieu thereof "agency."

On page 6, beginning with line 1 strike out all down through line 8.

On page 26, after the semicolon in line 20 insert "and".

On page 27, line 2, strike out "agency; and" and insert in lieu thereof "agency."

On page 27, beginning with line 3 strike out all down through line 10.

● Mr. LEVIN. Mr. President, the purpose of my technical amendment is to strike from this bill certain provisions I offered as an amendment to the bill when introduced that have since been enacted into law in S. 272, the small business notice bill. S. 272 was signed into law on August 11, 1983, and it is my hope that its enactment will produce great savings from the reduced

use of sole-source procurement. Events having overtaken this language, it is no longer that the Levin sole-source provisions be a part of S. 338.●

The ACTING PRESIDENT pro tempore. The question is on agreeing to the amendment.

The amendment (No. 2604) was agreed to.

AMENDMENT NO. 2605

(Purpose: To make technical corrections)

Mr. BAKER. Now, Mr. President, I send to the desk another amendment on behalf of the distinguished Senator from Maine (Mr. COHEN) and ask that it be stated.

The ACTING PRESIDENT pro tempore. The clerk will report.

The legislative clerk read as follows: The Senator from Tennessee (Mr. BAKER), for Mr. COHEN, proposes an amendment numbered 2605.

Mr. BAKER. Mr. President, I ask unanimous consent that further reading of the amendment be dispensed with.

The ACTING PRESIDENT pro tempore. Without objection, it is so ordered.

The amendment is as follows:

On page 27, strike out lines 16 and 17, and insert in lieu thereof the following:

"(1) The Act entitled 'An Act to provide conditions for the purchase of supplies and the making of contracts by the United States, and for other purposes', approved June 30, 1936 (commonly referred to as the 'Walsh-Healey Act') (41 U.S.C. 35-45).

"(2) The Act entitled 'An Act relating to the rate of wages for laborers and mechanics employed on public buildings of the United States and the District of Columbia by contractors and subcontractors, and for other purposes', approved March 3, 1931 (commonly referred to as the 'Davis-Bacon Act') (40 U.S.C. 276a-276a-5).

The ACTING PRESIDENT pro tempore. The question is on agreeing to the amendment.

The amendment (No. 2605) was agreed to.

● Mr. COHEN. Mr. President, I am pleased that the Senate is considering S. 338, the Competition in Contracting Act of 1983, which I introduced to increase the use of competition in government contracting and to impose more stringent restrictions on the awarding of noncompetitive, sole-source contracts.

This legislation was reported unanimously by the Governmental Affairs Committee on March 23 and by the Armed Services Committee on June 27. I am pleased to have Senators ROTH, LEVIN, RUDMAN, PERCY, PRYOR, PROXMIRE, HEINZ, DURENBERGER, STEVENS, DANFORTH, MITCHELL, RIEGLE, BINGAMAN, WILSON, EXON, WARNER, GOLDWATER, and HATCH as cosponsors.

Competitive procurement, whether formally advertised or competitively negotiated, is beneficial to the Government. The Competition in Contracting Act recognizes that competitive contracting takes more than one form and establishes an absolute preference for competition in the Federal procurement statutes. The legislation safe-

guards against unnecessary, sole-source contracting by providing limited conditions under which agencies are permitted to contract noncompetitively and by requiring agencies to publicize prospective contracts to flush the marketplace for potential competitors. As a final check on noncompetitive contracting, the bill establishes an advocate for competition and strengthens the recording and reporting requirements.

These procurement reform proposals are not new. In fact, the Armed Services Committee held hearings in 1959 on legislation to provide competitive negotiation equal status with formal advertising. The Commission on Government Procurement made similar recommendations to improve the procurement process in its 1972 report to Congress. Most recently, the Office of Federal Procurement Policy adopted the Commission's recommendations in its 1982 proposal for a uniform procurement system, which served as the basis for S. 338.

Despite this consensus over the past quarter century that procurement reform is needed, and despite the fact that the dollar value of Government contracts has almost tripled during the past decade alone—from \$57.5 billion in 1972 to \$158.9 billion in 1982—the laws which have governed contracting since 1947 remain intact.

Under our current contracting laws, Government agencies are required to promote the use of full and free competition in the procurement of property and services. In Government contracting, competition is a marketplace condition which results when several contractors, acting independently of each other and of the Government, submit bids or proposals in an attempt to secure the Government's business.

Currently, formal advertising is the preferred procurement procedure, with negotiation authorized by prescribed exceptions. Despite this preference for competition through formal advertising, however, negotiated contracts account for the vast majority of government procurement dollars. Negotiated contracts can be competitive—and the legislation recognizes and encourages competitive negotiation when it is the appropriate contracting method—but more than half of all negotiated contracts are sole-sourced. According to figures compiled by the Federal Procurement Data Center, \$79.2 billion of the \$146.9 billion spent on property and services over \$10,000 in fiscal 1982 was negotiated noncompetitively.

While not all Government contracts can be awarded competitively, too often agencies contract on a sole-source basis when competition is available. A July 1981 General Accounting Office (GAO) report, entitled "DoD Loses Many Competitive Procurement Opportunities," estimated that the Defense Department failed to obtain competition in awarding \$289 million

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in new fiscal 1979 contract awards surveyed. Moreover, an April 1982 GAO report, entitled "Less Sole-Source, More Competition Needed in Federal Civil Agencies' Contracting," found that this problem was not confined to the DoD. According to this report, the six civil agencies reviewed, which awarded new sole-source contracts totaling \$538.1 million, failed to obtain competition on an estimated 40 percent of their contract awards.

The benefits lost from awarding sole-source contracts which could have been competed are numerous. First, competition in contracting saves money. Studies have indicated that between 15 and 50 percent can be saved through increased competition. In 1977, the Defense Science Board (DSB) examined more than a dozen examples of competed contracts for weapons and found significant evidence of cost savings, with an average savings of nearly 15 percent. The DSB concluded that "competition is a powerful motivator for cost control." More recently, the GAO reported, at Senator Levin's request, the results of the competitive procurement for the T-3 tractor—a contract which initially was to have been awarded noncompetitively. The GAO found that the lowest bid in a competitive procurement for the T-3 tractor was 43 percent less than the cost of the contract had it been awarded on a sole-source basis.

In March 1983, the Congressional Budget Office estimated that significant savings could be achieved through the effective implementation of the Competition in Contracting Act. The CBO estimates that each 1 percent saved on new contract actions reduces costs by about \$200 million per year. Since studies on the use of competitive contracting have concluded that potential savings range from 15 to 50 percent, a conservative estimate of the savings resulting from this legislation would be well over \$2 billion.

In addition to potential cost savings, competition curbs cost growth. The Analytic Sciences Corporation (TASC) completed a study in April 1982 which compared cost growth between competitive and noncompetitive programs. The TASC study found that cost growth in programs during full-scale development varied from 2 percent for competitive programs to 40.2 percent for noncompetitive programs, while cost growth during production ranged from 9.65 to 12.7 percent.

The last, and possibly the most important, benefit of competition is its inherent appeal of fair play. Competition maintains the integrity in the expenditure of public funds by insuring that Government contracts are awarded on the basis of merit rather than favoritism.

I believe there are two primary shortcomings in the present procurement statutes: First, they do not recognize negotiation as a legitimate competitive procurement procedure; and second, they do not adequately restrict

the use of noncompetitive negotiation. Effective implementation of S. 338 would rectify both problems.

The formal advertising requirement in present law is intended to keep the system honest and to secure the most advantageous contract for the Government. The emphasis on formal advertising, however, results in excessive justification requirements for the use of negotiation, which is more appropriate for complex procurements. If contracting officers need to consider factors other than price in making awards, or wish to have any discussions with prospective contractors, they must satisfy one of the statutory exceptions that permit negotiation. For all practical purposes, therefore, competitive negotiation lacks recognition as a bona fide competitive technique.

Our legislation removes the restriction from—and the written justification required for—competitive negotiation and places it on par with formal advertising. Together, they constitute competitive procedures, with exceptions provided for noncompetitive procedures. The objective is to establish an absolute preference for competition and to provide more flexibility in contracting. William Long, former Deputy Under Secretary for DOD Acquisition Management, testified last year at a Governmental Affairs hearing that this new approach to competitive procurement best represents the real procurement world.

Under the Competition in Contracting Act, agencies are not only required to obtain competition, but to increase its effectiveness. Agencies should be required to obtain "effective competition" through advance procurement planning, market research, and the development of specifications which are not restrictive of competition. We recognize that this extensive an effort may not be cost effective for small purchases. Therefore, this legislation provides a basis in statute for regulations to establish separate small purchase procedures for procurements under \$25,000, which would allow agencies to scale down their efforts as long as they obtained reasonable competition.

The procurement statutes authorize negotiated procurement, but restrict its use to 17 conditions for defense contracts and 15 conditions for civilian contracts. While agencies are required to award negotiated contracts competitively to the maximum extent practicable, negotiation can be—and frequently is—noncompetitive. Beyond the justification for negotiated procurement, however, present law does not require further justification for noncompetitive award.

Due to this lack of direct restriction on noncompetitive contracting, the exceptions to formal advertising in present law are often used inappropriately to justify sole-source procurement, rather than negotiation. The justification most frequently invoked

by the executive agencies is the "competition is impracticable" exception—an enormous loophole. The use of such broad exceptions to formal advertising as a means to sole-source contract often conceals the true reason for awarding a contract noncompetitively.

S. 338 provides six exceptions to competitive procedures which permit agencies to use noncompetitive procedures in awarding a contract when competition is not possible. In doing so, the bill shifts the emphasis from having to justify negotiation, as is presently required, to having to justify noncompetitive procurements. The intent is to place greater restrictions on the use of noncompetitive procurements without precluding its use when necessary. Awarding a contract on a sole-source basis would for the first time constitute a clear violation of statute unless permitted by one of the following six exceptions:

First, the property or service is available from only a single source and no competitive alternatives are available;

Second, the agency's need is of such unusual and compelling urgency that the Government would be seriously injured by the delay associated with using competitive procedures;

Third, it is necessary to award the contract to a particular source in order to maintain an essential industrial capability, achieve industrial mobilization, or establish or maintain an essential research capability;

Fourth, the terms of any international agreement or treaty, or the directions of any foreign government, have the effect of requiring the use of noncompetitive procedures;

Fifth, a statute authorizes or requires that the procurement be made through another agency or from a specified source; or the agency's need is for a brand-name commercial item for authorized resale; or

Sixth, disclosure of the agency's needs to more than one source would compromise the national security.

These six exceptions parallel the conditions under which the Comptroller General has historically permitted agencies to award on a sole-source basis. Under the first exception, however, I feel there should be a "double check" for potential competition before the sole-source award is made. This legislation would generally require agencies to publish a notice of their prospective contracts over \$10,000 in the Commerce Business Daily. The objective is to alert contractors, who may be capable of meeting the agency's needs but would have otherwise not known of the contract, to submit offers. For contracts over \$100,000, moreover, S. 338 would require review by the head of the procuring activity, or his or her designee, before these contracts are negotiated noncompetitively.

Absent from the list of exceptions to competitive procedures are unsolicited

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proposals. While it may be the Government's policy to foster and encourage the submission of unsolicited proposals, the regulations specifically state that such proposals should not be merely an advance proposal for a specific agency requirement which would normally be procured by competitive methods. S. 338 therefore requires agencies to conduct a market search, without disclosing the offeror's ideas, proprietary information or solution contained in the unsolicited proposal, in order to determine whether the substance of the proposal is available from another source. If publication of an unsolicited proposal would disclose the offeror's original thoughts or proprietary information, S. 338 exempts such proposals from the notice requirement.

To facilitate oversight of noncompetitive contracts, the Competition in Contracting Act also requires agencies to maintain a record, by fiscal year, identifying all sole-sourced procurements. As proposed by Senator PRYOR, an advocate for competition in each procuring agency would be responsible for reporting the opportunities to achieve competition and any conditions which could potentially restrict competition. These new recording and reporting requirements would allow the Congress, the Office of Federal Procurement Policy, and senior agency officials to evaluate the progress of each agency in increasing the use of competitive contracting.

The Competition in Contracting Act builds on existing statutes to enhance the use of competition in Government contracting and to restrict sole-source award to only those cases where it is truly warranted. Within the new statutory framework, the evaluation and award procedures would be the same as those currently required for formal advertising and negotiation. Considering the history of Comptroller General and court decisions which have interpreted the present evaluation and award procedures, I am confident this legislation can be quickly and easily implemented. I strongly believe that the Competition in Contracting Act sets forth a workable solution to the costly problem of excessive sole-source contracting.

Mr. President, I urge the adoption of S. 338 and its conforming and technical amendments. ●

● Mr. PERCY. Mr. President, I rise with an inquiry. The Competition in Contracting Act would revise the Federal Property and Administrative Services Act to broaden the requirements for competition, but the language of section 303 contains the words "... except as . . . otherwise authorized by law . . ." carrying forward a very important distinction made in the Brooks Act, 40 U.S.C. 541. The distinction provides that architect and engineering services, defined as "those professional services of an architectural or engineering nature as well as incidental services that members of these profes-

sions and those in their employ may logically or justifiably perform", may be procured by competitive negotiation—a time-tested method for acquiring professional services of this kind. Am I correct that this important distinction will be preserved under the language of section 303?

Mr. COHEN. Yes; it would be preserved.

Mr. PERCY. I thank the Senator. I have also been concerned that the Comptroller General has given an overly restrictive interpretation to this definition of architecture and engineering services, and has decided on several occasions that surveying and mapping services are not included. However, the issue has been more recently addressed in the Supplemental Appropriations Act for 1983. The section of that act appropriating funds for the Corps of Engineers of the Department of the Army provides that "contracts for architect and engineering services, and surveying and mapping services, shall be awarded in accordance with title IX of the Federal Property and Administrative Services Act of 1949 (40 U.S.C. 541 et seq.) . . .". Under this language, the Corps of Engineers will award contracts for mapping and surveying in accordance with the Brooks Act.

Mr. COHEN. That is a positive step. I think it is important to note, moreover, that this language does not only apply to the Corps of Engineers, but to all Government procuring agencies.

Mr. PERCY. Would the Competition in Contracting Act then carry forward the construction of the Brooks Act contained in that language from the Supplemental Appropriations Act?

Mr. COHEN. That is correct.

Mr. PERCY. I thank the Senator from Maine for his most helpful clarification. ●

● Mr. ROTH. Mr. President, I rise in support of the Competition in Contracting Act of 1983. I am pleased to be an original cosponsor of the proposal and applaud Senator COHEN for his efforts in drafting this important piece of legislation. A similar bill was reported out of my Committee on Governmental Affairs late last year and I am very pleased that the committee was able to act quickly to report this measure. I am convinced the bill will strengthen the use of competitive practices in Government procurement activities. I would also like to commend very highly Senator TOWER, chairman of the Committee on Armed Services and Senator NUSS, the ranking member of the committee, for their strong support and expeditious action in reporting the bill out of their committee. I know that they are committed to improving the defense acquisition process and I applaud them for their leadership on this bill.

The Competition in Contracting Act of 1983, S. 338, will encourage greater levels of competition in Federal procurement and impose new restrictions on sole-sourcing contracts throughout

Government. It would do this by changing the focus of the existing procurement statutes to distinguish between truly competitive contracts and those which are not awarded competitively.

Currently, the procurement statutes do not stress the competitive aspects of Government purchasing practices and instead focus simply on whether or not a particular contract was advertised or negotiated. While the use of advertising is very important in Government contracting, and remains the preferred method of procurement under our bill, it is not the only type of competitive contracting method available. Our bill will encourage broader use of other competitive contracting methods and stimulate greater levels of real competition in Government procurement. In addition, the bill greatly narrows the number of exceptions in current law to using competitive practices and also requires a procuring agency to publish advance notice of most large contracts, even those the agency feels should not be competed, so that potential suppliers can place bids. This provision would act as a double check on the agency and encourage the marketplace to be used for a wider variety of contracts.

Mr. President, it is true that this bill would modify the procurement practices of all Federal agencies. However, I am particularly concerned about increasing the efficiency of procurement procedures in the Defense Department because that is where 75 percent of all procurement dollars will be spent next year. Real purchases of defense goods, including R&D and procurement of major weapons systems, will grow at an estimated rate of 16 percent annually under the President's budget between 1981 and 1987. This rate of growth exceeds the 14 percent annual rate of increase that occurred during the 3 peak years of the Vietnam buildup. Weapons system procurement and development, which totaled \$48.9 billion in 1980 will reach a level of over \$130 billion in the coming fiscal year. Clearly, with this magnitude of funding we must do everything possible to insure that our defense dollars are used effectively and efficiently.

My Committee on Governmental Affairs has held 4 days of hearings so far this year on the management of the defense acquisition process. We heard testimony from the administration indicating that it is trying to improve the effectiveness and reduce the costs of the procurement system. Deputy Secretary Thayer assured the committee that he is focusing his attention on a series of management initiatives which he believes would help to curb the cost of the procurement system.

Yet, one problem for years has plagued the DOD in its efforts to improve the management of massive, new weapons programs and that problem is the failure of the Department to encourage real competition in contract-

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ing. Some two-thirds of the value of all DOD procurements are noncompetitive, that is, not open to bidding or negotiation to all interested and qualified parties. Out of a total of \$65 billion awarded by DOD in 1980, over \$40 billion was negotiated without competition. In one study, GAO reviewed 25 contracts that it believed should have been competed and determined that contracting officers did not make required reviews to assure that competition was impossible. In 70 percent of these cases, the contracting officers placed contracts with companies their supervisors had suggested. It appears that DOD is running an auction without a caller and with only one participant who is admitted by special invitation only.

We need to insure greater competition in DOD procurement for several reasons, of which reduction in cost is just one. The fondness of DOD to sole source its goods and services may be having a serious effect on our military industrial base. The practice of sole-sourcing may contribute to reducing the number of firms willing to bid on DOD projects by shutting out innovative, smaller firms. For instance, only 25 firms currently hold approximately 50 percent of all defense contracts and only 8 firms conduct 45 percent of all defense research. Significantly, some 2,000 aerospace industry subcontractors disappeared from 1968 to 1975, many of them unique suppliers of critical defense components.

It is possible that excessive use of sole-source contracts by DOD was the final nail in the coffins of many of these contractors. By refusing to open up the DOD marketplace to competition, we may be forcing many companies to fold or refuse to contract for defense projects, thereby reducing further any opportunity for competition.

Costs too can be reduced through the use of competitive contracts by DOD. Some studies suggest that as much as 30 percent can be saved through the use of competition in the acquisition process. For example, one analyst has estimated that competition and lack of extensive specs saved \$640 million on the procurement of specialized ammunition for the A-10 aircraft. The Defense Science Board found more than a dozen examples of competed contracts for weapons such as the AIM-7 missile and uncovered significant evidence of cost savings averaging nearly 15 percent. The D.S.B. concluded that, "Competition is a powerful motivator for cost control."

Yet, with all of this evidence, DOD continually fails to use the forces of the marketplace to reduce costs. DOD claims that it is difficult to use competitive contracts in many cases and yet, as the Defense Science Board noted, there is "very little definitive evaluation by DOD on the real cost value of competition." In other words, DOD cannot stand the taste of the medicine it needs even though it has not tasted it very often.

Without competition in the acquisition process, there are few incentives on the part of the contractor or the DOD to reduce costs. DOD is helping to create a new "army," one composed of a few select companies operating in the warm glow of a monopoly contract. There may be some rivalry during the initial phases of a contract award for research and development but frequently the contractors involved do not fight long enough to really challenge each other. In the end, one firm usually becomes the sole developer and producer of a weapon for a decade or more.

Competition in DOD programs is not the only cost-reducing technique available but it is one of the most important. Unnecessary costs in defense programs must be brought under control soon for the American people cannot be fooled for long. More dollars must not mean more unnecessary expenses. Congress has already begun scaling back the increases in defense spending originally proposed by the President. Without visible, effective and lasting improvements in DOD's efforts to buy more weapons systems, the clamor for more defense cuts can only get louder.

I am confident the legislation we are considering today will begin the process of insuring more effective management of procurement by using the discipline of the marketplace to control costs. I look forward to the passage of this legislation to enhance competition and I am pleased to join Senator COHEN in this initiative. I urge my colleagues to support S. 338. ●

● Mr. LEVIN. Mr. President, I am most pleased today that the Senate is considering final passage of S. 338, the Competition in Contracting Act of 1983. I joined with Senator COHEN in cosponsoring this bill in February of this year. S. 338 is similar to a bill Senator COHEN and I cosponsored in the 97th Congress that was reported by the Governmental Affairs Committee but was never enacted into law.

Mr. President, I am convinced that this bill will accomplish two very important things: It will save the Federal Government large sums of money through increased competition leading to lower procurement prices; and also, it will foster the growth and health of small business and industry which is so essential to our economy and national defense.

NEED FOR COMPETITION

The way the Government spends its procurement dollars—both in the Department of Defense and in the rest of the Federal Government—has been one of my greatest interests and areas of endeavor since I came to the Senate. During these last 5 years I have been compelled to become an advocate for competition. I say compelled because I find the level of competition in Government procurement to be appalling. Although it is commonly accepted knowledge that competition can reduce the cost of procurement 25 percent or more, there is

no proven commitment to increase the levels of competitive procurement.

The size of these numbers and the possible savings involved is almost beyond human comprehension. In fiscal year 1982, total Federal contract actions totaled \$159 billion. Of this amount, actions within the Department of Defense accounted for \$125 billion. Yet, only 37 percent of these actions, and 35 percent of the DOD actions, were done competitively. In other words, 63 percent of the total \$159 billion are spent with sole-source contracts.

Mr. President, this bill represents not only my and Senator COHEN's efforts, but is the consensus product of broad-based consideration within the Senate. S. 338 has been carefully combed, filtered, and refined by both the Senate Committee on Governmental Affairs and the Senate Armed Services Committee. Furthermore, it represents the first major effort by Congress to overhaul the Government procurement statutes since the Armed Services Procurement Act of 1947 and the Federal Property and Administrative Services Act of 1949.

One of the reasons the Government has been able to award so many contracts on a sole-source basis is because of the large number of statutory exemptions from requirements for sealed-bid procurement included in these two procurement laws that have been on the books relatively unchanged for 35 years.

The 1947 act and the 1949 act contain 17 and 15 exemptions to the sealed-bid process, respectively. Until the Congress passed a relatively unheralded bill 3 months ago, the agencies have been able to cite these exemptions as the basis for using the process of negotiation instead of sealed bids, and then shift to procuring on a sole-source basis without need for further justification.

As my colleague, Senator COHEN, ably explained, S. 338 replaces these numerous and loosely worded exemptions with six tightly drafted exemptions to competition. Upon passage of this bill, no exception need be cited to move from sealed bids to competitive negotiation but moving from competition to sole-source procurement will prove much more difficult.

LEVIN SOLE-SOURCE AMENDMENT

Included in this bill, but already signed into law as an amendment to S. 272, the Small Business Notice Act, on August 11, 1983, is language I have attempted to have enacted for several years. The Levin sole-source amendment requires that any time the Government intends to procure on a sole-source basis on the grounds that no other business is capable of producing an item, the Government must publish notice in the Commerce Business Daily stating intent to make a sole-source award, but inviting any interested party to respond to the listed office, should they believe their firm

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could compete for the proposed contract.

A second prong in this Levin sole-source language requires signoff on the contracting officer's decision to go sole source by the head of the procuring activity. This signoff requirement operates on all procurements in excess of a certain threshold: \$1 million in the first year of operation; \$500,000 in the second year; and \$300,000 in the third year. At the end of that time the conferees reserved the right to look at lowering that threshold to the \$100,000 level.

CERTIFICATION OF COST AND PRICING DATA

Mr. President, in addition to the tightened exemptions to competition and the Levin sole-source amendment, another item of particular interest to me is an amendment I offered in markup in the Governmental Affairs Committee that returns the threshold for DOD contractor compliance with the requirement to certify cost and pricing data as required by the Truth in Negotiations Act of 1962 (P.L. 87-653) to the same \$100,000 level that must be abided by for doing business with the other procuring branches of the Federal Government. This act simply required that any contractor awarded a contract in the absence of competition for more than \$100,000 must certify that—

To the best of his knowledge and belief, the cost or pricing data he submitted was accurate, complete, and current.

Two years ago the conferees on the fiscal year 1982 DOD authorization bill accepted a House amendment that raised this threshold for certification from \$100,000 to \$500,000.

Mr. President we have since learned that with the passage of this amendment the Department of Defense routinely fails to audit contracts in this \$100,000 to \$500,000 range. Many of the spare parts horror stories and discussions of overpricing that have been so much in the forefront during the last year have resulted from contract modifications or ordering agreements that did not breach this threshold—and thus escaped tight auditing attention. Thank goodness for the DOD Inspector General's Office as they have been instrumental in catching many of these problems, but it is imperative that we provide the DOD auditors with the tools they need to demand fair and accurate prices.

CONCLUSION

Mr. President, there are other provisions in this bill that Senator COHEN has mentioned, and the combination of these efforts should prove to be an important initiative and milestone in the annals of Government procurement law.

We are asking the American public to foot an enormous bill for Government procurement, nearly 80 percent of that amount within the Department of Defense. We owe it to the public and to American business to do no less than these two things: Spend these awesome amounts sensibly and

sanely, never failing to grasp every conceivable opportunity to insure that our procurement practices are sound; and give every business in this land a meaningful opportunity to compete for these dollars, rather than funneling precious taxpayers funds to a chosen and unchallenged few.

I want to commend Senator COHEN and his staff for their work in drafting this bill, and also I want to commend the members of the Governmental Affairs and Armed Services Committees for their wise and expeditious consideration of this bill. We have before us now the product of long and thoughtful consideration that deserves the support of every Member of the Senate.●

The ACTING PRESIDENT pro tempore. The bill is open to further amendment. If there be no further amendment to be proposed, the question is on the engrossment and the third reading of the bill.

The bill was ordered to be engrossed for a third reading, was read the third time, and passed, as follows:

S. 338

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Competition in Contracting Act of 1983".

TITLE I—AMENDMENTS TO FEDERAL PROPERTY AND ADMINISTRATIVE SERVICES ACT OF 1949

COMPETITIVE AND NONCOMPETITIVE PROCEDURES

Sec. 101. (a) Title III of the Federal Property and Administrative Services Act of 1949 (41 U.S.C. 251 et seq.) is amended—

(1) by striking out section 303 (41 U.S.C. 253) and the heading of such section and inserting in lieu thereof the following:

"COMPETITION REQUIREMENTS

"SEC. 303. (a) Except as provided in subsection (e) or otherwise authorized by law, executive agencies shall use competitive procedures in making contracts for property or services. Executive agencies shall use advance procurement planning and market research and shall prepare specifications in such a manner as is necessary to obtain effective competition with due regard to the nature of the property or services to be acquired. Executive agencies shall use the competitive procedure or combination of competitive procedures that is best suited under the circumstances of the procurement action and shall specify its needs and solicit bids or proposals in a manner designed to achieve effective competition for the contract.

"(b) An executive agency may provide for the procurement of property or services in order to establish or maintain any alternative source or sources of supply under this title using competitive procedures but excluding a particular source for that property or services if the executive agency determines that to do so would (1) increase or maintain competition and would likely result in reduced overall costs for such procurement, or for any anticipated procurement, of such property or services, (2) be in the interest of industrial mobilization in case of a national emergency, or (3) be in the interest of national defense in establishing or maintaining an essential research capability to be provided by an educational or other nonprofit institution or a research

and development center funded by the United States.

"(c) Procurement regulations shall include special simplified procedures and forms for small purchases to facilitate making small purchases efficiently and economically.

"(d) For other than small purchases, an executive agency, when using competitive procedures—

"(1) shall solicit sealed bids when—

"(A) time permits the solicitation, submissions, and evaluation of sealed bids;

"(B) the award will be made on the basis of price and other price-related factors;

"(C) it is not necessary to conduct discussions with the responding sources about their bids; and

"(D) there is a reasonable expectation of receiving more than one sealed bid;

"(2) shall request competitive proposals when sealed bids are not required under clause (1) of this subsection.

"(e) An executive agency may use non-competitive procedures only when—

"(1) the property or services needed by the Government are available from only one source and no other type of property or services will satisfy the needs of the executive agency;

"(2) the executive agency's need for the property or services is of such unusual and compelling urgency that the Government would be seriously injured by the delay associated with using competitive procedures;

"(3) it is necessary to award the contract to a particular source or sources in order to (A) maintain a facility, producer, manufacturer, or other supplier available for furnishing property or services in case of a national emergency, (B) achieve industrial mobilization in the case of such an emergency, or (C) establish or maintain an essential research capability to be provided by an educational or other nonprofit institution or a research and development center funded by the United States;

"(4) the terms of any international agreement or treaty between the United States Government and a foreign government, or international organization, or the directions of any foreign government reimbursing the executive agency for the cost of the procurement of the property or services for such government, have the effect of requiring the use of noncompetitive procedures;

"(5) a statute authorizes or requires that the procurement be made through another executive agency or from a specified source or the agency's need is for a brand-name commercial item for authorized resale; or

"(6) the disclosure of the executive agency's needs to more than one source would compromise the national security.

"(f) For the purposes of applying subsection (e)(1)—

"(1) property or services shall be considered to be available from a source if such source has the capability to produce the property or deliver the service in accordance with the Government's specifications and delivery schedule; and

"(2) in the case of the procurement of technical or special property which has required a substantial initial investment or an extended period of preparation for manufacture, and where it is likely that production by a source other than the original source would 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, the property may be deemed to be available only from the initial source and may be procured through noncompetitive procedures.

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"PROCUREMENT NOTICE

"Sec. 313. (a)(1) Except as provided in subsection (c)—

"(A) an executive agency intending to solicit bids or proposals for a contract for property or services at a price expected to exceed \$10,000 shall furnish for publication by the Secretary of Commerce a notice described in subsection (b); and

"(B) an executive agency awarding a contract for property or services at a price exceeding \$10,000 shall furnish for publication by the Secretary of Commerce a notice announcing such award if there is likely to be any subcontract under such contract.

"(2) The Secretary of Commerce shall publish promptly in the Commerce Business Daily each notice required by paragraph (1).

"(3) Whenever an executive agency is required by paragraph (1)(A) to furnish a notice of a solicitation to the Secretary of Commerce, such executive agency may not—

"(A) issue such solicitation earlier than fifteen days after the date on which such notice is published by the Secretary of Commerce; or

"(B) establish a deadline for the submission of all bids or proposals in response to such solicitation that is earlier than thirty days after the date on which such solicitation is issued.

"(b) Each notice required by subsection (a)(1)(A) shall include—

"(1) an accurate description of the property or services to be contracted for, which description is not unnecessarily restrictive of competition;

"(2) the name and address of the officer or employee of the executive agency who may be contacted for the purpose of obtaining a copy of the solicitation;

"(3) a statement that any person may submit a bid, proposal, or quotation which shall be considered by the executive agency; and

"(4) in the case of a procurement using noncompetitive procedures, a statement of the reason justifying the use of noncompetitive procedures and the identity of the intended source.

"(c)(1) A notice is not required under subsection (a)(1) if—

"(A) the notice would disclose the executive agency's needs and the disclosure of such needs would compromise the national security; or

"(B) the proposed noncompetitive procurement would result from acceptance of an unsolicited research proposal that demonstrates a unique or innovative research concept and the publication of any notice of such unsolicited research proposal would disclose the originality of thought or innovativeness of the proposed research or proprietary data associated with the proposal.

"(2) The requirements of subsection (a)(1)(A) do not apply—

"(A) to any procurement under conditions described in clause (2), (3), (4), or (5) of section 303(e); and

"(B) in the case of any procurement for which the head of the executive agency carrying out such procurement makes a determination in writing, with the concurrence of the Administrator of the Small Business Administration, that it is not appropriate or reasonable to publish a notice before issuing a solicitation.

"RECORD REQUIREMENTS

"Sec. 314. (a) Each executive agency shall establish and maintain for a period of five years a record, by fiscal year, of the procurements, other than small purchases, in such fiscal year in which—

"(B) the relative importance assigned to each of those factors;

"(2) in the case of sealed bids—

"(A) a statement that sealed bids will be evaluated without discussions with the bidders; and

"(B) the time and place for the opening of the sealed bids; and

"(3) in the case of competitive proposals—

"(A) a statement that the proposals are intended to be evaluated with, and awards made after, discussions with the offerors but might be evaluated and awarded without discussions with the offerors; and

"(B) the time and place for submission of proposals.

"EVALUATION AND AWARD

"Sec. 312. (a) An executive agency shall evaluate sealed bids and competitive proposals based solely on the factors specified in the solicitation.

"(b) All sealed bids or competitive proposals received in response to a solicitation may be rejected if the head of the executive agency determines that such action is in the public interest.

"(c) Sealed bids shall be opened publicly at the time and place stated in the solicitation. The executive agency shall evaluate the bids without discussions with the bidders and shall, except as provided in subsection (b), award a contract with reasonable promptness to the responsible bidder whose bid conforms to the solicitation and is most advantageous to the United States, solely considering the price and the other factors included in the solicitation under section 311(b)(1). The award of a contract shall be made by transmitting written notice of the award to the successful bidder.

"(d)(1) The executive agency shall evaluate competitive proposals and may award a contract—

"(A) after discussions conducted with the offerors at any time after receipt of the proposals and prior to the award of the contract; or

"(B) without discussions with the offerors beyond discussions conducted for the purpose of minor clarification where it can be clearly demonstrated from the existence of effective competition or accurate prior cost experience with the product or service that acceptance of an initial proposal without discussions would result in fair and reasonable prices.

"(2) In the case of award of a contract under paragraph (1)(A), the executive agency shall conduct, before such award, written or oral discussions with all responsible offerors who submit proposals within a competitive range, price and other evaluation factors considered.

"(3) In the case of award of a contract under paragraph (1)(B), the executive agency shall award the contract based on the proposals as received (and as clarified, if necessary, in discussions conducted for the purpose of minor clarification).

"(4) The executive agency shall, except as otherwise provided in subsection (b), award a contract with reasonable promptness to the responsible offeror whose proposal is most advantageous to the United States, considering price and the other factors included in the solicitation under section 311(b)(1). The executive agency shall award the contract by transmitting written notice of the award to such offeror and shall promptly notify all other offerors of the rejection of their proposals.

"(e) If the head of an executive agency considers that any bid or proposal evidences a violation of the antitrust laws, he shall refer the bid or proposal to the Attorney General for appropriate action.

"(g) An executive agency may not award a contract using noncompetitive procedures unless—

"(1) the use of such procedures has been justified in writing; and

"(2) a notice has been published with respect to such contract pursuant to section 313 and all bids or proposals received in response to such notice have been considered by such executive agency.

"(h) For the purposes of the following laws, purchases or contracts made under this title using other than sealed bid procedures shall be treated as if they were made with sealed bid procedures:

"(1) The Act entitled 'An Act to provide conditions for the purchase of supplies and the making of contracts by the United States, and for other purposes', approved June 30, 1936 (commonly referred to as the 'Walsh-Healey Act') (41 U.S.C. 35-45).

"(2) The Act entitled 'An Act relating to the rate of wages for laborers and mechanics employed on public buildings of the United States and the District of Columbia by contractors and subcontractors, and for other purposes, approved March 3, 1931 (commonly referred to as the 'Davis-Bacon Act') (40 U.S.C. 276a-276a-5)."

(2) by adding at the end of section 309 (41 U.S.C. 259) the following new subsections:

"(b) The term 'executive agency' has the same meaning as provided in section 4(a) of the Office of Federal Procurement Policy Act (41 U.S.C. 403(a)), except that such term does not include the departments or establishments specified in section 2303(a) of title 10, United States Code.

"(c) The term 'competitive procedures' means procedures under which an executive agency enters into a contract after soliciting sealed bids or competitive proposals from more than one source that is capable of satisfying the needs of the executive agency.

"(d) The term 'noncompetitive procedures' means procedures other than competitive procedures.

"(e) The term 'small purchase' means any purchase or contract which does not exceed \$25,000. A proposed procurement shall not be divided into several procurements primarily for the purpose of using the small purchase procedures."; and

(3) by adding at the end thereof the following new sections:

"SOLICITATION REQUIREMENTS

"Sec. 311. (a)(1) Each solicitation under this title shall include specifications which—

"(A) consistent with the needs of the executive agency, permit effective competition; and

"(B) include restrictive provisions or conditions only to the extent necessary to satisfy such needs or as authorized by law.

"(2) For the purposes of paragraph (1), the type of specification included in any solicitation shall depend on the nature of the needs of the executive agency and the market available to satisfy such needs. Subject to such needs, specifications may be stated in terms of—

"(A) function so that a variety of products or services may qualify;

"(B) performance, including specifications of the range of acceptable characteristics or of the minimum acceptable standards; or

"(C) design requirements.

"(b) Each solicitation for sealed bids or competitive proposals other than for small at a minimum purchases shall include, in addition to the specifications described in subsection (a)—

"(1) a statement of—

"(A) all significant factors, including price, which the executive agency reasonably expects to consider in evaluating sealed bids or competitive proposals; and

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or maintain competition and would likely result in reduced overall costs for such procurement, or for any anticipated procurement, of property or services, (2) be in the interest of industrial mobilization in case of a national emergency, or (3) be in the interest of national defense in establishing or maintaining an essential research capability to be provided by an educational or other nonprofit institution or a research and development center funded by the United States.

"(c) Procurement regulations shall include special simplified procedures and forms for small purchases to facilitate making small purchases efficiently and economically.

"(d) For other than small purchases, the head of an agency, when using competitive procedures—

"(1) shall solicit sealed bids when—

"(A) time permits the solicitation, submission, and evaluation of sealed bids;

"(B) the award will be made on the basis of price and other price-related factors;

"(C) it is not necessary to conduct discussions with the responding sources about their bids; and

"(D) there is reasonable expectation of receiving more than one sealed bid;

"(2) shall request competitive proposals from responding sources when sealed bids are not required under clause (1) of this subsection.

"(e) The head of an agency may use non-competitive procedures only when—

"(1) the property or services needed by the Government are available from only one source and no other type of property or services will satisfy the needs of the agency;

"(2) the agency's need for the property or services is of such unusual and compelling urgency that the Government would be seriously injured by the delay associated with using competitive procedures;

"(3) it is necessary to award the contract to a particular source or sources in order to (A) maintain a facility, producer, manufacturer, or other supplier available for furnishing property or services in case of a national emergency, (B) achieve industrial mobilization in the case of such an emergency, or (C) establish or maintain an essential research capability to be provided by an educational or other nonprofit institution or a research and development center funded by the United States;

"(4) the terms of any international agreement or treaty between the United States Government and a foreign government or international organization, or the directions of any foreign government reimbursing the agency for the cost of the procurement of the property or services for such government, have the effect of requiring the use of noncompetitive procedures;

"(5) a statute authorizes or requires that the procurement be made through another agency or from a specified source; or the agency's need is for a brand-name commercial item for authorized resale; or

"(6) the disclosure of the agency's needs to more than one source would compromise the national security.

"(f) For the purposes of applying section 2304(e)(1) hereof: (A) property or services shall be considered to be available from a source if such source has the capability to produce the property or deliver the service in accordance with the Government's specifications and delivery schedule, and (B) in the case of the procurement of technical or special property which has required a substantial initial investment or an extended period or preparation for manufacture, and where it is likely that production by a source other than the original source would 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, the property may be deemed to be available only from the initial source and may be procured through noncompetitive procedures.

"(g) The head of an agency may not award a contract using noncompetitive procedures unless—

"(1) the use of such procedures has been justified in writing; and

"(2) a notice has been published with respect to such contract pursuant to section 2305(c) of this title and all bids or proposals received in response to such notice have been considered by such head of an agency.

"(h) For the purposes of the following laws, purchases or contracts made under this chapter using other than sealed bid procedures shall be treated as if they were made with sealed bid procedures:

"(1) The Act entitled 'An Act to provide conditions for the purchase of supplies and the making of contracts by the United States, and for other purposes', approved June 30, 1936 (commonly referred to as the 'Walsh-Healey Act') (41 U.S.C. 35-45).

"(2) The Act entitled 'An Act relating to the rate of wages for laborers and mechanics employed on public buildings of the United States and the District of Columbia by contractors and subcontractors, and for other purposes', approved March 3, 1931 (commonly referred to as the 'Davis-Bacon Act') (40 U.S.C. 276a-276a-5).

"§ 2305. Solicitation, evaluation, and award procedures; notice requirements

"(a)(1)(A) Each solicitation under this title shall include specifications which—

"(i) consistent with the needs of the agency, permit effective competition; and

"(ii) include restrictive provisions or conditions only to the extent necessary to satisfy such needs or as authorized by law.

"(B) For the purposes of subparagraph (A) of this paragraph, the type of specification included in any solicitation shall depend on the nature of the needs of the agency and the market available to satisfy such needs. Subject to such needs, specifications may be stated in terms of—

"(i) function so that a variety of products or services may qualify;

"(ii) performance, including specifications of the range of acceptable characteristics or of the minimum acceptable standards; or

"(iii) design requirements.

"(2) Each solicitation for sealed bids or competitive proposals other than for small purchases shall at a minimum include, in addition to the specifications described in paragraph (1) of this subsection—

"(A) a statement of—

"(i) all significant factors, including price, which the executive agency reasonably expects to consider in evaluating sealed bids or competitive proposals; and

"(ii) the relative importance assigned to each of those factors;

"(B) in the case of sealed bids—

"(i) a statement that sealed bids will be evaluated without discussions with the bidders; and

"(ii) the time and place for the opening of the sealed bids; and

"(C) in the case of competitive proposals—

"(i) a statement that the proposals are intended to be evaluated with, and awards made after, discussions with the offerors but might be evaluated and awarded without discussions with the offerors; and

"(ii) the time and place for submission of proposals.

"(b)(1) The head of an agency shall evaluate sealed bids and competitive proposals based solely on the factors specified in the solicitation.

"(2) All sealed bids or competitive proposals received in response to a solicitation may be rejected if the head of an agency determines that such action is in the public interest.

"(3) Sealed bids shall be opened publicly at the time and place stated in the solicitation. The head of an agency shall evaluate the bids without discussions with the bidders and shall, except as provided in paragraph (2) of this subsection, award a contract with reasonable promptness to the responsible bidder whose bid conforms to the solicitation and is most advantageous to the United States, solely considering the price and the other factors included in the solicitation under subsection (a)(2)(A) of this section. The award of a contract shall be made by transmitting written notice of the award to the successful bidder.

"(4)(A) The head of an agency shall evaluate competitive proposals and may award a contract—

"(i) after discussions conducted with the offerors at any time after receipt of the proposals and prior to the award of the contract; or

"(ii) without discussions with the offerors beyond discussions conducted for the purpose of minor clarification where it can be clearly demonstrated from the existence of effective competition or accurate prior cost experience with the product or service that acceptance of an initial proposal without discussions would result in fair and reasonable prices.

"(B) In the case of award of a contract under subparagraph (A)(i) of this paragraph, the head of an agency shall conduct, before such award, written or oral discussions with all responsible offerors who submit proposals within a competitive range, price and other evaluation factors considered.

"(C) In the case of award of a contract under subparagraph (A)(ii) of this paragraph, the head of an agency shall award the contract based on the proposals received (and as clarified, if necessary, in discussions conducted for the purpose of minor clarification).

"(D) The head of an agency shall, except as provided in paragraph (2) of this subsection, award a contract with reasonable promptness to the responsible offeror whose proposal is most advantageous to the United States, solely considering price and other factors included in the solicitation under subsection (a)(2)(A) of this section. The head of the agency shall award the contract by transmitting written notice of the award to such offeror and shall promptly notify all other offerors of the rejection of their proposals.

"(5) If the head of an agency considers that any bid or proposal evidences a violation of the antitrust laws, he shall refer the bid or proposal to the Attorney General for appropriate action.

"(c)(1)(A) Except as provided in paragraph (3) of this subsection—

"(i) the head of an agency intending to solicit bids or proposals for a contract for property or services at a price expected to exceed \$10,000 shall furnish for publication by the Secretary of Commerce a notice described in paragraph (2) of this subsection; and

"(ii) the head of an agency awarding a contract for property or services at a price exceeding \$10,000 shall furnish for publication by the Secretary of Commerce a notice announcing such award if there is likely to be any subcontract under such contract.

"(B) The Secretary of Commerce shall publish promptly in the Commerce Business

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Daily each notice required by subparagraph (A) of this paragraph.

"(C) Whenever a head of an agency is required by subparagraph (A)(i) of this paragraph to furnish a notice of a solicitation to the Secretary of Commerce, such head of an agency may not—

"(i) issue such solicitation earlier than fifteen days after the date on which such notice is published by the Secretary of Commerce; or

"(ii) establish a deadline for the submission of all bids or proposals in response to such solicitation that is earlier than thirty days after the date on which such solicitation is issued.

"(2) Each notice required by paragraph (1)(A)(i) of this subsection shall include—

"(A) an accurate description of the property or services to be contracted for, which description is not unnecessarily restrictive of competition;

"(B) the name and address of the officer or employee of the agency who may be contacted for the purpose of obtaining a copy of the solicitation;

"(C) a statement that any person may submit a bid or proposal which shall be considered by the agency; and

"(D) in the case of a procurement using noncompetitive procedures, a statement of the reason justifying the use of noncompetitive procedures and the identity of the intended source.

"(3)(A) A notice is not required under paragraph (1)(A) of this subsection if—

"(i) the notice would disclose the agency's needs and the disclosure of such needs would compromise the national security; or

"(ii) the proposed noncompetitive procurement would result from acceptance of an unsolicited research proposal that demonstrates a unique or innovative research concept and the publication of any notice of such unsolicited research proposal would disclose the originality of thought or innovativeness of the proposed research or proprietary data associated with the proposal.

"(B) The requirements of paragraph (1)(A)(i) of this subsection do not apply—

"(i) to any procurement under conditions described in clause (2), (3), (4), or (5) of section 2304(e) of this title; and

"(ii) in the case of any procurement for which the head of the agency carrying out such procurement makes a determination in writing, with the concurrence of the Administrator of the Small Business Administration, that it is not appropriate or reasonable to publish a notice before issuing a solicitation;"; and

(4) by adding at the end thereof the following new section:

"§ 2316. Record requirements

"(a) Each head of an agency shall establish and maintain for a period of five years a record, by fiscal year, of the procurements, other than small purchases, in such fiscal year in which—

"(1) noncompetitive procedures were used; and

"(2) only one bid or proposal was received after competitive procedures were used.

"(b) The record established under subsection (a) of this section shall include, with respect to each procurement—

"(1) information identifying the source to whom the contract was awarded;

"(2) the property or services obtained by the Government under the procurement;

"(3) the total cost of the procurement;

"(4) the reason under section 2304(e) of this title for the use of noncompetitive procedures; and

"(5) the position of the officers or employees of the agency who required and approved the use of noncompetitive procedures in such procurement.

"(c) The information included in the record established and maintained under subsection (a) shall be transmitted to the Federal Procurement Data Center referred to in section 6(d)(5) of the Office of Federal Procurement Policy Act (41 U.S.C. 405(d)(5))."

(b) The table of sections at the beginning of such chapter is amended—

(1) by striking out the items relating to sections 2304 and 2305 and inserting in lieu thereof the following:

"2304. Competition requirements.

"2305. Solicitation, evaluation, and award procedures; notice requirements.";

and

(2) by adding at the end thereof the following new item:

"2316. Record requirements."

CONFORMING AMENDMENTS

Sec. 202. Chapter 137 of title 10, United States Code, is amended—

(1) in section 2306—

(A) by striking out "may, in negotiating contracts under section 2304," in the second sentence of subsection (a) and inserting in lieu thereof "may in awarding contracts after using other than sealed bid procedures";

(B) by striking out "negotiated under section 2304" in the first sentence of subsection (b) and inserting in lieu thereof "awarded after using other than sealed bid procedures";

(C) by striking out "section 2304 of this title," in subsection (c) and inserting in lieu thereof "this chapter";

(D) in subsection (f)(1)—

(i) by striking out clause (A) and inserting in lieu thereof the following:

"(1) prior to the award of any prime contract under this title after using other than sealed bid procedures where the contract price is expected to exceed \$100,000;";

(ii) by striking out "negotiated" each place it appears in the second paragraph;

(iii) by striking out "negotiation," in the third paragraph and inserting in lieu thereof "proposal for the contract, the discussions conducted on the proposal under this title."; and

(iv) by striking out "\$500,000" each place it appears in clauses (B), (C), and (D) and inserting in lieu thereof "\$100,000; and

(E) by adding at the end thereof the following new subsection:

"(f) Except in a case in which the Secretary of Defense determines that military requirements necessitate the 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.";

(2) by striking out subsection (b) of section 2310 and inserting in lieu thereof the following:

"(b) Each determination or decision under section 2306(c), section 2306(g)(1), section 2307(c), or section 2313(c) of this title 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) 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, (2) support the findings required by section 2306(g)(1), (3) clearly indicate why advance payments under section 2307(c) would be in the public interest, or (4) clearly indicate why the application of section

2313(b) to a contract or subcontract with a foreign contractor or foreign subcontractor would not be in the public interest. 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.";

(3) by striking out section 2311 and inserting in lieu thereof the following: "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."; and

(4) by striking out "negotiated" in the second sentence of section 2313(b) and inserting in lieu thereof "awarded after using other than sealed bid procedures".

TITLE III—ADVOCATE FOR COMPETITION; ANNUAL REPORT ON COMPETITION

DEFINITION

Sec. 301. For the purposes of this title, the term "executive agency" has the same meaning as provided in section 4(a) of the Office of Federal Procurement Policy Act (41 U.S.C. 403(a)).

ADVOCATE FOR COMPETITION

Sec. 302. (a)(1) There is established in each executive agency an advocate for competition.

(2) Each head of an executive agency shall—

(A) designate for each executive agency one officer or employee serving in a position authorized for such executive agency on the date of enactment of this Act to serve as the advocate for competition;

(B) relieve such officer or employee of all duties and responsibilities that are inconsistent with the duties and responsibilities of the advocate for competition; and

(C) provide such officer or employee with such staff or assistance as may be necessary to carry out the duties and responsibilities of the advocate for competition.

(b)(1) The advocate for competition shall promote competition in the procurement of property and services.

(2) The advocate for competition in an executive agency shall—

(A) review the purchasing and contracting activities of the executive agency;

(B) identify and report to the head of the executive agency—

(i) opportunities to achieve competition on the basis of price and other significant factors in the purchases and contracts of the executive agency;

(ii) solicitations and proposed solicitations which include unnecessarily detailed specifications or unnecessarily restrictive statements of need which may reduce competition in the procurement activities of the executive agency; and

(iii) any other condition or action which has the effect of unnecessarily restricting competition in the procurement actions of the executive agency; and

(C) prepare and transmit to the head of the executive agency an annual report describing his activities under this section.

ANNUAL REPORT

Sec. 303. (a) Not later than September 30 of each of 1983, 1984, 1985, and 1986, each head of an executive agency shall transmit to the Committee on Governmental Affairs of the Senate and the Committee on Government Operations of the House of Representatives and annual report including the information specified in subsection (b).

(b) Each report transmitted under subsection (a) shall include—

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(1) a specific description of all actions that the head of the executive agency intends to take during the next fiscal year to—

(A) increase competition for contracts with the executive agency on the basis of price and other significant factors; and

(B) reduce the numbers and dollar value of contracts entered into by the executive agency after soliciting bids or proposals from, or evaluating bids or proposals with discussions with, only one source; and

(2) a summary of the activities and accomplishments of the advocates for competition of the executive agency during the fiscal year in which the report is transmitted.

TITLE IV—APPLICABILITY

Sec. 401. The amendments made by this Act shall apply with respect to any solicitations for bids or proposals issued on or after the date two hundred and seventy days after the date of the enactment of this Act.

Mr. BAKER. Mr. President, I move to reconsider the vote by which the bill was passed.

Mr. BYRD. Mr. President, I move to lay that motion on the table.

The motion to lay on the table was agreed to.

FEDERAL PHYSICIANS COMPARABILITY ALLOWANCE ACT AMENDMENTS OF 1983—CONFERENCE REPORT

Mr. BAKER. Mr. President, I submit a report of the committee of conference on H.R. 2077 and ask for its immediate consideration.

The ACTING PRESIDENT pro tempore. The report will be stated.

The legislative clerk read as follows:

The committee of conference on the disagreeing votes of the two Houses on the amendment of the Senate to the bill (H.R. 2077) to amend title 5, United States Code, to extend the Federal Physicians Comparability Act of 1978, and for other purposes, having met, after full and free conference, have agreed to recommend and do recommend to their respective Houses this report, signed by all of the conferees.

The ACTING PRESIDENT pro tempore. Without objection, the Senate will proceed to the consideration of the conference report.

(The conference report will be printed in the House proceedings of the RECORD.)

The ACTING PRESIDENT pro tempore. Without objection, the conference report is agreed to.

Mr. BAKER. Mr. President, I move to reconsider the vote by which the conference report was agreed to.

Mr. BYRD. Mr. President, I move to lay that motion on the table.

The motion to lay on the table was agreed to.

LEASES AND CONTRACTS AFFECTING LAND WITHIN THE SALT RIVER PIMA-MARICOPA INDIAN RESERVATION

Mr. BAKER. Mr. President, I ask unanimous consent that the Senate now turn to the consideration of H.R. 2910, regarding the leases and contracts affecting land within the Salt River Pima-Maricopa Indian Reservation.

The ACTING PRESIDENT pro tempore. The bill will be stated by title.

The legislative clerk read as follows:

A bill (H.R. 2910) to amend the act of November 2, 1966, regarding leases and contracts affecting land within the Salt River Pima-Maricopa Indian Reservation.

The ACTING PRESIDENT pro tempore. Is there objection to the immediate consideration of the bill?

There being no objection, the Senate proceeded to consider the bill.

● Mr. GOLDWATER. Mr. President, we have before us, H.R. 2910, a bill which amends existing law to allow the Salt River Pima-Maricopa Indian community of Arizona and allotted Indian landowners to enter into lease agreements with binding arbitration clauses that could be enforced in the Federal district court.

This legislation is identical to a proposal I introduced this session, S. 1686, except for two technical amendments which the House Interior Committee made. The committee accepted an Interior Department recommendation on two technical changes in the language of the bill and the second amendment, offered by the Indian community, was of a clarifying nature.

This bill would not affect the trust responsibility of the United States or adversely affect the trust status of lands within the community's reservation or other property held in trust for the community or its members by the United States. The Secretary of the Interior still has the authority to approve or disapprove leases or contracts affecting trust lands or resources as provided under existing law. In order to promote industry and economic development on the reservation, the Salt River Pima-Maricopa Indian community felt that binding arbitration of disputes would give potential developers and those who finance them the security of enforcement for a lease or contractual arrangement that one might have with a non-Indian entity.

The Interior Department does support this legislation and the Congressional Budget Office has indicated in its report that enactment of this bill will result in no cost to the Federal, State, or local governments.

Mr. President, this is a noncontroversial proposal, concerning only the Salt River Pima-Maricopa Indian community which has requested it, and I ask my colleagues to join me in supporting H.R. 2910. ●

The ACTING PRESIDENT pro tempore. The bill is before the Senate and open to amendment. If there be no amendment to be offered, the question is on the third reading and passage of the bill.

The bill (H.R. 2910) was ordered to a third reading, was read the third time, and passed.

Mr. BAKER. Mr. President, I move to reconsider the vote by which the bill was passed.

Mr. BYRD. Mr. President, I move to lay that motion on the table.

The motion to lay on the table was agreed to.

RESTORATION OF FEDERAL RECOGNITION TO THE CONFEDERATED TRIBES OF THE GRAND RONDE COMMUNITY OF OREGON

Mr. BAKER. Mr. President, I would like now to go to H.R. 3885, if the minority leader is agreeable.

Mr. BYRD. Mr. President, that matter has been cleared on this side.

Mr. BAKER. Mr. President, I ask unanimous consent that the Senate now turn to the consideration of H.R. 3885.

The ACTING PRESIDENT pro tempore. The bill will be stated by title.

The legislative clerk read as follows:

A bill (H.R. 3885) to provide for the restoration of Federal recognition of the Confederated Tribes of the Grand Ronde community of Oregon, and for other purposes.

The ACTING PRESIDENT pro tempore. Is there objection to the immediate consideration of the bill?

There being no objection, the Senate proceeded to consider the bill.

Mr. HATFIELD. Mr. President, let me express my gratitude to the distinguished majority leader for his bringing H.R. 3885 to the floor in an expeditious fashion. In light of the fact that the House only passed this bill on November 7, the majority leader's prompt attention to my concerns and the concerns of the Grand Ronde community is all the more meaningful. The record should also reflect my sincere thanks to Senator ANDREWS and Senator MELCHER for their allowing this bill to be held at the desk, thereby permitting H.R. 3885 to be on the President's desk before the end of this year.

For the past several years, the Confederated Tribes of the Grand Ronde community of Oregon have busied themselves compiling the requisite documentation to prove the wrongfulness of their 1954 termination by the Government. They have come to my office for the past several years and I have asked them to come back after they have established a more complete record justifying a restoration of their Federal rights. Indian restoration cases are not new projects for my office. In the past several Congresses I have sponsored legislation which has restored federally recognized tribal status to the Siletz Indians and to the Cow Creed Indians. The experiences gained from these bills have given me a keen sense of when a tribe has made a credible showing justifying Federal recognition and when it has not. Mr. President, in H.R. 3885, the Grand Rondes have made such a credible showing. They have done their homework and have presented a case which leaves no doubt as to their worthiness for a restoration of their tribal rights.

Mr. President, the Grand Rondes have waited 29 years for their day in court, and I am pleased to be involved in the process of granting them their long-awaited measure of justice.