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HOUSE OF REPRESENTATIVES
REPORT
98-690

DEFENSE SPARE PARTS PROCUREMENT REFORM ACT

APRIL 18, 1984.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. NICHOLS, from the Committee on Armed Services, submitted the following

REPORT

[To accompany H.R. 5064]

[Including cost estimate of the Congressional Budget Office]

The Committee on Armed Services to whom was referred the bill (H.R. 5064) to amend title 10, United States Code, to provide for more cost effective and efficient purchases of spare parts by the Department of Defense, and for other purposes, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

The amendment is as follows:

Strike out all after the enacting clause and insert the following:

SHORT TITLE

SECTION 1. This Act may be cited as the "Defense Spare Parts Procurement Reform Act".

CONGRESSIONAL FINDINGS AND POLICY DIRECTION

SEC. 2. The Congress finds that recent disclosures of excessive payments by the Department of Defense for replenishment parts have undermined confidence by the public and Congress in the defense procurement system. The Secretary of Defense shoud make every effort to reform procurement practices relating to replenishment parts. Such efforts should, among other matters, be directed to elimination of excessive pricing of replenishment spare parts and the recovery of unjustified payments. Specifically, the Secretary should—

(1) direct that officials in the Department of Defense refuse to enter into contracts unless the proposed prices are fair and reasonable;

(2) continue and accelerate ongoing efforts to improve defense contracting procedures in order to encourage effective competition and assure fair and reasonable prices;

(3) direct that replenishment parts be acquired in economic order quantities and on a multiyear basis whenever feasible, practicable and cost effective;

(4) direct that standard or commercial parts be used whenever such use is technically acceptable and cost effective; and

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(5) vigorously continue reexamination of policies relating to acquisition, pricing, and management of replenishment parts and of technical data related to such parts

PERSONNEL EVALUATIONS TO INCLUDE EMPHASIS ON COMPETITION AND COST SAVINGS

SEC. 3. (a) Chapter 137 of title 10, United States Code, is amended by adding at the end thereof the following new section:

"§ 2317. Encouragement of competition and cost savings

"The Secretary of Defense shall establish procedures to ensure that personnel appraisal systems of the Department of Defense give appropriate recognition to efforts to increase competition and achieve cost savings in areas relating to contracts covered by this chapter.".

(b) The table of sections at the beginning of such chapter is amended by adding at the end thereof the following new item:

"2317. Encouragement of competition and cost savings.".

IDENTIFICATION OF SOURCES OF SUPPLIES

SEC. 4. (a) Section 2384 of title 10, United States Code, is amended to read as follows:

"§ 2384. Supplies: identification of supplier and sources

"(a) The Secretary of Defense shall require that the contractor under a contract with the Department of Defense for the furnishing of supplies to the United States shall mark or otherwise identify supplies furnished under the contract with the identity of the contractor, the national stock number for the supplies furnished, and the contractor's identification number for the supplies.

"(b) The Secretary of Defense shall prescribe regulations requiring that, whenever practicable, each contract for supplies require that the contractor identify—

"(1) the name of the actual manufacturer or producer of the item or of all sources of supply of the contractor for that item;

"(2) the national stock number of the item or, if there is no such number, the identification number of the actual manufacturer or producer or of each source; and

"(3) the source of any technical data delivered under the contract.

"(c) Identification of supplies and technical data under this section shall be made in the manner and with respect to the supplies prescribed by the Secretary of Defense.".

(b) The item relating to such section in the table of sections at the beginning of chapter 141 of such title is amended to read as follows:

"2384. Supplies: identification of supplier and sources.".

PROHIBITION OF LIMITING DIRECT SALES BY SUBCONTRACTORS TO THE UNITED STATES

SEC. 5. (a) Chapter 141 of title 10, United States Code, is amended by adding at the end thereof the following new section:

"2402. Prohibition of contractors limiting subcontractor sales directly to the United States.".

"(a) Except as provided in subsection (b), each contract for the purchase of supplies or services made by the Department of Defense shall provide that the contractor will not—

"(1) enter into any agreement with a subcontractor under the contract that has the effect of unreasonably restricting sales by the subcontractor directly to the United States of any item or process (including computer software) like those made, or services like those furnished, by the subcontractor under the contract (or any follow-on production contract); or

"(2) otherwise act to restrict unreasonably the ability of a subcontractor to make sales to the United States described in clause (1).

"(b) This section does not prohibit a contractor from asserting rights it otherwise has under law.".

(b) The table of sections at the beginning of such chapter is amended by adding at the end thereof the following new item:

"2402. Prohibition of contractors limiting subcontractor sales directly to the United States.".

DEFINITIONS

SEC. 6. Section 2302 of title 10, United States Code, is amended by adding at the end thereof the following new paragraphs:

"(4) 'Technical data' means recorded information (regardless of the form or method of the recording) of a scientific or technical nature. It does not include computer software.

"(5) 'Unlimited rights' means, with respect to technical data required to be delivered to the United States under a contract, legal authority of the United States to use, duplicate, and disclose the technical data for any purpose and the legal authority to have or permit others to do so.

"(6) 'Developed at private expense' means, with respect to an item (or technical data relating to an item) delivered to the United States under a contract, developed without direct payment by the United States under a provision of the contract which requires the performance of the development effort.".

PLANNING FOR PROCUREMENT OF SUPPLIES

SEC. 7. Section 2304 of title 10, United States Code, is amended by adding at the end thereof the following new subsections:

"(j) The Secretary of Defense shall ensure that before a contract for the delivery of supplies to the Department of Defense is entered into—

"(1) when the appropriate officials of the Department are making an assessment of the most advantageous procedure for acquisition of the supplies (considering quality, price, delivery, and other factors), there is a review of the availability and cost of each item of supply—

"(A) through the supply system of the Department of Defense; and

"(B) under standard Government supply contracts, if the item is in a category of supplies defined under regulations of the Secretary of Defense as being potentially available under a standard Government supply contract; and

"(2) there is a review of both the procurement history of the item and a description of the item, including, when necessary for an adquate description of the item, a picture, drawing, diagram, or other graphic representation of the item.

"(k)(1) The Secretary of Defense shall prescribe regulations requiring that, whenever practicable, an offeror submitting a proposal for a contract shall furnish information in the proposal identifying—

"(A) with respect to all items that will be delivered to the United States under the contract (other than items to which paragrpah (2) applies), those items for which technical data will not be provided to the United States; and

"(B) with respect to technical data that will be delivered to the United States under the contract, any of such technical data that will not be provided with unlimited rights.

"(2) with respect to items that will be delivered to the United States under the contract, described in paragraph (1) with respect to which it would be impracticable to ascertain, at the time the contract is entered into, the information required to be furnished under that paragraph, the contract shall require that the contractor provide identifying information similar to that required to be furnished under that paragraph at a time to be specified in the contract.

"(3) The Secretary of Defense shall ensure that information furnished under paragraph (1) is considered in selecting the contractor for the contract.".

RIGHTS IN TECHNICAL DATA AND COMPUTER SOFTWARE

SEC. 8. (a)(1) Chapter 141 of title 10, United States Code, is amended by inserting after section 2386 the following new section:

"§ 2386a. Rights in technical data and computer software

"(a) A contract for supplies entered into by the Department of Defense which provides for delivery of technical data or computer software to the United States shall provide that the United States shall have unlimited rights in—

"(1) technical data and computer software resulting directly from performance of experimental, developmental, or research work which was specified as an element of performance in a Government contract or subcontract;

"(2) computer software required to be originated or developed under a Government contract or generated as a necessary part of performing a contract;

"(3) computer data bases prepared under a Government contract consisting of information supplied by the Government, information in which the Government has unlimited rights, or information which is in the public domain;

"(4) technical data necessary to enable manufacture of end-items, components, and modifications, or to enable the performance of processes, when the end-items, components, modifications or processes have been, or are being, devloped under a Government contract or subcontract in which experimental, developmental, or research work is or was specified as an element of contract performance, except technical data pertaining to items, components, processes, or computer software developed at private expense;

"(5) technical data and computer software prepared or required to be delivered under a Government contract or subcontract and constituting corrections or changes to Government-furnished data or computer software;

"(6) technical data pertaining to end-items, components, or processes prepared or required to be delivered under a Government contract or subcontract for the purpose of identifying sources, size, configuration, mating and attachment characteristics, functional characteristics, and performance requirements;

"(7) manuals or instructional materials prepared or required to be delivered under the contract or any subcontract of the contract for installation, operation, maintenance, or training purposes;

"(8) technical data or computer software which is in the public domain or which has been or is normally released or disclosed by the contractor or subcontractor without restriction on further disclosure; and

"(9) technical data or computer software for which unlimited rights in such data or software are otherwise provided for under the contract.

"(b)(1) Each contract for the acquisition of supplies which includes a requirement for the contractor to furnish technical data or computer software to the United States shall provide—

"(A) that the contractor agrees to have a data management system approved by the Department of Defense in operation before the United States accepts delivery of any data required to be delivered to the United States under the contract; and

"(B) that the United States may ignore, correct, or cancel any restriction on the release of technical data or computer software that is not authorized by the contract if the contractor fails to substantiate, within 60 days after receiving a written request from the United States for such substantiation, the propriety of the restriction.

"(2) Each contract described in paragraph (1) shall provide that if—

"(A) the contractor asserts that the United States is not entitled to unlimited rights in technical data relating to an item, component, or process; and

"(B) the assertion is not sustained and it is determined that the assertion was not substantially justified,

the contractor shall be required to pay to the United States the costs to the United States of contesting the assertion.

"(3) Rights of the United States under paragraphs (1)(B) and (2) may not be asserted after the end of the three year period beginning on the date of final payment by the United States under the contract, unless the contract provides for a different period of time.

"(4) Notwithstanding the inspection and acceptance by the United States of technical data furnished under a contract and notwithstanding any provision of the contract concerning the conclusiveness of such inspection and acceptance, the contractor shall warrant in the contract that all technical data delivered under the contract will at the time of delivery to the United States conform with the specifications and all other requirements of the contract or the contractor will correct the technical data to so conform. The period of such a warranty shall be as provided for in the contract.

"(c) The Secretary of Defense shall prescribe by regulation standards for determining whether a contract entered into by the Department of Defense shall provide that, after a time to be specified in the contract, the United States shall have the right to use (or have used) for any purpose of the United States all technical data (including technical data of subcontractors at any tier) required to be delivered to the United States under the contract. The time specified in a contract with respect to such a right of the United States in any such data may not exceed seven years from the date the data was required to be delivered to the United States or the date

an item to which such data relates was required to be delivered to the United States, whichever is earlier.

"(d) Nothing in this section shall be construed as affecting rights of the United States or of any contractor or subcontractor with respect to patents, copyrights, or any other law establishing particular rights in technical data.

"(e) In this section, 'technical data', 'unlimited rights', and 'developed at private expense' have the meaning given those terms in section 2302 of this title.".

(2) The table of sections at the beginning of such chapter is amended by inserting after the item relating to section 2386 the following new item:

"2386a. Rights in technical data and computer software.".

(b)(1) Not later than one year after the date of the enactment of this Act, the Secretary of Defense shall develop a plan for a system for the acquisition and management of technical data appropriate for the acquisition of supplies under the jurisdiction of that department. The plan shall address the possibility of a uniform system that would allow exhange of information among the military departments and the Defense Logistics Agency. The plan shall also address the possibility of a centralized system to identify the repository location of technical data relating to any item and the types of data on file in that repository.

(2) The Secretary of Defense shall ensure that the plan developed under paragraph (1) is implemented not later than five years after the date of the enactment of this Act.

COMPETITION ADVOCATES

SEC. 9. (a) Chapter 137 of title 10, United States Code, is amended by inserting after section 2306 the following new section:

"§ 2306a. Competition advocates

"(a) The head of each agency shall designate a person within that agency to be the competition advocate for the agency and shall designate a competition advocate for each procuring activity of the agency. The competition advocates shall promote the use of competitive methods of procurement.

"(b) The head of each agency shall prescribe by regulation the functions of competition advocates. Such regulations shall provide that each competition advocate shall—

"(1) advocate changes to policies and procedures to encourage maximum consideration of opportunities for competition during the acquisition process (including the supply process); and

"(2) challenge practices and procedures that inhibit competition, including unnecessarily restrictive statements of agency needs, unnecessarily detailed or restrictive specifications, use of procurement method codes, and other actions that could result in an inappropriate noncompetitive procurement.

"(c) The head of each agency shall ensure that—

"(1) programs designed to increase competitive procurement of supplies are maintained and periodically reassessed;

"(2) there is a system within the agency for review of noncompetitive acquisitions; and

"(3) each competition advocate within the agency has access to personnel within the agency who can advise the competition advocate in specialized areas relating to competition, including persons who are specialists in engineering, technical operations, contract administration, financial management, supply management, and utilization of small and disadvantaged business concerns.

"(d) This section does not apply to the Coast Guard or the National Aeronautics and Space Administration.".

(b) The table of sections at the beginning of such chapter is amended by inserting after the item relating to section 2306 the following new item:

"2306a. Competition advocates.".

ANNUAL REPORT

SEC. 10. Chapter 137 of title 10, United States Code, is amended by adding after section 2317 (as added by section 3) the following new section:

"§ 2318. Annual report on competition for supplies

"(a) The Secretary of Defense shall submit to Congress, not later than December 15 of each year, a report on the management by that department of the acquisition of supplies during the preceding fiscal year.

"(b) Each report under this section shall include—

"(1) a report on the activities of the competition advocates of the Department of Defense during the preceding fiscal year; and

"(2) the rate of competition for contracts for supplies entered into by the Department during the preceding fiscal year, shown (A) by the number of contracts awarded competitively as a percentage of the total number of contracts awarded, and (B) by the dollar value of contracts awarded competitively as a percentage of the total dollar value of contracts awarded.

"(c) All information in reports under this section shall be shown for the Department as a whole and for each of the military departments and the Defense Logistics Agency.".

(b) The table of sections at the beginning of such chapter is amended by adding after the item relating to section 2317 (as added by section 3) the following new item:

"2318. Annual report on competition for supplies.".

PUBLICATION OF PROPOSED REGULATIONS

SEC. 11. Section 2303 of title 10, United States Code, is amended by adding at the end thereof the following new subsection:

"(d) A regulation prescribed under this chapter by the Secretary of Defense or the Secretary of a military department that would have an effect beyond the internal operating procedures of the Department of Defense or that would have a cost or administrative impact on contractors may not take effect until 30 days after such regulation has been published in the Federal Register for public comment.".

EFFECTIVE DATE

SEC. 12. (a) Except as provided in subsection (b), this Act and the amendments made by this Act shall take effect at the end of the 180-day period beginning on the date of the enactment of this Act and shall apply with respect to contracts for which bids or proposals are solicited after the end of such period.

(b)(1) Sections 2 and 8(d) and the amendments made by sections 10 and 11 shall take effect on the date of the enactment of this Act.

(2) The amendments made by sections 3 and 9 shall take effect at the end of the 90-day period beginning on the date of the enactment of this Act.

EXPLANATION OF THE COMMITTEE AMENDMENT

The committee adopted an amendment in the nature of a substitute during its consideration of H.R. 5064. The amendment differed from the introduced bill in the following areas:

Technical changes were made throughout to more accurately reflect the terminology currently used and accepted by the Department of Defense.

Section 2 was amended to reflect the committee's intent that the policies recommended be utilized when they represent the most cost-effective approach.

Section 3 was amended to indicate clearly that an individual's ability to achieve costs savings as well as increase or maintain competition should be recognized.

Section 4 of the substitute language more clearly reflects the committee's intent that supplies be marked when it is practicable to do so, and that the Department of Defense decide what documents should contain the information identifying sources and manufacturers or producers of supplies.

Section 7 differs from the bill introduced by recognizing that the individual or individuals in the department responsible for determining whether an acceptable item is in the supply system and available within the time required is not necessarily the contracting officer. The provision was also changed to indicate that the requirement for identification of the respective parties' rights in

technical data, if not fully possible when the contract is entered into, is a continuing obligation.

Section 8 strengthens the provisions in the introduced bill relating to rights in technical data. It clearly states those instances in which the government will have unlimited rights to use technical data required to be delivered under the contract. It omits the requirement for contractor certification that data the contractor identified as developed at private expense was properly identified as such, and the requirement for certification that data provided was complete, accurate and adequate for the purpose intended. In place of the certification requirement, which the committee was advised would not serve its intended purpose, the committee recommends the requirement for an approved data-management system, and a provision in each contract which would allow the government to disclose data if the contractor fails to substantiate the propriety of the restriction on its use within 60 days of a written request to do so.

The liquidated damages provision, which the committee was advised would not be an effective deterrent, was replaced by a provision clearly indicating that a contractor must pay the government's cost of challenging an assertion that the government was not entitled to unlimited use of data, but only if the contractor's assertion was not substantially justified.

Recognizing the burden placed on contractors by these provisions, the substitute authorizes the government to assert its rights under this section only if it does so within three years from the date of final payment under the contract, unless a different period of time was agreed to by the government and the contractor.

The contractor is also required to warrant that data it provides conforms to the requirement stated in the contract and, if not, the contractor must correct the data. This provision more accurately reflects the intent that this provision is not a requirement that the contractor guarantee that any contractor can produce an item using the data provided, but rather, that the government clearly has the right to require correction at any time notwithstanding its prior acceptance of such data.

The substitute also contains a new provision requiring the Secretary of Defense to prescribe by regulations standards for determining whether a contract shall include a time limit, not to exceed seven years, on any restriction on the government's use of technical data.

Finally, the substitute adds a new provision requiring publication in the Federal Register for public comment of significant Department of Defense regulations.

The purpose and a more detailed description of the provisions of the bill are discussed in the remainder of the report.

PURPOSE

The purpose of H.R. 5064 is to establish improvements in the process of acquiring and managing spare parts and other supplies by the Department of Defense which will ensure more cost-effective and efficient purchases. The bill contains provisions which will institutionalize efforts aimed at improving defense contracting proce-

dures, encouraging effective competition, and assuring fair and reasonable prices.

SUMMARY OF PROPOSED LEGISLATION

H.R. 5064 seeks to accomplish its purpose by enunciating congressional policy, by directing the Secretary of Defense to take certain actions to improve internal procedures relating to personnel and administrative matters, and by establishing minimum standards to be applied in contracts for supplies.

H.R. 5064 would direct the Secretary of Defense to continue to accelerate efforts to improve contracting procedures and to refuse to enter into contracts unless proposed prices are fair and reasonable.

The bill would also require the Department of Defense to purchase replenishment parts in economic order quantities or on a multiyear basis, whenever cost effective, and use standard or commercial parts whenever technically acceptable. In addition, the bill would direct the Secretary of Defense to prescribe regulations that would require a review of the procurement history (most recent price and date when the item was purchased), as well as a description or diagram of the item so the buyer or contracting officer will know what is being ordered. The bill would also require a review of the cost of acquiring and the availability of an item through the supply system inventory or through standard government contracts, before deciding to make a new purchase.

H.R. 5064 would encourage competition and cost savings by requiring that performance evaluations for personnel in the Department of Defense reflect an individual's efforts to increase competition and achieve cost savings on contracts. The bill would also mandate by statute the designation of a "Competition Advocate" at each procuring activities, as well as for the agency as a whole. The Competition Advocate would be responsible for challenging noncompetitive procurement practices and policies, and would act as a catalyst within the agency to promote effective competition.

To ensure that an item may be purchased directly from the manufacturer or producer of an item, the bill would require contractors to identify the actual manufacturer or producer of an item, or its sources of supply, and would prohibit a prime contractor from unlawfully preventing a subcontractor from selling directly to the government.

The will would establish standards for all contracts which enumerate those instances in which the government would acquire unlimited rights in technical data, and would require the Secretary of Defense to prescribe regulations for determining whether a DOD contract shall include a time limit, not to exceed seven years, on a contractor's right to limit the government's use of technical data. The bill would require contractors to warrant that data they provide is in conformance with the contract, and would require a contractor to pay the government's costs of challenging an improper restriction on the government's use of technical data, if the contractor's position were not substantially justified. Under the bill the government could ignore any restriction on the use of technical data if the contractor failed to substantiate its right to restrict the

data with 69 days of a written request from the government to do so.

H.R. 5064 would require the Department of Defense to develop a plan for improving its data management system to allow for more timely access to available government technical data. The Department of Defense would also be required to report annually on the activities of the Competition Advocates and the level of competition for supply contracts. Finally, the bill states that significant proposed regulations to be issued by the Department of Defense may not take effect unless they are published in the Federal Register for public comment at least 30 days prior to their effective date.

Background

H.R. 5064 is the culmination of a year-long review of the problems associated with the procurement of spare parts by the Department of Defense. The Investigations Subcommittee held oversight hearings to investigate the cause of apparently excessive spare parts prices and price increases on April 19 and 20, May 25, June 9, July 13 and October 6, 1983. Based on these hearings, a bill to improve those acquisition and management procedures which had resulted in noncompetition acquisitions and excessive prices was drafted.

This bill, H.R. 5064, was introduced on March 7, 1984. The subcommittee conducted additional hearings on March 13 and 21, 1984.

Discussion

Examples of apparently inflated and excessive prices for spare parts are readily available and too numerous to detail in this report. Although such prices can gererally be attributed to the vagaries and complexity of pricing and accounting practices which do not require prices which relate to the value of the item, none would argue against the premise that increased competition would foster realistic pricing of supplies. Nor is there any disagreement that opportunities exist for improving the government's ability to obtain fair and reasonable prices.

During the committee review of the numerous studies that have been conducted, incuding those by the General Accounting Office, the Air Force Management Analysis Group, and the President's Private Sector Survey on Cost Control, and during the testimony presented on the spare parts acquisition process, no single cause of the current problem and, therefore no singular answer, could be found.

In a system in which approximately 3,400,000 spare parts are managed, the sheer volume of parts ordered and the complexity of the acquisition process make effective change difficult. The committee acknowledges that the initiatives of the Secretary of Defense and the defense industry have had a significant impact over the past year. It is concerned, however, that the present commitment to improving the acquisition process may wane. The committee believes that competition will be increased and cost savings achieved only when every person within the Department of De-

fense makes the additional effort to achieve this end and only when management internalizes those goals.

The provisions of H.R. 5064 are intended to provide an ongoing catalyst to foster increased competition in the acquisition of supplies for the Department of Defense and to ensure that a fair balance exists between the needs of the government and the economic well-being of the U.S. industrial base.

CONGRESSIONAL FINDINGS AND POLICY DIRECTION

During the course of the committee's investigation, a number of examples were found in instances in which the Department of Defense was charged (as in the case of the $1,118.26 plastic stool cap) or a contractor proposed (as in the case of the $110 diode) a price that was excessive in relation to the intrinsic value of the part. The committee believes that reports of this nature clearly and understandably undermine the public confidence in the defense procurement system, irrespective of the fact that many of the alleged overcharges were uncovered by the department itself and that, in the cases examined by the committee, there was no evidence of fraud or criminal activity.

Inappropriate spare parts prices primarily occur because of pricing procedures, such as statistical pricing and formula agreements, that result in a price unrelated to the cost or value of an item. A clear example of this process was cited in a recent Air Force report.[1] The report explains how a diode which cost a contractor $0.04 was billed to the government at $110.34. The example considers an order for two diodes that cost the supplier $0.04 each and six power supplies that cost the supplier $100 each, and shows how the price charged the government for each item was calculated, utilizing a pricing procedure in which material handling and overhead costs were allocated equally to each line item ordered.

	Diode		Power supply	
Purchased parts	2@$0.04	$0.08	6@$100	$600.00
Material handling labor cost 4.5 hours @$18		81.00		81.00
Overhead, 94 percent		76.14		76.14
Total manufacturing cost		157.22		757.14
General and administrative cost, 21 percent		33.02		159.00
		190.24		916.14
Profit, 16 percent		30.44		146.58
Total price		220.68		1,062.72
Unit price		110.34		177.12

Had the material, handling and overhead charged to the contract been allocated to the diode on a percentage basis, according to the cost of the item, as shown below, the price for the diode would have been $0.09 and the price of the power supply would have been $213.87.

[1] Report of the Air Force Management Analysis Group, October 1983.

"VALUE" ALLOCATION BASIS

	Diode		Power supply	
Purchased parts	2@$0.04	$0.08	6@$100	$600.00
Material handling labor		.02		161.98
Overhead, 94 percent		.02		152.26
Total manufacturing cost		.12		914.24
General and administrative cost, 21 percent		.03		191.99
		.15		1,106.23
Profit, 16 percent		.03		176.99
Total price		.18		1,283.22
Unit price		.09		213.87

The price for the total order would have remained the same, but individual, low-value item prices would not have been distorted.

In addition, many prime contractors provide support services, including configuration management, material handling, provisioning, engineering support to production, service engineering, source approval, training, quality assurance, and development of repair processes. These services may or may not have been utilized with respect to a specific spare part, but the costs are allocated across the board to spare parts the Department of Defense orders. Unless these services are priced separately instead of the costs being apportioned across all orders, parts ordered from such contractors will continue to reflect prices which appear inappropriate.

Although the committee does not believe legislating the manner in which parts are priced is appropriate, the committee does believe that, unless pricing procedures are changed to ensure that the price charged the government reflects the intrinsic value of the part, other improvements in the acquisition process will be of no avail. The Committee, therefore, recommends that the Department of Defense continue to review alternate pricing methods, including allocation of overhead and administrative expenses according to the value of the item and separate pricing for support services provided by prime contractors, which will result in prices which appropriately reflect the intrinsic value of an item.

Furthermore, although pricing is clearly a problem, in the examples cited previously the items should not have been purchased through a prime contractor in any event. With respect to the diode, testimony by the Auditor General, Department of the Navy, indicated the item was available through the government's supply system, and that government personnel failed to determine the most economical method of acquiring the parts. As to the stool cap—it had been ordered by national stock number—the supply officer did not know he or she was ordering a stool cap, and the cap had been inappropriately coded as an item to be bought from only one source. The cap had originally been priced as part of a large order and the specific price for that item was not reviewed. Upon request, however, the contractor was able to document the cost actually incurred to produce the item and the validity of the price charged the government. Again, the committee found no evidence of fraud or improper activity on the part of the contractor—costs were billed in accordance with Department of Defense regulations.

In this instance, the primary fault lies with the government's procedures for ordering such a part from a prime contractor, without knowing what the item was, without planning how many parts might be required to achieve an economic production quantity, and without considering the availability of a standard commercial part. The contractor, however, is equally at fault for agreeing to make an item for which a common commercial substitute was available.

Obviously, with the quantity of parts being acquired and managed, a trade-off must be made between the amount of time, personnel and paperwork required to ensure an abuse of the system does not occur, and to achieve a reasonable degree of certainty that the government pays fair and reasonable prices for the goods and services it procures.

Generally, the most effective method for ensuring fair and reasonable prices is to allow unrestricted competition from all qualified companies. While competition should not be considered an end in itself, many opportunities for increasing effective competition exist, especially by allowing small businesses to compete on an equal basis for all government contracts.

The committee emphasizes that every effort should be made to utilize off-the-shelf or standard parts when a government-unique item is not necessary to fulfill the government's requirements. This practice, which has been implemented in the Department of Defense Parts Control Program, should result in increased competition, lower prices and more cost-effective support of an item or system.

The practice of ordering small quantities of parts at a time is also an obstacle to securing fair and reasonable prices for supplies. This practice has occurred for many reasons, including internal Department of Defense policies which prevented funds from being allocated to the procuring activities in a manner which would have allowed consolidated purchases of more economic quantities, inadequacies in computer resources which would allow consolidation of purchase requests, and the failure of contractors to identify a purchase rate which would be more cost effective.

In order to overcome this obstacle, the bill states that the policy of the Congress is to procure items using multiyear contracts and economic order quantities whenever feasible, practicable and cost effective. The department must assess its needs, the cost of acquiring and storing parts in advance, and other factors which warrant consideration when determining the most cost-effective method of acquiring supplies for the government.

INCREASING COMPETITION

A primary objective of H.R. 5064 is to increase competition by removing disincentives for competition within the Department of Defense acquisition process. Repeatedly, examination of those instances in which inordinate prices had been charged revealed a lack of effective competition. An absence of technical data or of the right to use such data, a subject addressed in a later section, has been cited by many as one of the primary causes of noncompetitive purchases. The committee found, however, that in the majority of the cases in which purchases were made noncompetitively, compe-

Admission against the need for competitive licensing.

tition was not pursued by government personnel because management did not place adequate emphasis on competition and cost effectiveness.

The committee found indications that employees have been evaluated and career development has depended primarily on how quickly a contract was executed. In addition, though the number of contracting actions has risen steadily, the number of personnel dedicated to the acquisition process has consistently declined. Consequently, employees believed they could not spend the time required to examine adequately the past procurement history for the item or to evaluate whether alternative sources could supply an item.

The committee believes that, although readiness should remain a prime concern, management should also stress that purchases be made in the most cost-effective manner. While not precluding monetary awards, the committee recommends that an individual's job performance evaluation include an assessment not only of the individual's ability to perform the job in a timely manner, but also an assessment of the quality of that person's work, including the individual's ability to exercise some business judgment when purchasing supplies. The execution of this responsibility and the judgment required of contracting personnel require the highest qualification and professional standards for such personnel.

In addition to improving individual incentives, the department should place top priority on improving computer hardware and software systems to assist in the management and acquisition of supplies.

Further, although recognizing that there are many instances where buying directly from a subcontractor is not desirable or feasible (for example, when a prime contractor is doing the testing of the item or is integrating an item into a larger system), the government should at least know the identity of the actual manufacturer, producer or supplier. By the same token, a subcontractor should not unlawfully be precluded from selling directly to the government if it desires to do so. The committee does not intend to preclude lawful restraints on subcontractors' sales (for example, when a prime contractor has supplied tooling, dies or other equipment for the subcontractors' use in providing parts to it alone, or when restrictions such as to a license have been placed on the use of technical data or know-how provided by the prime contractor).

The committee also recommends that a Competition Advocate be required by statute for each agency and each contracting activity within the agency. The Competition Advocate is not intended to relieve the obligation of each person within the Department of Defense to pursue competitive alternatives in fulfilling the government needs. The Competition Advocate is intended, instead, to act as a catalyst to ensure that proper attention is given to competition during all aspects of the acquisition process—particularly during the acquisition planning stage. Because the contracting officer is not generally technically qualified to determine whether an item will satisfy the governments minimum needs, a contracting officer is often not in a position to change a restrictive specification or restricted source request. The Competition Advocate would have access to any personnel necessary to resolve questions of technical

qualification, to ensure that all responsible vendors offering technically acceptable items are allowed to compete, to seek and qualify new sources, and to ensure fair and reasonable prices for all items.

The Competition Advocate would be responsible for ensuring that the government's ability to obtain competition in future acquisitions is considered during acquisition planning, and that appropriate planning occurs to prevent the increasing number of sole-source emergency acquisitions.

The committee intends that the Competition Advocate interface with the Small and Disadvantaged Business Utilization Office and with any other officials established to promote increased opportunities for small business participation.

ACQUISITION PLANNING

In many instances the committee found that parts had been ordered without an analysis of what the past price for the item had been, whether the item was already available from the government's supply inventory, or whether the item was available through standard government supply contracts, such as the General services Administration Supply Schedule. Often, an item was available through a supply schedule contract in a much shorter time and was considerably less expensive than the same item purchased from the system prime contractor. The committee would not require that the government utilize such sources, only that a responsible official evaluate those alternatives before deciding what the most effective acquisition method would be, cost and other factors considered.

The committee recommends that a diagram of the item be required and available to a contracting officer if a description is not adequate to indicate the nature of the item. This recommendation is intended to ensure that contracting officers are not mislead in their assessment of the value of a part by a technical description of the item.

An inherent part of acquisition planning, particularly for major systems, is an assessment of future requirements and logistics supportability. Too often in the budget process resource constraints result in deletion of funding for initial spare parts, even when such parts could be purchased in the most cost-effective manner by acquiring them as part of the initial production contract. In addition, the long-term cost impact of a contractor's proposal for government support of a system, including the government's ability to procure parts and components for multiple sources and to require technical data rights to allow competitive acquisition of parts, is not given adequate consideration.

The committee recommends that a prospective contractor be required to identify those items that would be provided to the government with technical data and to identify whether the technical data would be provided to the government without restriction in order to allow competitive purchases in the future.

RIGHTS IN TECHNICAL DATA

The issue of rights in technical data is a subject of concern to both industry and the Department of Defense. Lack of technical

data, or prohibitions on the use of such data, have been cited repeatedly as significant impediments to the government's ability to secure competition for future acquisitions. Small businesses, in particular, indicate that they are precluded from competing for many government purchases because the government cannot provide them the data to manufacture a similar part. On the other hand, data in and of itself would not ensure that another contractor would be able to produce an equivalent part of the requisite quality. Evidence presented the committee indicates that the government's inability to retrieve data it is authorized to use and provide that information to a prospective contractor, and improper procurement method coding of supplies, are the primary restraints on the government's ability to allow competition for the contract.

The committee believes, however, that the government is unnecessarily restricted in its replenishment spare parts purchases by intital decisions not to acquire rights in technical data because of the cost (without an appropriate assessment of future savings) and by failure to plan adequately for future competition when initially acquiring a system.

Further, the government has, in the past, not adequately provided for those situations in which a contractor revises technical data which the government was entitled to use without restriction prior to the revision. The committee recommends that the Secretary of Defense issue regulations where appropriate requiring contract clause that would ensure that the government would obtain unrestricted use of any revisions, changes and modifications to data previously provided with unlimited rights and that the government would be provided the most up-to-date technical data on the item.

To require that rights in technical data be acquired in every instance is inappropriate. In some cases the value of the rights to use the data would not be worth the cost. In other cases, contractors cannot be expected to divulge technology and manufacturing processes developed by them at private expense for a competitor's use. There is also no need for the government to acquire data, or the unlimited rights to use data, which relate to standard commercial products.

To expect that the government will not be charged for the acquisition of data rights it is not otherwise entitled to is unrealistic. A contractor that has developed a product or process at its own expense must recover those costs and is entitled to exploit its innovative technology whether or not it has patented the product or process.

The committee has attempted to balance the interests of the government and industry by requiring an assessment of whether, and to what extend, the government will be able to obtain competition for future purchases, without requiring a contractor to give up its right to exploit technology developed by the company at its own expenses.

The bill would direct the Secretary of Defense, however, to prescribe by regulation standards for detemining whether a contract shall include a time limit (not to exceed seven years) on the duration of any restriction on the government's use of technical data. This provision is considered necessary to ensure that the government's data rights are not abused and to assure that the govern-

ment will be able to buy replenishment parts of fair and reasonable prices during the lifetime of its major systems.

The government must have some protection in those cases in which a minor change to an otherwise standard part results in the restriction of the technical data relating to the part and prevents the government form securing that part on a competitive basis. In addition, the government should not be locked into using only new source for repair or replacement items where the technology is not state of the art.

This provision is not intended to allow the expropriation of rights in state of the art defense-related technology which was developed through private initiative and invention, particularly that technology which was developed for commercial application. Nor is it intended to be applied to those items which are available from two or more sources or when the Secretary of Defense is assured that other alternatives will provide adequate assurances that the needs of the government will be met. It is not the intent of the bill to impose a time limit on rights to data relating to processes or products for which there is a commercial market when that data has been developed on the independent initiative of the contractor without a contractual obligation to do so imposed and paid for by the government.

The committee is also aware that commercal licensing practices often serve to increase the number of available supplies and enhance the quality of products available. It is not the intent of this bill that license agreements should be discouraged, rendered unenforceable or otherwise affected by any regulations or contract provisions imposing a time limit on restrictions on the government's authority to disclose data.

The committee does not believe the type of data that must be delivered under the contract should be specified by statute, recognizing that the government must have the flexibility to determine whether technical data sufficient to identify only size, configuration, attachment and functional characteristics, or performance requirements is sufficient to allow competition. Manufacturing data, which is data generated by the contractor's manufacturing facility to enable production of items defined by engineering drawings (including tool drawings, testing procedures, inspection procedures and process specifications) is often too tailored to a specific manufacturing facility and would be of little value to another supplier. For the government to acquire sufficient manufacturing data to allow a contractor who has not invested the necessary resources to design and development of products to replicate a part manufactured by another company may not be desirable or cost effective.

It has come to the attention of the committee that there is some reticence by the department to use data in its possession to evaluate the acceptability of a potential supplier's product. Even though the government does not acquire unlimited rights to use data, it is authorized under present regulations and standard contract clauses to use such data to evaluate the technical acceptability of an item from an additional source. Such evaluations do not violate a restriction on disclosure, and the committee recommends increased use of such procedures as an alternative to requiring unlimited rights to use data provided the government.

H.R. 5064 would also provide for certain contractor liability if the contractor unjustifiably mismarks data or delivers unusable, defective or incomplete data. None of the provisions recommended by the committee, however, should be relied upon as a substitute for effective inspection and contract administration. In addition, the recommendations are intended only to be minimum requirements. The government is encouraged to pursue other alternatives to ensure contractor performance on data delivery requirements, such as separate pricing of technical data delivery requirements and concomitant withholding of payment for failure to deliver acceptable data.

The committee clearly places the burden of proving the right to restrict use of data on the contractor. The committee recommends, however, a fair time limit—three years from the date of final payment on the contract—on the contractor's liability to correct data and to pay the government's cost in challenging a contractor's unjustified assertion to restrict data. The government and the contractor may negotiate shorter or longer periods of time for assertions of these rights as appropriate in a particular contract. In addition, recognizing that a resolution of the parties' rights may not occur within the three-year period, the provision only requires an assertion of such a right, and notification by the government of an intent to challenge a restriction, within the three-year period.

The evidence presented and reviewed by the committee clearly indicated that the problem of acquiring technical data in appropriate instances pales in comparison to the inability of some of the departments to access technical data in its possession in a timely manner. H.R. 5064 would require the Secretary of Defense to develop and implement a plan to provide for improved access to and retrieval of such data. The committee will review the plan and the department's progress periodically to ensure that there is appropriate progress in the implementation of necessary changes. Regardless of its recommendations, however, the committee believes requirements to provide technical data are of no avail if proper contract administration is lacking.

CONCLUSION

This bill is the result of an extended review and analysis of the process of procuring spare parts by the Department of Defense. The committee dedicated substantial time to this issue because of the complexity of the process and to ensure that any legislation proposed to prevent such overchargings and price increases would in fact result in a systemic change. The committee was concerned that the legislation affect a fundamental change in the process and not simply address a symptom. Consequently, H.R. 5064, in many instances, codifies recent Department of Defense initiatives or current Department of Defense regulations. The committee recognizes that such an action removes, to some extent, the flexibility the department had to accommodate unforeseen circumstances. This disadvantage was carefully weighed by the committee and determined to be necessary in those situations in which the committee believed the preservation of and attention to these policies could only be accomplished through permanent legislation. Circumstances also

exist in which preservation of the ability of the Secretary of Defense to resolve conflicting interests on a case-by-case basis is necessary. For example, the government's desire to use standard parts and acquire data rights to allow future competition is often in conflict with the government's goal of fostering private investment in new and innovative technologies, and of ensuring that the United States has the best technology available to it. Legislation that would accommodate in every case the government's own conflicting interests, as well as the divergent interests of the private sector, in the view of this committee, is virtually impossible.

In addition, further provisions to prevent abuses of the acquisition process must be balanced against the administrative burden such requirements would place on the government and its contractors, and the cost of such additional requirements. The committee believes this bill represents a fair and reasonable balancing of the often conflicting interests of the U.S. government, as well as those of the defense industry, including the many small businesses this country relies upon for its well-being. The committee recognizes that legislation alone will not solve many of the problems that have come to light and that Congress must agree to support Department of Defense requests for personnel and computer resources to support its initiatives and those mandated by this legislation.

SECTION-BY-SECTION ANALYSIS

CONGRESSIONAL FINDINGS AND POLICY DIRECTION

Section 2 of the bill reflects the belief of Congress that disclosures of excessive payments for spare parts have undermined the confidence of the public in the Department of Defense and its ability to acquire the goods and services it needs for the defense of this nation. It directs that DOD officials refuse to enter into contracts unless they are fair and reasonable. This section also requires the Secretary of Defense to continue and accelerate ongoing efforts to improve defense contracting procedures in order to encourage effective competition and ensure fair and reasonable prices, indicates Congress's intent that standard or commercial parts be used when those parts are technically acceptable and cost effective. Finally, this section requires the secretary to direct that parts be acquired in economic order quantities and on a multiyear basis whenever feasible, practicable and cost effective.

PERSONNEL EVALUATIONS TO INCLUDE EMPHASIS ON COMPETITION AND COST SAVINGS

Section 3 amends chapter 137 of Title 10, United States Code, to require the Secretary of Defense to establish procedures to ensure that personnel appraisal systems give appropriate recognition to efforts to increase competition and achieve cost savings.

IDENTIFICATION OF SOURCES OF SUPPLIES

Section 4 would amend section 2384 of Title 10, United States Code, which requires marking of an item with the name of the contractor who supplied it by adding a requirement that supplies be marked or otherwise identified with the national stock number for

the item. This section also requires the Secretary of Defense to prescribe regulations requiring identification of the actual manufacturer or producer of the item or any replaceable component of that item, as well as the national stock number, in appropriate documents. This provision will allow DOD personnel to assess whether a part may be purchased directly from the actual producer or manufacturer and to determine which contractor generated the technical data which accompanied the item.

PROHIBITION OF CONTRACTORS LIMITING SUBCONTRACTORS SALES DIRECTLY TO THE UNITED STATES

Section 5 would amend chapter 141 of Title 10, United States Code, by adding a new section which would prohibit unlawful restrictions on subcontractor sales directly to the United States. Subsection (b) provides that this language is not intended to prohibit valid, prime-subcontractor relationships in which a subcontractor may agree not to sell to other than the prime contractor because the prime contractor retained rights in technical data or processes which the subcontractor was authorized to use for limited purposes only, or the prime has provided special tools or dies to the subcontractor.

DEFINITIONS

Section 6 would amend section 2304 of Title 10, United States Code, by adding definitions of "technical data", "unlimited rights" and "developed at private expense."

PLANNING FOR PROCUREMENT OF SUPPLIES

Section 7 would amend section 2304 of Title 10, United States Code, by adding a new section requiring the Secretary of Defense to ensure that, before a contract for delivery of supplies is entered into, there is an assessment of the most advantageous procedure for acquisition of the supplies considering price, quality, delivery and other factors. This provision requires the assessment to include a review of the availability and cost of the item through the supply system and under standard government supply contracts. The provision does not mandate a given purchase procedure, ony that there be a reasonable review so that an informed decision can be made as to the most effective method of acquisition. To ensure further that an informed decision to contract for an item at a particular price is made, there must also be a review of the procurement history for the item, and an appropriate description and diagram of the item, if necessary, so that the DOD personnel will know, at a minimum, what it is they are buying, what the department paid for that item previously, and how long ago that price was established.

Section 7 also requires the Secretary of Defense to prescribe regulations requiring, whenever practicable, identification of those items which will be provided to the government with technical data, and to the extent technical data is provided, whether it will be provided with unlimited rights. In those instances in which it is premature to identify the particular technology to be used, and

thus whether technical data will be provided, prior to a contract award, section 7 requires that the contract provide for such identification at the appropriate time.

RIGHTS IN TECHNICAL DATA AND COMPUTER SOFTWARE

Section 8 would amend chapter 141 of Title 10, United States Code, by adding a new section, section 2386a, addressing rights in technical data. Subsection (a)(1) specifies those circumstances in which the United States will receive unlimited rights to use technical data. These circumstances, currently prescribed in regulation will become law, provide that the government shall have unlimited rights in:

(1) technical data and computer software resulting directly from the performance of experimental, developmental or research work performed under a government contract or subcontract;

(2) computer software generated as a necessary part of performing a government contract or required by the contract;

3. computer data bases prepared under a government contract if the information was supplied by the government, the government has unlimited rights in such information, or the information is in the public domain;

4. technical data necessary to manufacture an item, component or modification if the item was or is being developed under a government contract unless the item, component, process or computer software was developed at private expense;

5. technical data and computer software required to be delivered under a government contract and which is a correction or change to government-furnished data or computer software;

6. technical data which identifies sources, size, configuration, functional characteristics and performance requirements;

7. manuals or instructional materials prepared or required to be delivered under the contract to allow proper installation, operation and maintenance of the item as well as for training purposes;

8. technical data or computer software which is in the public domain or which has been or is normally disclosed by the contractor or subcontractor without restriction on further disclosure; and

9. technical data or computer software for which unlimited rights are otherwise provided for under the contract.

These provisions are not all inclusive, but set minimum standards for those situations in which the government was entitled to receive unlimited rights to use technical data. The ninth provision authorizes the Department of Defense to negotiate at any time additional circumstances in which the government could receive unlimited rights to use technical data. This subsection applies only to those contracts in which technical data or computer software are to be delivered under the contract, and thus would not apply, for example, to any general contract for standard commercial supplies in which the government would not be paying directly (i.e., other than through a company's normal recovery of development expenses in the purchase price) for development of the item. This section does

not require the Department of Defense to acquire technical data or computer software, but instead allows the Secretary of Defense to determine when it is appropriate to acquire technical data or computer software.

Subsection (b)(1) of section 2386a is again limited in application to those contracts which include a requirement for delivery of technical data or computer software. Subsection (b)(1)(A) requires that each such contract include a clause requiring the contractor to have a data management system approved by the department in operation before the government accepts delivery of any technical data. Rather than require the contractor to certify that it had made a proper review of its technical data to ensure it did not improperly identify data as being of a restricted nature, the contractor will be required to satisfy the department that its procedures for determining whether to assert a restriction are acceptable.

Subsection (b)(1)(B) of section 2386a authorizes the United States to ignore a restriction it believes is invalid if the contractor fails to substantiate the propriety of the restriction. It clearly places the burden of proving that the government is not entitled to use data to allow procurement of the item from other sources, on the contractor who asserts such a right, since he is in a better position to prove such entitlement. Disputes with respect to this provision will be handled as they are presently for those contracts in which a clause similar to this has been included, under the normal procedure for disputes established by the Contract Disputes Act of 1978. The government may not invoke this right after the end of the three-year period beginning on the date of final payment by the U.S. under the contract stipulates a different period of time.

Subsection (b)(2) requires the contractor to pay the government's costs associated with challenging an assertion that the United States is not entitled to unlimited rights to use data, but only if the government ultimately prevails and the contractor's assertion was not substantially justified. Thus, a good faith assertion by a contractor that it was entitled to restrict use of the data will not subject a contractor to liability for the government's expenses in challenging the claim. The government may not assert its right to collect its expenses after the three-year period commencing on the date of final payment under the contract, unless the contract provides otherwise.

Subsection (b)(4) requires the contractor to warrant that all technical data delivered under the contract, notwithstanding the government's inspection and acceptance of the data was, at the time of delivery, in compliance with the terms of contract. If not accepted, the contractor must correct the data to conform to the contract.

Subsection 2386(c) establishes a requirement that after a given period of time, not to exceed seven years, the government will have the right to use or have used, for any purpose of the United States, all technical data required to be delivered under the contract. The Secretary of Defense shall prescribe regulations for determining whether a contract shall include such a provision, taking into consideration other provisions which may ensure that the government will be able to obtain competition on the item or components of that item in the future, such as multiple sourcing of components

and parts, use of technical assistance agreements, and breakout to actual manufacturers or producers.

This provision does not require such a clause in every contract, nor must it be applied to every item or component purchased under a given contract. It requires the Secretary of Defense to establish regulations to require the time limit in all contracts in which it is appropriate.

Proposed subsection 2386a(d) provides that the section does not affect the rights of any contractor or the United States with respect to patents or copyrights. In addition, it is not intended to supersede or interfere with rights granted contractors by any other law, particularly those granted small businesses in the Small Business Innovative Research Act.

Section 8(b)(1) requires the Secretary of Defense, not later than one year after the enactment of this act, to develop a plan for a system for the acquisition and management of technical data which is more responsive to the needs for timely and complete data packages and which also addresses the possibility of a unfiorm system for the military departments and the Defense Logistics Agency. The Secretary of Defense is required to implement the plan within five years.

COMPETITION ADVOCATES

Section 9 would amend chapter 137, Title 10, United States Code, by adding a new section, section 2306a, requiring appointment of a competition advocate for each agency and each procuring activity of the agency. The functions of the competition advocates shall include advocating changes to policies and procedures to encourage maximum consideration of opportunities for competition and to challenge practices and procedures which inhibit competition. The head of the agency is also directed to ensure that programs designed to increase competitive procurement of supplies are maintained and reassessed and that there is a system within the agency for review of noncompetitive acquisitions. The head of the agency is also tasked with ensuring that each competition advocate has access to personnel within the agency whose advice and expertise are necessary for the competition advocate to carry out his responsibilities.

ANNUAL REPORT ON COMPETITION FOR SUPPLIES

Section 10 would amend chapter 137 of Title 10, United States Code, by adding a new section, section 2318, which would require an annual report from the Department of Defense on the activities of the competition advocates, as well as the rate of competition for supply contracts.

PUBLICATION OF PROPOSED REGULATIONS

Section 11 would amend section 2303 of Title 10, United States Code, by adding a new subsection providing that any significant proposed procurement regulations may not become effective unless the proposed regulation was published in the Federal Register at least 30 days before its effective date. This provision relates only to

significant procurement regulations issued by the Secretary of Defense or head of the agency (excluding NASA and the Coast Guard) with department, or agency-wide effect. It does not apply to proposed regulations which do not have an effect beyond the internal operating procedures of the issuing agency, or a cost or administrative impact on contractors.

Departmental Views

The Department of Defense witnesses testified on March 13, 1984, in favor of the legislation, although numerous changes were recommended. The committee received testimony from representatives of each of the military departments, the Defense Logistics Agency, and the Assistant Deputy Under Secretary of Defense for Acquisition Management. The witnesses were unanimous in their support of the principle contained in the bill but were concerned that the legislation did not provide the agency the latitude to develop regulations which would meet changing situations and circumstances.

Committee Position

The Committee on Armed Services, on April 3, 1984, a quorum being present, approved H.R. 5064 by voice vote.

Fiscal Data

Pursuant to clause 7 of rule XIII of the Rules of the House of Representatives, the committee attempted to ascertain annual outlays resulting from the bill during fiscal year 1985 and the four following fiscal years.

The committee is of the opinion that the costs attributed to improvements in the procurement process required by this bill are expected to be offset by the savings attributed to increased competition for future acquisitions. It is expected that the requirement to perform reviews and implement the improvements required by this bill, to the extent they are not required under present regulations, may result in additional personnel expenditures. However, to the extent additional personnel are required, the savings are expected to offset such costs.

CONGRESSIONAL BUDGET OFFICE ESTIMATE

In compliance with clause 2(l)(3)(C) of rule XI of the Rules of the House of Representatives, the estimate prepared by the Congressional Budget Office and submitted pursuant to section 403 of the Congressional Budget Act of 1974 is included hereafter.

U.S. Congress,
Congressional Budget Office,
Washington, D.C., April 9, 1984.

Hon. Melvin Price,
Chairman, Committee on Armed Services,
House of Representatives, Washington, D.C.

Dear Mr. Chairman: The Congressional Budget Office has reviewed H.R. 5064, the Defense Spare Parts Procurement Reform

Act, as ordered reported by the House Committee on Armed Services, April 3, 1984.

We cannot estimate whether a significant additional cost or savings to federal, state or local governments would be incurred as a result of enactment of this legislation.

The Defense Spare Parts Procurement Act would amend current law by establishing seven new requirements for the DoD to fulfill when contracting for spare parts. These are:

SECTION 3

Ensure that personnel evaluations include an emphasis on competition and savings by giving appropriate recognition to efforts to increase competition and achieve cost savings relating to contracts covered by the bill;

SECTION 4

Require that sources of supplies be identified by obtaining the name of the appropriate contractor and national stock number, or contractor stock number if no national number exists;

SECTION 5

Prohibit contractors from limiting direct sales by subcontractors to the United States, but without prohibiting a contractor from asserting rights it otherwise has under law;

SECTION 7

Plan for the procurement of supplies by reviewing the availability and cost of each item of supply through DoD's supply system, under standard Government supply contracts, and a review of the history of the item;

SECTION 8

Ensure that a contract for supplies guarantees unlimited rights to technical data and computer software when such items are a direct result of Government funded contractor performance. Included in this data rights section is a directive to develop a plan for sharing such data between services through a central data service and a requirement that contractor data management systems be approved by DoD before the U.S. accepts delivery of any data required under a contract;

SECTION 9

Establish competition advocates for each agency and each procuring activity who shall promote the use of competitive methods of procurement; and

SECTION 10

Submit to Congress an annual report on the management of the acquisition of replenishment parts during the proceeding fiscal year.

In addition, section 1 of the bill includes a provision that encourages the Secretary of Defense to make every effort to reform procurement practices relating to replenishment parts. The Secretary should: direct that contracts not be entered into unless proposed prices are fair and reasonable; accelerate current efforts to reform procurement procedures; direct that multiyear procurement and economic order quantities be used when feasible and practicable; direct that standard or commercial parts be used whenever technically acceptable and cost effective; and continue reexamining policies relating to acquisition, pricing and management of replenishment parts and of technical data related to such parts.

Only three provisions contained in section 8 might lead to additional significant costs or savings. Section 8(6)(1)(A) states that a contracor must have a data management system approved by the DoD before the U.S. accepts any data under a contract. There will certainly be some cost to DoD to devise a data management system review process and for contractors to meet newly established standards. However, until such steps as defining data management system are taken, it is not possible to project how many contractors will meet those standards or what will be the cost to evaluate systems.

Section 8(b)(4) states that each contractor shall warrant in the contract that all technical data will at the time of delivery to the U.S. conform with the specifications and all other requirements of the contract or the contractor will correct the technical data to so conform. If this provision merely reinforces existing review rights for the Government, no additional cost would be incurred. If this warrant provision represents an added right, then its inclusion in any contract would have to be negotiated and contractors would have to be reimbursed accordingly.

Section 8(c)(1) sets a limit on the number of years that a contractor has rights to contractor funded data that was required to be delivered to the U.S. under a contract. Now contractors have unlimited rights to such data and can charge for its use at any time. This provision would limit contractor rights to seven years, after which the U.S. shall have rights to all technical data delivered under a contract. Contractors will certainly make every effort to write future contracts in a way that will allow them to recoup earnings in seven years that are at least equal to what they might have earned over a much longer period of time. But it is not possible to estimate how much contractors might try to recoup and how often they would succeed in doing so through contract negotiations.

The remaining provisions of this bill represent activities that are already being carried out by DoD and that are reflected in current budget plans. For example, contractor identification is already required by DoD in its Defense Acquisition Regulations and a program of financial rewards exists for employees whose suggestions save money on DoD contracts.

If you wish further details on this estimate, we will be pleased to provide them.

Sincerely,

RUDOLPH G. PENNER, *Director.*

COMMITTEE COST ESTIMATE

The committee concurs generally with the estimate of the Congressional Budget Office, recognizing that the bill does not provide for new budget authority. To the extent that contractors attempt to recoup costs associated with their release of proprietary rights to the Department of Defense, savings in future years are expected to offset such costs. The cost of additional requirements for improving the acquisition process are impossible to quantify and are expected to be offset by the savings to be realized by such improvements.

INFLATION-IMPACT STATEMENT

Pursuant to clause 2(l)(4) of rule XI of the Rules of the House of Representatives, the committee attempted to determine the inflationary impact of the bill.

The committee believes that enactment of this legislation would have no significant inflationary impact.

OVERSIGHT FINDINGS

With reference to clause 2(l)(3)(D) of rule XI of the Rules of the House of Representatives, the committee has not received a report from the Committee on Government Operations pertaining to the subject matter.

With reference to clause 2(b)(1) of rule X of the Rules of the House of Representatives, this legislation results from extensive hearings on all aspects of the spare parts procurement process, and on the particular provisions of the bill, which represents a significant part of the committee's oversight responsibility with regard to organization of the Department of Defense.

Disagreement w/

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3 of Rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman):

TITLE 10, UNITED STATES CODE

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SUBTITLE A—GENERAL MILITARY LAW

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PART IV—SERVICE, SUPPLY, AND PROCUREMENT

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CHAPTER 137—PROCUREMENT GENERALLY

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§ 2302. Definitions

In this chapter—

(1) "head of an agency" means the Secretary, the Under Secretary, or any Assistant Secretary, of the Army, Navy, or Air

Force; the Secretary of Transportation; or the Administrator of the National Aeronautics and Space Administration.

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

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

(4) "Technical data" means recorded information (regardless of the form or method of the recording) of a scientific or technical nature. It does not include computer software.

(5) "Unlimited rights" means, with respect to technical data required to be delivered to the United States under a contract, legal authority of the United States to use, duplicate, and disclose the technical data for any purpose and the legal authority to have or permit others to do so.

(6) "Developed at private expense" means, with respect to an item (or technical data relating to an item) delivered to the United States under a contract, developed without direct payment by the United States under a provision of the contract which requires the performance of the development effort.

§ 2303. Applicability of chapter

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

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

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

(1) public works;
(2) buildings;
(3) facilities;
(4) vessels;
(5) floating equipment;
(6) aircraft;
(7) parts;
(8) accessories;
(9) equipment; and
(10) machine tools.

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

(d) A regulation prescribed under this chapter by the Secretary of Defense or the Secretary of a military department that would have an effect beyond the internal operating procedures of the Department of Defense or that would have a cost or administrative impact on contractors may not take effect until 30 days after such regulations have been published in the Federal Register for public comment.

§ 2304. Purchases and contracts: formal advertising; exceptions

(a) * * *

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(j) The Secretary of Defense shall ensure that before a contract for the delivery of supplies to the Department of Defense is entered into—

(1) when the appropriate officials of the Department are making an assessment of the most advantageous procedure for acquisition of the supplies (considering quality, price, delivery, and other factors), there is a review of the availability and cost of each item of supply—

(A) through the supply system of the Department of Defense; and

(B) under standard Government supply contracts, if the item is in a category of supplies defined under regulations of the Secretary of Defense as being potentially available under a standard Government supply contract; and

(2) there is a review of both the procurement history of the item and a description of the item, including, when necessary for an adequate description of the item, a picture, drawing, diagram, or other graphic representation of the item.

(k)(1) The Secretary of Defense shall prescribe regulations requiring that, whenever practicable, an offeror submitting a proposal for a contract shall furnish information in the proposal identifying—

(A) with respect to all items that will be delivered to the United States under the contract (other than items to which paragraph (2) applies), those items for which technical data will not be provided to the United States; and

(B) with respect to technical data that will be delivered to the United States under the contract, any of such technical data that will not be provided with unlimited rights.

(2) With respect to items that will be delivered to the United States under a contract described in paragraph (1) with respect to which it would be impracticable to ascertain, at the time the contract is entered into, the information required to be furnished under that paragraph, the contract shall require that the contractor provide identifying information similar to that required to be furnished under that paragraph at a time to be specified in the contract.

(3) The Secretary of Defense shall ensure that information furnished under paragraph (1) is considered in selecting the contractor for the contract.

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§ 2306a. Competition advocates

(a) The head of each agency shall designate a person within that agency to be the competition advocate for the agency and shall designate a competition advocate for each procuring activity of the agency. The competition advocates shall promote the use of competitive methods of procurement.

(b) The head of each agency shall prescribe by regulation the functions of competition advocates. Such regulations shall provide that each competition advocate shall—

(1) advocate changes to policies and procedures to encourage maximum consideration of opportunities for competition during the acquisition process (including the supply process); and

(2) challenge practices and procedures that inhibit competition, including unnecessarily restrictive statements of agency needs, unnecessarily detailed or restrictive specifications, use of procurement method codes, and other actions that could result in an inappropriate noncompetitive procurement.

(c) The head of each agency shall ensure that—

(1) programs designed to increase competitive procurement of supplies are maintained and periodically reassessed;

(2) there is a system within the agency for review of noncompetitive acquisitions; and

(3) each competition advocate within the agency has access to personnel within the agency who can advise the competition advocate in specialized areas relating to competition, including persons who are specialists in engineering, technical operations, contract administration, financial management, supply management, and utilization of small and disadvantaged business concerns.

(d) This section does not apply to the Coast Guard or the National Aeronautics and Space Administration.

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§ 2317. Encouragement of competition and cost savings

The Secretary of Defense shall establish procedures to ensure that personnel appraisal systems of the Department of Defense give appropriate recognition to efforts to increase competition and achieve cost savings in areas relating to contracts covered by this chapter.

§ 2318. Annual report on competition for supplies

(a) The Secretary of Defense shall submit to Congress, not later than December 15 of each year, a report on the management by that department of the acquisition of supplies during the preceding fiscal year.

(b) Each report under this section shall include—

(1) a report on the activities of the competition advocates of the Department of Defense during the preceding fiscal year; and

(2) the rate of competition for contracts for supplies entered into by the Department during the preceding fiscal year, shown (A) by the number of contracts awarded competitively as a percentage of the total number of contracts awarded, and (B) by the dollar value of contracts awarded competitively as a percentage of the total dollar value of contracts awarded.

(c) All information in reports under this section shall be shown for the Department as a whole and for each of the military departments and the Defense Logistics Agency.

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CHAPTER 141—MISCELLANEOUS PROCUREMENT PROVISIONS

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[§ 2384. Supplies: marking with name of contractor

[Each contractor furnishing supplies to a military department shall mark them with his name in the manner directed by the Secretary of that department. No supplies may be received unless so marked.]

§ 2384. Supplies: identification of supplier and sources

(a) The Secretary of Defense shall require that the contractor under a contract with the Department of Defense for the furnishing of supplies to the United States shall mark or otherwise identify supplies furnished under the contract with the identity of the contractor, the national stock number for the supplies furnished, and the contractor's identification number for the supplies.

(b) The Secretary of Defense shall prescribe regulations requiring that, whenever practicable, each contract for supplies require that the contractor identify—

(1) the name of the actual manufacturer or producer of the item or of all sources of supply of the contractor for that item;

(2) the national stock number of the item or, if there is no such number, the identification number of the actual manufacturer or producer or of each source; and

(3) the source of any technical data delivered under the contract.

(c) Identification of supplies and technical data under this section shall be made in the manner and with respect to the supplies prescribed by the Secretary of Defense.

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§ 2386a. Rights in technical data and computer software

(a) A contract for supplies entered into by the Department of Defense which provides for delivery of technical data or computer software to the United States shall provide that the United States shall have unlimited rights in—

(1) technical data and computer software resulting directly from performance of experimental, developmental, or research work which was specified as an element of performance in a Government contract or subcontract;

(2) computer software required to be originated or developed under a Government contract or generated as a necessary part of performing a contract;

(3) computer data bases prepared under a Government contract consisting of information supplied by the Government, information in which the Government has unlimited rights, or information which is in the public domain;

(4) technical data necessary to enable manufacture of end-items, components, and modifications, or to enable the performance of processes, when the end-items, components, modifications or processes have been, or are being, developed under a Government contract or subcontract in which experimental, developmental, or research work is or was specified as an element of contract performance, except technical data pertaining to items, components, processes, or computer software developed at private expense;

(5) technical data and computer software prepared or required to be delivered under a Government contract or subcontract and constituting corrections or changes to Government-furnished data or computer software;

(6) technical data pertaining to end-items, components, or processes prepared or required to be delivered under a Government contract or subcontract for the purpose of identifying sources, size, configuration, mating and attachment characteristics, functional characteristics, and performance requirements;

(7) manuals or instructional materials prepared or required to be delivered under the contract or any subcontract of the contract for installation, operation, maintenance, or training purposes;

(8) technical data or computer software which is in the public domain or which has been or is normally released or disclosed by the contractor or subcontractor without restriction on further disclosure; and

(9) technical data or computer software for which unlimited rights in such data or software are otherwise provided for under the contract.

(b)(1) Each contract for the acquisition of supplies which includes a requirement for the contractor to furnish technical data or computer software to the United States shall provide—

(A) that the contractor agrees to have a data management system approved by the Department of Defense in operation before the United States accepts delivery of any data required to be delivered to the United States under the contract; and

(B) that the United States may ignore, correct, or cancel any restriction on the release of technical data or computer software that is not authorized by the contract if the contractor fails to substantiate, within 60 days after receiving a written request from the United States for such substantiation, the propriety of the restriction.

(2) Each contract described in paragraph (1) shall provide that if—

(A) the contractor asserts that the United States is not entitled to unlimited rights in technical data relating to an item, component, or process; and

(B) the assertion is not sustained and it is determined that the assertion was not substantially justified.

the contractor shall be required to pay to the United States the costs to the United States of contesting the assertion.

(3) Rights of the United States under paragraphs (1)(B) and (2) may not be asserted after the end of the three year period beginning on the date of final payment by the United States under the contract, unless the contract provides for a different period of time.

(4) Notwithstanding the inspection and acceptance by the United States of technical data furnished under a contract and notwithstanding any provision of the contract concerning the conclusiveness of such inspection and acceptance, the contractor shall warrant in the contract that all technical data delivered under the contract will at the time of delivery to the United States conform with the specifications and all other requirements of the contract or the contractor will correct the technical data to so conform. The period of such a warranty shall be as provided for in the contract.

(c) The Secretary of Defense shall prescribe by regulation standards for determining whether a contract entered into by the Department of Defense shall provide that, after a time to be specified in the contract, the United States shall have the right to use (or have used) for any purpose of the United States all technical data (including technical data of subcontractors at any tier) required to be delivered to the United States under the contract. The time specified in a contract with respect to such a right of the United States in any such data may not exceed seven years from the date the data was required to be delivered to the United States or the date an item to which such data relates was required to be delivered to the United States, whichever is earlier.

(d) Nothing in this section shall be construed as affecting rights of the United States or of any contractor or subcontractor with respect to patents, copyrights, or any other law establishing particular rights in technical data.

(e) In this section, "technical data", "unlimited rights", and "developed at private expense" have the meaning given those terms in section 2302 of this title.

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§ 2402. Prohibition of contractors limiting subcontractor sales directly to the United States

(a) Except as provided in subsection (b), each contract for the purchase of supplies or services made by the Department of Defense shall provide that the contractor will not—

(1) enter into any agreement with a subcontractor under the contract that has the effect of unreasonably restricting sales by the subcontractor directly to the United States of any item or process (including computer software) like those made, or services like those furnished, by the subcontractor under the contract (or any follow-on production contract); or

(2) otherwise act to restrict unreasonably the ability of a subcontractor to make sales to the United States described in clause (1).

(b) This section does not prohibit a contractor from asserting rights it otherwise has under law.

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BILL SUMMARY

PURPOSE

The purpose of H.R. 5064 is to establish improvements in the process of acquiring and managing spare parts and other supplies by the Department of Defense which will ensure more cost-effective and efficient purchases. The bill contains provisions which will institutionalize efforts aimed at improving defense contracting procedures, encouraging effective competition, and assuring fair and reasonable prices.

FISCAL DATA

The costs attributed to improvements in the procurement process required by this bill are expected to be offset by the savings attributed to increased competition for future acquisitions. It is expected that the requirement to perform reviews and implement the improvements required by this bill, to the extent they are not required under present regulations, may result in additional personnel expenditures. However, to the extent additional personnel are required, the savings are expected to offset such costs.

DEPARTMENTAL DATA

Representatives of the Department of Defense testified in favor of the legislation, although numerous changes were recommended.

COMMITTEE POSITION

The Committee on Armed Services, on April 3, 1984, a quorum being present, approved H.R. 5064 by voice vote.

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