REPORT OF THE COMMISSION ON GOVERNMENT PROCUREMENT

VOLUME 1

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REPORT OF

THE COMMISSION ON GOVERNMENT PROCUREMENT

FOREWORD

The Commission on Government Procurement was created by Public Law 91–129 [1] in November 1969 to study and recommend to Congress methods "to promote the economy, efficiency, and effectiveness" of procurement by the executive branch of the Federal Government. The appointment of all commissioners and the assembling of the principal staff was completed some eight months later.

The study was proposed in 1966, and preliminary hearings were held by the 89th and 90th Congresses. The bill [2] that led to Public Law 91–129 was introduced in the 91st Congress by Representative Chet Holifield on January 3, 1969, and hearings were held in the spring and summer. Testimony from more than 100 witnesses filled ten volumes of hearings on the House bill and a companion bill introduced by Senator Henry M. Jackson.

A commission, with membership from the legislative and executive branches and from the public, was adopted as the study mechanism. The statute provided for a bipartisan, 12-member body. Two members of the House of Representatives and a public member were appointed by the Speaker of the House; two members of the Senate and a public member were appointed by the President of the Senate. Two members of the executive branch and three public members were appointed by the President of the United States. The Comptroller General of the United States was designated a member by the statute.

The commissioners elected public member Perkins McGuire as chairman and Representative Chet Holifield as vice-chairman. The Commission appointed an executive committee [3] to assist and advise the chairman and vice-chairman in the management of the study operations. A staff of about 50 professional members was employed by the Commission to conduct day-to-day study operations and direct the study effort.

The collection and analysis of massive amounts of materials required help and advice of Government, industry, and the academic community. In all, the services of almost 500 persons were loaned to the Commission on a full- or part-time basis; some for periods exceeding a year. Details on the fields of inquiry and membership of the Study Groups are presented in Appendix B.

In the first phase of the study, more than 400 problems and issues were identified and divided among 13 study groups and several special teams. The study was organized to provide in-depth coverage of the procurement process in three ways: (1) the environment in which procurement occurs (for example, Federal organizations and personnel and the numerous authorities and controls under which they operate); (2) the sequence of procurement events (for example, precontract planning, pricing and negotiation, selection and award, and contract administration and audit); and (3) types of procurement (for example, research and development, major systems, commercial products, and construction).

The Commission and its participants reviewed thousands of pages of procurement reports, congressional testimony, documents, comments, and opinions; consulted approximately 12,000 persons engaged in procurement; held more than 2,000 meetings at 1,000 Government, industry, and academic facilities, including 36 public meetings attended by over

[1] For text of Public Law 91–129, as extended by Public Law 92–47, see Appendix A.

[2] H.R. 474, 91st Cong., reported out of committee Aug. 12, 1969 (H. Rept. 91–468); a companion bill, S. 1707, reported out of committee Sept. 24, 1969 (S. Rept. 91–427). Conference Report (H. Rept. 91–613), Nov. 12, 1969. Other 91st Cong. House bills: H.R. 9339; H.R. 10070; H.R. 13286. Earlier House bills in the 90th Cong. include H.R. 157, H.R. 2541, H.R. 4324, H.R. 7565, and H.R. 8785. Also a clean bill, H.R. 12510, was reported out of committee on Nov. 6, 1967 (H. Rept. 890). See also H. Rept. 1344, 89th Cong., Mar. 23, 1966, discussing the need for a comprehensive study.

[3] Chairman McGuire, Vice-Chairman Representative Holifield, Comptroller General Elmer Staats, Senator Edward Gurney, and Under Secretary of the Navy Frank Sanders.

Part A—General Procurement Considerations

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CHAPTER 1

Introduction

From the time the Second Continental Congress established a Commissary General in 1775, Government procurement has commanded the attention of public officials and private citizens. All too often, the attention has focused on individual abuses rather than the overall system.

In many respects, Government procurement is guided by the same considerations the Commissary General faced in 1775: maximize competition, obtain reasonable prices, and assure accountability of public officials for public transactions. Despite the similarity of principles, present-day purchasing agencies have additional problems. Huge and exotic systems to meet military and civilian needs; spiralling costs; and far-reaching economic and political effects of Government purchases complicate the Government procurement process and continually keep it before public and congressional attention.[1]

THE NEED FOR THIS STUDY

The extensive hearings [2] conducted by Congress on Public Law 91–129 indicated that: (1) the procurement process is overly complex, (2) patchwork solutions to procurement problems will no longer suffice, (3) Government procurement is important economically and politically in both its methods and goals, and (4) Congress and the public are deeply concerned about the effectiveness of procurement and the manner in which it is conducted.

In establishing the Commission, Congress recognized that the annual expenditures for procurement and the attendant administrative costs are so great that even small improvements promise large rewards; that not only the Government but industry and ultimately the American people could benefit greatly from a full-scale study of the entire procurement process.

Procurement Expenditures

The Commission estimates that in fiscal 1972 the Government contracted to spend $57.5 billion for goods and services.[3] Savings of two percent on these contracts would have saved the American taxpayer more than $1 billion.

Modernize and Simplify the System

No systematic review of Government procurement has been undertaken since the First Hoover Commission in 1949 and the Second Hoover Commission Task Force in 1955, which was limited to military procurement. Neither of these bodies was devoted exclusively to studying the procurement process.

In the meantime, numerous newly created departments and agencies have undertaken significant procurement activities in support of their programs, such as improving the Nation's transportation system, purifying the environ-

[1] See Appendix G for an account of the "Historical Development of the Procurement Process."

[2] U.S. Congress, House, hearings before a subcommittee of the Committee on Government Operations on H.R. 157, 90th Cong., 1st sess., 1967, on H.R. 474, 91st Cong., 1st sess., 1969; Senate, hearings before the Committee on Government Operations, 91st Cong., 1st sess., 1969.

[3] See Appendix D.

cussion that follows highlights only selected aspects.

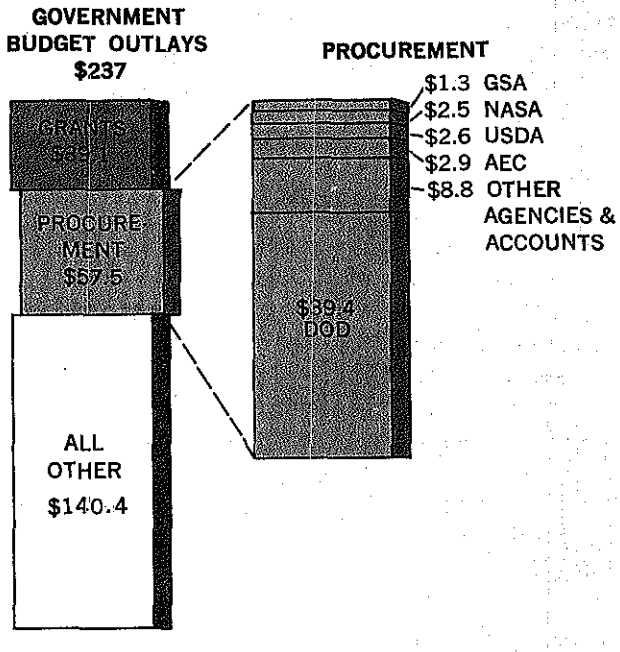
Economic Significance

The $57.5 billion spent on procurement by the Government in fiscal 1972 represented about one-fourth of the budget (fig. 2), a truly formidable amount, particularly when combined with the estimated $39.1 billion expended through Federal grants.[8] Procurement expenditures are thought to generate some three times their amount through the "multiplier" effect (secondary and related consumer spending). Thousands of Government activities are involved in acquiring products and services or supporting programs that affect millions of persons.

The impact of Government procurement on the Nation's economic and social well-being is more far-reaching than even these figures suggest. The award of a major contract can stimulate the growth of States and localities; the withdrawal of a contract may cause the decline of long-established communities and enterprises; and the failure of a large Government contractor may plunge sizeable areas into economic hardship.

RELATIONSHIP OF BUDGET OUTLAYS TO GOVERNMENT PROCUREMENT AND GRANTS

FISCAL 1972 ESTIMATE (Billions of dollars)



Sources: Appendix I.
The U.S. Budget in Brief, Fiscal Year 1973, Office of Management and Budget, table 8, Budget Receipts and Outlays, 1789–1972, p. 85.

Figure 2

Catalytic Role in Economy

Federal procurement plays a catalytic and pacing role in bringing Government-developed standards and products into practical commercial use. These range from automobile safety standards and Apollo fire-resistant materials to solid-state computer components. Entire segments of industry have been spawned by technological breakthroughs and spinoffs from Government procurements for electronics, metallurgy, fuels, and lubricants.

Social and Economic Implications

The magnitude of Government procurement provides leverage which is used as an instrument for achieving national, social, and economic objectives that do not pertain directly to deliverable goods and services. For example, procurement is used to assure equal employment opportunities, improve wages and conditions of employment, and channel employment and business opportunities into labor-surplus areas.

[8] Part F outlines a plan for improving the use of grants and contracts in Federal assistance programs.

CONCERNS OVER THE PROCUREMENT PROCESS

There is genuine and specific concern over the manner in which the procurement process works and over its deficiencies.

Major Systems

Understandably, the public is concerned over the cost growth of major systems, a characteristic of almost every major procurement hav-

amount of profit that should be permitted on capital invested in this environment as contrasted with return on risk capital in the regular commercial world.

Contract Disputes and Remedies

Disputes and protests result from the award, performance, and administration of Government contracts. Such disputes must be resolved fairly, efficiently, and economically. The system for resolving contract disputes is said to be too time-consuming and costly for resolution of smaller claims and is often said to lack procedural safeguards. Protesting a contract award is allegedly confused by a multiplicity of forums and lack of an effective remedy for those with valid protests.

GOVERNMENT NEEDS AND RESOURCES

Types of Procurement

The Government as a consumer participates in thousands of activities that involve millions of people and each year spends billions of dollars for the purchase or development of products and services. Many of these products and services are consumed by Government employees and military personnel, but billions of dollars go to buy "program support" in fields such as atomic energy development, scientific research, space technology, environmental improvement, housing, transportation, health protection, and many others.

An increasing number of acquisitions consist of major military or civilian systems of vital importance to the Nation's defense, technological advancement, and future well-being. Because the Government usually is the only customer for such major systems and the number of suppliers is limited, the normal rules of the commercial market do not apply fully.

Thousands of products, off-the-shelf or specially fabricated, and services are acquired from the commercial marketplace. Even here, the rules are partially tailored to the unique character of the Government as a customer, bound by legal, procedural, and social program requirements not generally applicable to other customers.

Alternative Sources

To satisfy its needs, the Government may rely on private industry, the academic community, or other nonprofit organizations. It may also resort to in-house facilities run by Government employees, or it may turn to not-for-profit organizations established and funded by the Government but operating in a manner that is neither wholly Government nor wholly private enterprise.

Traditionally, the criticality of the need and the "relative cost" to the Government of relying on private enterprise rather than Government sources have been the primary factors in deciding on the resources to be used.

Businessmen worry over what they believe is a trend, particularly in a period of cutback or belt-tightening, to retain work "in-house" that was previously performed commercially. It is alleged that this trend is encouraged by Government policy that favors performance in-house. However, Government employee groups are concerned that there is a trend toward increased use of contracts for services, especially when Government personnel ceilings limit hiring.

BLUEPRINT FOR ACTION

As may be gathered from the foregoing discussion, Government procurement is more than a purchasing function. It is affected by a wide range of Government needs influenced by numerous social, political, and economic activities—all of which act and react on each other. The Commission tried to identify the principal problem areas and the concerns of Congress, the public, and the procurement community itself. We outline now the direction of our proposals for improving the process in accordance with the mandate of Congress.

The Role of Leadership

As we have examined the management of the procurement process, we have been repeatedly drawn to the conclusion that a process of such central importance demands continuing, thoughtful attention by the leaders in Government. No capable executive in the private sector or in the Government can afford to ignore the significance of his purchasing operation when organizational success depends largely on effective contracting. This is particularly true of the Government's purchasing function because of the broad social, political, and economic implications of Government spending.

All too often we see the ill effects of the lack of an executive branch mechanism that can focus Government-wide attention on the impact of procurement on costs and efficiency. For example, attempts to achieve uniformity in interagency policy often go unheeded and become compounded by management-level neglect or by isolated congressional actions. Similarly, our studies show that social and economic goals attached to the procurement process involve needlessly cumbersome administrative procedures. Controversies over how best to proceed are often relegated to low-level interagency haggling rather than being dealt with expeditiously by top management.

The improvements we recommend in organization, personnel capabilities, policies, and procedures, together with the other elements of the integrated system just described, would considerably improve the procurement process—but more is needed. Without strong leadership, understanding, and effort by top management in both the legislative and executive branches, the procurement process will not be a strong mechanism for accomplishing national goals.

A Concluding Thought

The complexity of procurement is such that mistakes will be made even by people dedicated to doing a quality job. The important thing is to learn from the mistakes and continually improve the process. There are no universal answers to the myriad operating problems of Government procurement and the many goals it supports. However, if the recommendations advanced in this report receive effective and timely implementation, measurable improvement should result in the short term and even greater improvements should result over the long term.

The Commission has not attempted to make an estimate of the savings which could be achieved through the adoption of its recommendations. Indeed, it would have been impossible since many of them are in the nature of policy changes for which estimates could not be made with any degree of precision. At the same time, the Commission is certain that substantial savings can be made and has so indicated at many points in its report. For example, one recommendation alone—increasing from $2,500 to $10,000 the limit on exemptions from using advertised procurement procedures for small purchases—would save approximately $100 million.

CHAPTER 2

Policy Development and Implementation

Federal agencies contract within a framework of ground rules set by all three branches of Government. These policies [1] establish the overall environment of procurement, and control millions of individual decisions. Therefore, in reviewing the procurement process we concentrated on the manner in which basic policies are developed and implemented.

There is a void in policy leadership and responsibility, and a fragmented and outmoded statutory base. These shortcomings in basic law and policy are root causes of many problems that beset the procurement process. Virtually every Commission study group recommended, in one form or another, enhanced central policy direction.

Effective management of the procurement process requires a high degree of direction and control of basic policy. However, except for isolated and sporadic cases, the executive branch has not seen fit to fill this need. This is not to say that there should be centralized Federal buying for all agencies, or a central group involved in agency business decisions. Nor do we suggest a huge policymaking bureaucracy to issue all procurement regulations.

What we urge, instead, is an Office of Federal Procurement Policy, high in competence and small in size, established by law and responsive to Congress, and placed in the executive branch at a level where it can provide leadership and oversee the development and application of procurement policy. The contracting agencies should continue to be responsible for individual procurement actions and agency procurement operations.

We have placed creation of a central policy office first among our recommendations because of its overall importance in achieving the improvements we propose in the procurement process.

Recommendation 1. Establish by law a central Office of Federal Procurement Policy in the Executive Office of the President, preferably in the Office of Management and Budget, with specialized competence to take the leadership in procurement policy and related matters. If not organizationally placed in OMB, the office should be established in a manner to enable it to testify before committees of Congress. It should develop and persistently endeavor to improve ways and means through which executive agencies can cooperate with and be responsive to Congress.

SOURCES OF PROCUREMENT POLICY

Many segments of Government make or strongly influence procurement policy. Table 1 lists the major policymakers by branch. The next few paragraphs outline the nature of these influences.

Legislative Branch

Congress establishes fundamental procurement policies through legislation and through

[1] For example, policies governing methods of procurement, contract clauses, solicitation of bids and proposals, administration of contracts, termination of contracts, cost allowability, quality control, contract types, contract forms, warranties, contract options, and small purchase procedures.

others; and reporting on the results of action taken. The policies initiated in the executive branch also cover important subjects on which Congress and the courts have not spoken.

The President establishes procurement policy in some areas through Executive orders [4] or similar directions [5] to the agencies. Despite its pervasive authority, the Office of Management and Budget (OMB) has little direct, formal involvement in the formulation of procurement policy and has not evidenced a continuing concern with overall procurement management; it infrequently promulgates policy in circulars [6] limited to a particular topic.

Under the Armed Services Procurement Act, the Department of Defense (DOD) establishes policy for the military departments.[7] The General Services Administration (GSA) is directed by the Federal Property and Administrative Services Act to set basic policies for the civilian agencies.[8] However, this direction is circumscribed by a series of exceptions and limitations.[9]

In the absence of an effective focal point for procurement policy in the executive branch, DOD dominates its development. DOD dominates primarily because the military departments historically have done the major share of Federal contracting. Through the Armed Services Procurement Regulation Committee structure, DOD operates the most effective forum for development of procurement policies.[10] The defense agencies are required to follow the Armed Services Procurement Regulations (ASPR) and other agencies often do so if no other guidance is available.

By virtue of its responsibility for the Federal Procurement Regulations (FPR), GSA has the second most significant impact in the executive branch on the evolution of procurement policy. The Federal Procurement Regulations are developed with the advice of an interagency committee composed of representatives from 27 agencies. However, the functioning of the committee is sporadic, and most of what is incorporated in the FPR stems from earlier coverage in ASPR. The military departments and others, including the National Aeronautics and Space Administration (NASA) are not bound by the FPR. For this and other reasons, including the status of GSA in the executive branch, the FPR system has not been an effective source of Government-wide procurement policy. New agencies, and existing agencies whose procurement missions expand into new areas, lack the guidance that should be available from a system of uniform Government-wide procurement policy.[11]

The present lack of central leadership in the formulation of procurement policy has led to development of many policies and procedures that are needlessly diverse or meaninglessly different. In our discussion of the regulatory framework in Chapter 4 and elsewhere throughout this report we discuss some of these diverse policies.

In Chapter 11, we discuss numerous social and economic programs that wholly or partially depend on the procurement process for their implementation. Agencies primarily concerned with these programs, such as the Department of Labor and the Environmental Protection Agency, issue rules and regulations that are binding on procurement officials in other agencies.[12] Our studies show that procedures for coordinating these policies and for melding them into overall procurement policies range from virtually nonexistent to barely satisfactory. The lack of continuing management attention and leadership from a level above both the procuring agencies and the agencies principally concerned with social and economic programs is a chief cause of problems with these programs.

[4] For example, Executive Order 11602, 3 CFR 234, Clean Air Act Administration with Respect to Federal Contracts, Grants, and Loans.

[5] For example, Memorandum and Statement of Government Patent Policy issued by President Nixon, Aug. 23, 1971, *Federal Register*, 36:16887.

[6] For example, OMB Circular A-100, *Cost Sharing on Research Supported by Federal Agencies*, Dec. 18, 1970.

[7] In the act, this authority is granted by implication only. Other authorities relied on are 10 U.S.C. 2202 and 5 U.S.C. 301 (1970).

[8] 41 U.S.C. 242(a) (1970).

[9] *Ibid.*

[10] Also significant is the fact that the *Armed Services Procurement Regulation* predated the *Federal Procurement Regulations* by a dozen years. As a result, the content of FPR has been strongly influenced by ASPR.

[11] A specific example is the recently published procurement regulations of the Department of Transportation (*Federal Register*, 37:4801 et seq. (1972), over 90 pages in length, which implement and supplement the FPR. A DOT official estimated that 98 percent of the DOTPR material should have been developed and issued at the FPR level, but because FPR is neither adequate or timely for their purposes DOT was forced to develop these policies at the agency level.

[12] For example, 41 CFR, Ch. 50—Public Contracts, Department of Labor.

- Serve as the focal point within the executive branch with special competence and leadership in Government-wide procurement and procurement-related matters.
- Provide for the issuance of Government-wide policies as separate instructions or for DOD issuance of such policies for defense agencies and GSA issuance for other agencies. Provide for the granting of exceptions to established policies and procedures when justified.
- Designate lead agencies to develop most Government-wide and multi-agency policies and procedures in coordination with other agencies. Participate, as appropriate, with the lead agency in coordination with other agencies.
- Establish Government-wide guidelines concerning the use of grants and the policies to be followed in making grants.
- Review and reconcile, where appropriate, those procurement policies and procedures that are not Government-wide but affect two or more Government agencies, or their suppliers (for example, the number and kinds of differing requirements placed on suppliers).
- Make or obtain the final decision when controversy or irreconcilable differences exist between executive agencies concerning procurement policy or regulatory development.
- Develop and promote programs for the upgrading of procurement personnel, including recruitment, training, career development, and standards of performance and the conduct and sponsorship of research in procurement policy and procedures.
- Monitor and revise instructions concerning reliance on the private sector and maintenance of the in-house competence necessary to assure that this reliance yields benefits commensurate with its promise.
- Promote Government-wide exchange of information that highlights successful ways to improve the procurement process.
- Establish requirements for uniform reports and statistics on procurement activities.
- Establish advisory groups, as desirable, to provide counsel and advice and to serve as sounding boards for policies, procedures, and practices related to procurement.

Organizational Placement for the Central Policy Office

Alternatives considered for the organizational placement of the Office of Federal Procurement Policy ranged from placement in an existing agency to the creation of an independent office. On the basis of the functions to be performed and the authority to be vested in the central authority, the Commission strongly favors placement in the Office of Management and Budget.

OMB has broad Government-wide policy and management responsibility and can relate procurement matters to other program and operational requirements. It has a large measure of responsibility for leadership in all areas of management improvement and demonstrated capability for achieving interagency coordination and cooperation. It is also in a central position in the Executive Office of the President, which should make it effective in dealing with executive branch procurement activities, GAO, Congress, and the public. Additionally, having a Government-wide perspective and no purchasing responsibilities, we believe OMB can consider procurement policy needs in a more objective manner than can an agency engaged directly in procurement.

Within OMB, the Office of Federal Procurement Policy should be headed by an experienced, high-level official. We recommend a Deputy Director with no other responsibilities. This would ensure the identity, level of authority, and continuity of effort necessary for leadership toward effective management of the procurement function.

We recognize that the wishes of the President are of overriding importance in the organization of his Executive Office. Therefore, we have stopped short of saying that the office should only be in OMB. Placement elsewhere in the Executive Office, as long as responsiveness to Congress is assured, would be consistent with our recommendation.

CHAPTER 3

The Statutory Framework

Statutes provide the foundation for the whole framework of Government procurement. They create agencies; define roles and missions; authorize programs; appropriate funds; balance public and private interests; provide for methods of procurement and for contract award procedures; and promote fairness, effectiveness, and uniformity in the procurement process.

The charter act of the Commission directed us to "study and investigate the present statutes affecting Government procurement" and to include in our report "recommendations for changes in statutes. . . ." [1]

This chapter is concerned with the need to unify the two basic procurement statutes and to improve statutory provisions on methods of procurement and on procedures for contractor selection. Part J deals with the potential for codifying procurement and procurement-related laws as well as with statutory matters not directly related to methods of procurement or procedures for contractor selection.

STATUTORY FOUNDATION

Recommendation 2. Enact legislation to eliminate inconsistencies in the two primary procurement statutes by consolidating the two statutes and thus provide a common statutory basis for procurement policies and procedures applicable to all executive agencies. Retain in the statutory base those provisions necessary to establish fundamental procurement policies and procedures. Provide in the statutory base for an Office of Federal Procurement Policy in the executive branch to implement basic procurement policies.

The procurement systems of the defense agencies, the Coast Guard, and the National Aeronautics and Space Administration (and to some extent the Central Intelligence Agency) are governed generally by the Armed Services Procurement Act of 1947 (ASPA).[2] The procurement systems of many civilian agencies are governed generally by title III of the Federal Property and Administrative Services Act of 1949 (FPASA).[3]

Consolidation or Conformance

We recognize that the two acts could be conformed to eliminate inconsistencies and incorporate the new principles we recommend. However, we think that a single consolidated act would focus attention upon procurement as a Government-wide operation and minimize the possibility of agencies obtaining independent statutory treatment. Our preference, therefore, is for a single consolidated statute to replace the two basic procurement acts, and thus eliminate the inconsistencies between them. In our judgment, a single act would provide the best assurance against the recurrence of inconsistencies.

Our studies revealed more than 30 troublesome inconsistencies between the two acts. For example, major inconsistencies involve:

- *Competitive Discussions.* ASPA re-

[1] 41 U.S.C. 251 note, sec. 4(a) (1970).

[2] 10 U.S.C. 2301–2314; 50 U.S.C. 403(c) (1970).

[3] 41 U.S.C. 251–260 (1970).

primarily intended to amend the Small Business Act and was processed by the committees having jurisdiction over that act. The legislative history does not explain or even mention that the bill would change only one of the two basic procurement acts.

The present statutory foundation is a welter of disparate and confusing restrictions and of grants of limited authority to avoid the restrictions. This problem has arisen in part because Congress has never been called on to focus its attention on the overall procurement process. The inaction of top managers of the executive agencies has aggravated the problems.

Although both DOD and NASA are governed by ASPA, each relies on its separate organic act or on general statutory provisions [13] to issue separate and often unnecessarily inconsistent procurement regulations.[14] Some provisions of FPASA give the appearance of minimizing the multiplicity of agency regulations; they give either the President or the Administrator of the General Services Administration (GSA) authority to prescribe regulations or policies.[15] However, FPASA effectively or potentially excludes from GSA regulations [16] the major procurement activities which come under its "no impairment" provision.[17] The "no impairment" provision is a broad, ambiguous statement which provides that nothing in FPASA shall impair or affect the general authority of certain named agencies or specified functions of other designated agencies.

The agencies have differed in their approach as to what they consider an "impairment." The Atomic Energy Commission (AEC) generally has followed GSA's Federal Procurement Regulations (FPR), but in a few cases has decided to adopt more "liberal" regulations under the broader statutory authority of its organic act. The Tennessee Valley Authority (TVA), on the other hand, has interpreted the "no impairment" provisions as giving it authority to disregard the FPR's completely.[18]

[13] For example, 10 U.S.C. 2202 and 5 U.S.C. 301 (1970).

[14] These agencies are not required to comply with regulations issued pursuant to FPASA. See 41 U.S.C. 252(a)(1) (1970).

[15] See 40 U.S.C. 481(a)(1) and 486(a) and (c); and 41 U.S.C. 252(a) (1970).

[16] 41 U.S.C. 252(a)(2) (1970).

[17] 40 U.S.C. 474 (1970).

[18] The matter of diversity in regulations is discussed in greater detail in Chapter 4.

The statutory foundation must be changed if significant improvements in unifying procurement policies and procedures are to be achieved. Consolidation of the procurement statutes would be a major step in fostering a single regulatory system which would help rather than hamper those wishing to do business with the Government.[19] It also would focus attention on the fact that procurement is a Government-wide operation and would discourage attempts by parochial interests to obtain special statutory treatment.

Greater statutory uniformity may be viewed by some as a threat to the special missions of executive agencies. Such a fear is unfounded. Our recommendations contemplate Congress confining its dictates to fundamental matters. Under our recommendations, the regulatory system will assume the responsibility of amplifying congressional direction and of creating such restrictions or safeguards as may apply only to some agencies or that prove essential only for limited periods. This approach provides the best balance of congressional control and executive efficiency. It minimizes the burden on a busy Congress. It also recognizes that, when feasible, administrative action by regulation is quicker, more specific, and more readily adaptable to necessary change. Such latitude is essential to the use of procurement techniques which best ensure the success of a Government program.

Sharing of responsibility for procurement policy between the legislative and executive branches is consistent with the practice in other policy areas; that is, Congress establishes the general framework of a national priority and the executive branch is charged with the responsibility to implement the approved program. The need for executive branch latitude to fill in the details by regulation is particularly acute in Government procurement because of the number of techniques and technologies involved; the frequency and volatility of change; the close connection between procurement and agency missions; and the multitude of detailed policies, procedures, guidelines, and controls attending the process.

Executive branch latitude, however, cannot justify accelerating the issuance of conflicting

[19] See Chapter 4, for the discussion and recommendation to establish a system of Government-wide coordinated procurement regulations.

are publicized widely for competition.[20] Some of these contracts are awarded on a fixed-price basis, others on a cost-reimbursable basis.[21]

In negotiated fixed-price competitions the Government usually does not rely on the prices initially submitted by competitors. The comparability between initial offers generally is insufficient to judge the relative merits on the basis of the common denominator of price. For this or other reasons, contracting agencies ordinarily conduct discussions or bargaining with the competitors in the course of entering into a fixed-price contract with the one who offers the best terms.[22]

In competitive negotiations involving cost-type contracts, the offerors submit cost estimates rather than fixed prices. The fact that a cost-type approach is used generally indicates that the primary interests of both the competitors and the contracting agency will focus on relative technical competence, not price "guesstimates."

The single element which most acutely distinguishes negotiation techniques from formal advertising is the subjective judgment which weighs quality and other factors against price; these judgments are referred to as "tradeoffs." Formal advertising, in effect, resolves all "tradeoffs" by specifying a common product before offers are solicited. Only products conforming to that specification can represent the best, and indeed the only, deal for the Government, subject solely to the variable of the prices which will be submitted. Negotiation, on the other hand, uses a more general or more complex specification which asks the seller to recommend the combination of those aspects of the solicitation he thinks will represent the best deal to the Government; all aspects are variables to be considered in selecting the contractor. Price is likely to be an important, often critical aspect in competitively negotiated fixed-price contracts, and not as likely to be so in cost contracts.

[20] Sole-source negotiation is discussed later in this chapter.

[21] Generally, a contract awarded on a cost-reimbursable basis is one where the Government promises, for performance of a contract, to pay; (1) the reasonable, allocable, and allowable cost of performance, as determined by predetermined cost principles and the terms of the specific contract (see ASPR 7-203.4 and ASPR, sec. XV, part 2); and (2) a fee, where applicable.

[22] Competitive negotiations in fixed-price contracts is further discussed with respect to Recommendation 4, under "Competitive Discussions for Fixed-Price Contracts."

COMPETITION

Competition is not a procurement technique. It is a phenomenon of the marketplace, and the extent to which it exists in any given marketplace ordinarily is not influenced by the method of procurement employed. Competition is the effort of sellers, acting independently of each other and offering products or services that are reasonably close substitutes for those offered by other sellers, to secure the business of the buyer by proposing the most attractive contract terms.

Formal advertising is one means of obtaining competition. It involves a broad sclicitation of offerors, but so do competitively negotiated procurements. Although fixed-price contracts are always used in formal advertising, this feature also is not peculiar to that method of procurement; they are used as well in many negotiated procurements. Further, the desire among competitors for winning the award should be equally strong regardless of which method of procurement is used. The unique feature of the Government's formal advertising technique is its insistence on offers of products or services which are *essentially identical,* regardless of which competitor is selected.

Many procurements involve an item that is not sufficiently comparable to others available from the same general market to make an award on the basis of price without discussions with the offeror. In these circumstances, the technique of negotiation affords the best opportunities to obtain the most effective competition available. It permits discussions with competitors for the purpose of more precisely defining achievable requirements, or otherwise obtaining sufficient comparability between offers, in order to reach a common understanding of the specifications. By enhancing the degree of competition in this manner, the Government may be able to validly select the contractor on the basis of price and thus consummate a fixed-price contract.

Cost-type competitions often involve markets quite dissimilar to those in which fixed-price competitions take place. The end items may be of such magnitude and exhibit so many unknowns that initially no one can draw specifications that realistically dictate a common technical baseline for all offerors; nor can the parties agree to fixed-price contracts which

competitive negotiations instead of formal advertising has arisen only in the last three decades. During that period, first the urgency and demands of war, and then national domestic priorities, compelled Government to meet more of its needs by advancing the state of technology rather than by purchasing items "off the shelf." This development—not the conjecture that agency officials intentionally and increasingly disregard the law—explains the decline in the use of formal advertising. In recent years, many Government requirements do not lend themselves to the form of specifications needed for "formal advertising." Creating such specifications to procure items beyond the existing state of technology is not realistic.

Simply identifying the conditions which justify negotiation is time-consuming. When the statute also requires that such justification be put in writing, more time and expense is consumed. Of even greater importance is the fact that when the contracting officer's written justification must be approved at higher levels, the process often is wasteful and even more expensive and time-consuming.

These justification provisions are intended to discourage sole-source negotiation. However, they also may restrain the use of competitive negotiation to satisfy requirements for imprecise, changeable, and sometimes unique products and services. Competition in the markets where these requirements must be satisfied cannot be achieved by the use of formal advertising. The point is not that there should be more negotiation and less advertising but that competitive negotiation should be recognized in law for what it is; namely, a normal, sound buying method which the Government should prefer where market conditions are not appropriate for the use of formal advertising.[26]

Formal advertising can be as inappropriate in some Government procurements as it is appropriate in others. Since its use in many potentially competitive circumstances is inappropriate, it should not be encouraged, much less preferred, in those circumstances. When competitive negotiations are the appropriate procurement technique, the statute should not require Government officials to indulge in expensive, wasteful, and time-consuming procedures to carry out congressionally authorized missions.

UNDUE RESTRAINTS AGAINST THE USE OF COST-TYPE CONTRACTS

The current statutes[27] provide that cost-reimbursable and incentive contracts cannot be used without a finding either that such contracts probably will be cheaper or that it is impractical to use any other type of contract.[28] However, in numerous situations the use of cost-reimbursable or incentive contracts is desirable, even if fixed-price contracts could be used or might be cheaper. Many of these are competitively awarded and include procurements where the use of a fixed-price contract would involve an inordinate risk or where the procuring agency wishes to motivate the contractor to apply his efforts toward specific elements of contract performance.

Where a cost-reimbursable or incentive contract promises no net advantage over a fixed-price contract, public policy rightly favors the use of the fixed-price contract. In competitively negotiated procurements, it provides the greater assurance that the benefits of competition have been obtained and employed. However, conjectures that one type of contract will prove more expensive than another or otherwise be "impractical" to use generally are pure speculation. Nor is there any reliable way of validating whether the prediction was an accurate one. Consequently, the finding or prediction required by the present statute is a hollow requirement and in practice is generally satisfied by findings which merely repeat the language of the statute.

We believe the procurement statutes should not stigmatize cost-reimbursable and incentive contracts and require their use to be accom-

small business set-aside contracts, which are restricted to small business but are also awarded by formal advertising techniques, account for approximately an additional four to five percent of reported Government procurement award dollars. In terms of the number of reported procurement actions in DOD during fiscal 1972, the restricted and unrestricted use of formal advertising techniques totaled approximately 11.4 percent of all military procurement actions of $10,000 or more.

[26] See similar point made by the Task Force on Procurement, *Military Procurement*, 1955, p. 24, prepared for the Commission on Organization of the Executive Branch of the Government.

[27] 10 U.S.C. 2306(c) and 41 U.S.C. 254(b) (1970).

[28] They also contain an absolute prohibition against "cost-plus-a-percentage-of-cost" contracts, which prohibition we recommend be continued. See 10 U.S.C. 2306(a) and 41 U.S.C. 254(b) (1970).

posals is required "from the maximum number of qualified sources consistent with the nature and requirements" of a procurement. Translating this requirement to practice poses a vexing problem.

R&D procurements, probably more than any other, embody the two characteristics which give rise to the problem; namely, a large number of firms seeking Government contracts and relatively complex proposals which are costly to prepare and evaluate. Under these circumstances, total solicitation costs may exceed the value of the contract. Moreover, most R&D procurements seek innovative ideas and frequently cannot be considered as essentially cost or price competitive. Therefore, the participation of a maximum number of firms does not necessarily ensure minimum costs to the Government, a primary purpose of the statute. Participation by a "maximum" number of firms in such situations may unduly complicate the selection process and add considerably to both the procuring agency's and the offerors' costs.

Several agencies now interpret the statute to permit limiting the initial issuance of requests for proposals (RFPs) to a reasonable number of firms deemed most competent. Others are reluctant to follow this practice. They believe a blanket issuance of the RFP and the evaluation of all proposals is easier, safer, and possibly less costly than attempting to justify a limited solicitation. Moreover, some consider that the intent of Congress, as reflected in the statute, requires that all doubts be resolved in favor of "maximum" solicitation.

Providing in the statute for the solicitation of a "competitive" rather than a "maximum" number of sources in negotiated procurements should convey the intent that the desirable number of sources depends on the conditions which prevail in the market at the time the purchase is made. We recognize that this change could foster favoritism for certain contractors; that is, only "favorites" might be invited to submit proposals. To prevent this abuse, we recommend retaining the statute which requires public announcement of procurements [32] and adding to it a requirement that agencies honor all reasonable requests by uninvited offerors to compete.

[32] 15 U.S.C. 637(e) (1970).

COMPETITIVE DISCUSSIONS FOR FIXED-PRICE CONTRACTS

An exception in ASPA permits an agency conducting a competitively negotiated procurement to select a contractor on the basis of his initial offer, without discussions with any of the competitors.[33] When Congress was considering the exception language in the legislation, GAO's view was that it would curtail competition. GAO was concerned that the contracting agency would not be in a position (without the benefit of discussions) to determine with any degree of certainty the reasonableness of estimated costs and proposed prices. Congress, however, accepted DOD's position that the statutory requirement for discussions include the exception permitting awards without discussions. DOD believed that the exception would discourage offerors from submitting padded initial prices.

GAO's concern appears to have been directed toward the use of fixed-price contracts in negotiated procurements. It cited an example where the contracting agency rejected formally advertised bids because of a statutory technicality. The agency later conducted a "negotiated" procurement for the same items, without competitive discussions, and accepted a low offer from a contractor which was about $20,000 higher than the offer he made in the formally advertised procurement. GAO maintained that discussions would prevent these abuses without encouraging padded offers, since competitors would hesitate to submit unnecessarily high offers that eliminated them from the competitive range.

Our studies suggest that offerors will not be deterred from including substantial contingencies in initial offers.[34] Moreover, we believe there is a likelihood of the Government's

[33] Offerors must be advised of the possibility that discussions may not be conducted, and the prices received must appear reasonable to the contracting officer. The exception applies to both cost-type and fixed-price contracts.

[34] Responses to a question raised by Study Group 8 (Negotiations and Subcontracting), disclosed that more than half of the Government buyers interviewed on this point thought sellers did not pad their offers; over half of the sellers believed they did. (See Study Group 8, *Final Report*, vol. II, appendix F.

"technical transfusion" and "auctioneering," the complexity of the subject, and the present state of flux in implementing the statute, we have concluded it would be inappropriate at this time to recommend detailed statutory revisions.

EVALUATION CRITERIA

The procuring agencies use different procedures for evaluating proposals. The procedure most commonly used for larger or more complex procurements in which price may be only one of numerous considerations requires that evaluation criteria be established prior to soliciting offers. Evaluation criteria apprise competing sellers of the features, in addition to cost, the Government considers important to the purchase and their relative importance to each other. The criteria also alert Government technical specialists, who may not be the ones who devised the criteria, of what to look for and what weight to give to certain aspects of the proposal in scoring or otherwise evaluating it.

The statutes currently are silent on the evaluation criteria the Government uses to select a contractor, although this is a matter of major importance. Proposers often complain they cannot adequately respond to solicitations because the evaluation criteria do not indicate the relative weight the buyer attaches to various elements of the specification or proposed contract terms.

The procuring agencies have reservations about communicating the relative importance of evaluation criteria. They fear such disclosure may result in the buying officials and the sellers relying too heavily on the mechanics of the scoring system instead of using their own judgment. They also believe that the Government might award contracts to inferior firms which had a slightly higher "score" than a superior competitor, that competitors might be inhibited from submitting innovative ideas which did not agree with the evaluation criteria, and that GAO might be inclined to uphold protests on the ground that award was not made to the competitor with the highest score. The weakness in these observations is that neither law nor common sense supports the likelihood of their occurrence.

Nothing could be more basic to sellers than knowing what the buyer really wants. Without knowledge of the relative importance of evaluation criteria, sellers can determine only partially what the procuring agency considers important. Withholding uniform and formal disclosure of such information may, on occasion, lead to some sellers learning more than others about what the agency regards as important.

Acceptance of our recommendation to communicate the relative importance of evaluation criteria would create greater public confidence in the procurement process, motivate procuring agencies to give greater attention to defining what they want from sellers, and facilitate the preparation of more responsive proposals.

Post-Award Policy

Recommendation 5. When competitive procedures that do not involve formal advertising are utilized, establish that agencies shall, upon request of an unsuccessful proposer, effectively communicate the reasons for selecting a proposal other than his own.

Letting an offeror know why he lost a competition contributes to his ability to compete for future solicitations. It also adds to the general confidence in the fair application of the rules and procedures governing Federal procurement. Today there are no statutory requirements or uniform practices for informing losing offerors why their proposals were not considered as advantageous to the Government as the winning contractor's.

Losing competitors believe they should be, but frequently are not, provided with enough details on the relative value of their proposals. Consequently, existing practices often result in informal complaints as well as formal protests to force adequate disclosure. We believe the Government will receive better proposals and gain more credibility if a statutory base exists for honoring the post-award requests of losing offerors for the reasons why the contractor was selected.

dicates that DOD alone issued 795,917 formally advertised contracts under $10,000.[37] This represented only 7/10 of 1 percent of the total dollar value of all reported DOD military procurements.[38] In terms of procurement actions, more than 98 percent are for less than $10,000.[39] Many of these tranactions are for commercial items for which prices are set competitively or by regulatory processes. Mandatory procedures for small transactions in excess of $2,500 require a great deal of extra paperwork, time, and frustration, and discourage many companies from competing. This results in additional costs and longer delivery schedules. GAO estimated that up to $100 million in administrative costs [40] can be saved annually by DOD procurement centers if contracts under $10,000 could be awarded under simplified, small purchase procedures.[41]

To assure that potential savings are not lost, more is required than simply raising the dollar ceiling. The need to avoid the statutory rigidity of a fixed dollar ceiling is of equal importance. Such rigidity can inadvertently restrain the use of appropriate procurement techniques and increase administrative costs. Therefore, the ceiling should be made flexible by relating it to the purchasing power of the dollar.[42]

Multi-year Contracting Authority

Recommendation 8. Authorize all executive agencies to enter into multi-year contracts with annual appropriations. Such contracts shall be based on clearly specified firm requirements and shall not exceed a five-year duration unless authorized by another statute.

"Multi-year procurement" is a special term used to denote a method of competitively contracting for more than one year. It is now used by agencies which either have "no-year" or multi-year appropriations, or special statutory authority.[43] However, many appropriations, including most of those for the procurement of services, are on an annual basis. This requires that the funds be obligated within the fiscal year for which the appropriation is made and only for needs arising during that fiscal year. Further, 31 U.S.C. 627 prohibits contracting in excess of an appropriation unless an act of Congress declares specifically that such a contract may be executed. Consequently, in the absence of special statutory authority, multi-year contracting generally has not been used when annual appropriations are involved.

Multi-year contracting properly is used only to purchase firm and clearly specified requirements, which do not change during the term of the contract.[44] This method of contracting provides for the solicitation of prices based on both the current one-year program, and on the annual increments making up the total program, for a period of up to five years. The contractors' nonrecurring or "start-up" costs [45] are lumped together in their one-year bids, but are prorated over the entire period of the contract in the multi-year bids. The contract is awarded on the basis of the bid that reflects the lowest unit prices to the Government. Often, the proration of nonrecurring costs and other advantages of high-volume and long-term production results in a multi-year bid representing the lower overall cost.

If a multi-year contract is awarded, only the first year is funded. The next year, if additional funds are available, the contracting officer notifies the contractor prior to a deadline date or event to continue; notice obligates the parties to the next year's performance. If

[37] *Ibid.*, p. 49.

[38] The dollar value of these contracts in fiscal 1972 was $259.5 million. Letter from U.S. Department of Defense (Comptroller) to the Commission, Nov. 1, 1972. (Percentage calculated by the Commission.)

[39] Note 36, *supra*, p. 38. (Military procurement actions under $10,000, including both negotiated and formally advertised actions, represented 10.3 percent of DOD procurement monies in fiscal 1972. *Ibid.*, p. 53.)

[40] Letter (B–160725) from the Assistant Comptroller General to the Commission, Nov. 30, 1972.

[41] See 10 U.S.C. 2304(a)(3) and 41 U.S.C. 252(c)(3) (1970) for ceiling of $2,500.

[42] See Part D, Chapter 4, for additional discussion of the use of simplified procedures for small purchases.

[43] Isolated statutes provide a few agencies with limited authorization to enter into long-term contracts with appropriated funds. See, for example, 42 U.S.C. 2201(u), 7 U.S.C. 427(i), 7 U.S.C. 416, 10 U.S.C. 2306(g), and 10 U.S.C. 2352 (1970). A list of statutes providing authority for long-term contracts is found in Study Group 2, *Final Report*, vol. III, appendix 1 to chapter 3, pp. 1033–1035.

[44] A change in the character of the purchase would bring into question whether the work completed was the work competed, that is, whether there had been a valid competition and a competively established price.

[45] "Start-up" costs are nonrecurring costs, such as the expense of training labor or of purchasing equipment for the specific contract.

Both ASPA and FPASA [54] require that cost-type contracts contain a provision for advance notification to the procuring agency by the contractor of cost-plus-a-fixed-fee subcontracts and of fixed-price subcontracts in excess of $25,000 or five percent of the estimated cost of the prime contract.

These statutory provisions, while not objectionable per se, do not establish an adequate system for the review of contractor procurement transactions and represent inflexible requirements which can result in an unnecessary and inefficient use of resources. They typify the kind of detail that should be eliminated from the statute and made a part of the policy responsibilities of the executive branch. Both ASPR and FPR now contain criteria for reviewing contractor purchasing systems and transactions. In Chapter 8, we discuss the need for placing more emphasis on the review of contractor purchasing systems and recommend the adoption of a Government-wide policy in this area. We conclude that the guidelines for review and approval of contractor purchase transactions should be established by the Office of Federal Procurement Policy.

[54] 10 U.S.C. 2306(e); 41 U.S.C. 254(b) (1970).

CHAPTER 4

The Regulatory Framework

After statutes and Executive orders, agency regulations are the most important written means for directing the Government procurement process. At the Government operating level, regulations provide the main, if not the sole, reference source for guidance on Government procurement policy and procedures. Regulations affect contractors directly to the extent that they are given the force and effect of law and are binding on contractors and indirectly to the extent that they control contracting officers and thus limit what contractors can accomplish by negotiation.

The impact of regulations goes beyond the immediate contracting parties. Subcontractors and vendors are affected through flowdown clauses.[1] Workers, minorities, and others also are affected by wage, hour, and work standards,[2] as well as by nondiscrimination,[3] safety,[4] health,[5] insurance,[6] and environmental requirements [7] which implement social and economic objectives. Buy-American,[8] gold-flow,[9] and barter policies [10] have international repercussions. Thus procurement regulations have widespread ramifications and many parties in interest.

Problems involving the substance of specific regulations are discussed throughout this report. Here we focus on the regulatory process and consider problems relating to:

- The organization, composition, and volume of procurement regulations
- The extent of industry and other public participation in procurement rulemaking
- The legal force and effect of procurement regulations.

A SYSTEM OF COORDINATED PROCUREMENT REGULATIONS

Multiplicity of Procurement Regulations

Recommendation 10. Establish a system of Government-wide coordinated, and to the extent feasible, uniform procurement regulations under the direction of the Office of Federal Procurement Policy, which will have the overall responsibility for development, coordination, and control of procurement regulations.

In our review, we found a burdensome mass and maze of procurement and procurement-related regulations.[11] There are:

- Too many primary sources of regulations
- Numerous levels of supplementing and implementing regulations
- Numerous collateral procurement-related regulations, issued independently of, but nevertheless affecting the procurement process and organization.

And there is no effective overall system for coordinating, controlling, and standardizing regulations. Basically, there is no central

[1] FPR 1-3.814-3.
[2] FPR 1-12.605.
[3] FPR 1-12.803-2.
[4] FPR 1-12.904-1.
[5] *Ibid.*
[6] FPR 1-10.3, 1-10.4, 1-10.5.
[7] Proposed Environmental Protection Agency regulations relating to Administration of the Clean Air Act with respect to Federal contracts, grants, and loans. See also Executive Order 11602, same subject, June 29, 1971, 3 CFR 167 (1971 Comp.).
[8] ASPR 6-100.
[9] ASPR 6-800.
[10] ASPR 4-501.

[11] See fig. 1, for an example of a system of regulations as it impacts on a local procurement officer.

manager and therefore no Government-wide management of procurement regulations.[12] We emphasize that our recommendation does not require publication of a single Government-wide procurement regulation; the recommendation can be accomplished through the present structure. Leadership by the Office of Federal Procurement Policy in directing and controlling a coordinated and uniform system of regulations is the key to our recommendation.

There are two primary procurement regulations: the Armed Services Procurement Regulation (ASPR), and the Federal Procurement Regulations (FPR). The statutory relationship between the ASPR and the FPR is somewhat nebulous and varies with the subject matter involved.[13] Although the question of preeminence or authority of one over the other has not been pressed to a conclusion, in practice, a working accommodation has been achieved in areas of mutual interest.

There are also semiautonomous procurement regulations for AEC, CIA, NASA, TVA, Bonneville Power, and, until recently, the Coast Guard. Each of these has some degree of independence from the FPR, though the extent to which this is manifested varies in form and practice. For example, the NASA PR, like the ASPR, is published independently of the FPR. The AECPR, however, generally follows the FPR.

Collateral policies and procedures are issued by nonprocuring organizations outside the normal channels of procurement regulations. Though not designated as "procurement regulations," they directly affect procurement. Some are interagency, some intra-agency. The interagency collateral policies and procedures are issued by such agencies as:

- Department of Labor
- Small Business Administration
- Environmental Protection Agency
- Office of Management and Budget
- General Services Administration (with respect to property management and disposal)
- Renegotiation Board
- General Accounting Office.

Intra-agency collateral policies and procedures are issued by high-level nonprocurement elements within an agency (such as comptroller, engineering, accounting, supply, audit, and agency administration). In the Department of Defense (DOD) these may take the form of DOD directives, manuals, circulars, and instructions.[14] Some directly affect procurement, such as those governing funding, source selection, management reporting systems, and data requirements.

Supplementing and implementing—and often repeating and rephrasing—the top-level procurement and collateral regulations are subordinate agency procurement and collateral regulations. These sometimes flow down to the fourth and fifth levels. For example, in the Army, the ASPR and other primary regulations are amplified by five levels of intermediate regulations and instructions (see fig. 1).

As a result, a contracting officer at the U.S. Army Electronics Command, Philadelphia Procurement Division, has a five-foot shelf of procurement and procurement-related regulations which he is responsible for knowing and applying to the extent they govern his area of procurement (see fig. 2).[15]

This five-foot stack of regulations does not include interagency regulations such as those of the Department of Labor. Apart from the burden of absorbing and piecing together all this guidance and reducing it to everyday practice, there is the mechanical task of keeping the books up-to-date. Considerable manpower is expended for this purpose alone. For example, revisions 8 and 9 to the 1969 edition of ASPR (published in a seven-month period) totaled 1664 pages and represented about 53 percent of the total number of ASPR pages. DOD has estimated that its internal cost for posting these two revisions was $482,000 (72 man years).[16]

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[12] The Federal Procurement Regulations staff and the Interagency Procurement Policy Committee established by GSA cannot in practice be considered a central manager of procurement regulations as we envision one should operate. See Chapter 2 for a discussion of the proposed Office of Federal Procurement Policy.

[13] The following provisions of FPASA have circumscribed in some respects the seemingly broad authority of GSA to prescribe procurement policies and regulations under FPASA: 40 U.S.C. 474, 481(a); 41 U.S.C. 252(a)(1)–(2) (1970).

[14] An example of such an intra-agency collateral regulation is DOD Directive 5000.1, *Acquisition of Major Systems.*

[15] ASPR 1–403.

[16] Memorandum for the Chairman, ASPR Committee (Case 71–87), Feb. 4, 1972, p. 4.

ASPR covering formal advertising only ten are identical, while most have two or three different versions. A comparison of the standard fixed-price supply contract clauses in the FPR with those in ASPR and the NASA PR shows that only 15 of 36 are identical, while most have two or three different versions.

These multiple, and for the most part, minor differences add to the burden of contracting. The parties must make sure just what version is applicable in any procurement and what, if any, difference in substance is intended. In many cases, the differences do not seem to be based on significant differences in program requirements or agency operations.

Multiple and nonuniform regulations complicate contract administration for offices that serve many agencies. These offices must tailor their practices and adapt their personnel to the various contract clauses, policies, and procedures established by the different purchasing agencies.

For the same reasons, the present system also is complicated for contractors dealing with different agencies, for they must adjust their pricing, negotiating, and contracting practices to the variable requirements and regulations of the different agencies or determine that differences in contract clauses are not significant. For example, in dealing with DOD they must concern themselves with Weighted Guidelines for Profit, Contractor's Weighted Average Share (CWAS) in determining overhead, mandatory submission of prospective subcontractor cost or pricing data, the DOD Manual for Control of Property in Possession of Contractors, Defense Financing Regulations, Rules for Avoidance of Organizational Conflicts of Interest, and use of the Material Inspection and Receiving Report (DD Form 250). In dealing with other agencies, such regulatory requirements are either different or nonexistent. There are variations even in cost principles. DOD, for example, has much more liberal policies than does AEC for reimbursing an allocable share of a cost contractor's bid and proposal costs and for independent research and development costs.[23]

As previously noted, the ASPR coverage is more complete and detailed than that found in other regulations. Prima facie, therefore, Government-wide coordination of regulations as recommended would involve extension of the ASPR coverage to other regulations. To the degree this would bring about greater uniformity, the result would be beneficial. However, if not properly managed, the interagency coordination process could handicap all agencies in issuing regulation changes needed to provide prompt solutions to problems.

Differences in Format

In reviewing major procurement regulations, we found troublesome differences in format and method of publication, including the numbering of paragraphs. These differences are not warranted and result in needless additional cost to the Government.[24] To the extent possible, the proposed system of Government-wide coordinated procurement regulations should require a uniform method for numbering regulations at all levels.

Functional Procurement Manuals

Procurement personnel at the buying level who are forced to handle and update a "five-foot shelf" of procurement regulations, in many cases use only a small portion of the regulations because their responsibility is limited to a specific area (for example, construction, small purchases, interdepartmental orders, research and development, or standard commercial items). Various sources in and out of Government have recommended that the basic procurement regulations be broken up into functional volumes to simplify issue, handling, and use and to save money when a change affects only one type of procurement, such as R&D, construction, and professional services. For example, it seems unnecessary and costly to burden the 35,591 holders of ASPR [25] with a change to a contract clause for mortuary services.[26]

[23] Compare ASPR 15-205.3, 15-205.35 and AECPR 9-15.5010-12, 9-15.5010-13. See also Part B for discussion of bid and proposal (B&P) and independent research and development (IR&D) costs.

[24] See Study Group 3 (Regulations), *Final Report*, Nov. 1971, pp. 89-125.

[25] ASPR Subcommittee Report, ASPR Case 71-87, Feb. 4, 1972, p. 3.

[26] ASPR 7-1201.13.

	indicating that the technical proposals may be accepted without further discussion and the Government may proceed with the second step without requesting further information.			
3–1000 (subpart J) Contractors Weighted Average Share in Cost Risk (CWAS) & ASPR XV.	This subpart sets forth the concepts and objectives which govern the Contractor Weighted Average Share in Cost Risk (CWAS) technique. It also sets forth detailed procedures for determining the contractors weighted average share for a given fiscal year as a percentage of costs incurred by type of contract during the contractor's fiscal year.	The FPR lacks the coverage provided in ASPR 3–1000 and ASPR XV.	No coverage in AEC regulations on CWAS.	NASA regulations lack CWAS standards as provided in ASPR 3–1000 and ASPR XV.
Part 15—Contract Cost Principles and Procedures. Although much of the language in this part compares word for word there are many areas of language differences which can result in different policy interpretations, e.g., in ASPR 15–401.2 the words "home office" are used whereas in FPR 1–15.402–2 the words "central or branch office" are used.	The use of the CWAS indicator in ASPR 15–201 et seq. constitutes the major variance in ASPR, FPR, and NASA PR cost principles.	The language in FPR 1–15.4 is different than ASPR 15–4. This subpart provides cost principles for Construction and Architect-Engineer Contracts.	AEC, in subpart 9–15.50, charts a generally independent course on the subject of cost principles and rules, with the exception of its use of those in FPR 1–15.3 for cost-reimbursement-type contracts with educational institutions. However, contracts with educational institutions for the operation of AEC-owned contractor-operated research laboratories are governed by 9–15.50 and 9–7.5006–9. See 9–15.103(a).	NASA cost principles are substantially similar to ASPR, however, NASA does not make use of the Contractors Weighted Average Share (CWAS) as defined in ASPR Part 3, Subpart J. Also NASA PR 15.205–30 provides that pre-contract costs can be subject to the Date of Incurrence of Costs clauses in 7.205–52, 7.404–5, and 7.453–52.

*Citation refers to ASPR section.
Source: Study Group 3, *Final Report*, Nov. 1971, pp. 56–58.

requirements of the Administrative Procedure Act.[32] Elimination of the "contracts" exemption was proposed by Recommendation 16 of the Administrative Conference of the United States adopted at its Third Plenary Session, October 21–22, 1969, Washington, D.C. Following that recommendation, bills were introduced in Congress to eliminate the exemption.[33]

We agree that giving contractors and other interested parties an opportunity to comment on proposed procurement regulations during their development is essential to ensure consideration of all available alternatives and information, promote better understanding and relationships, and enhance the acceptability of regulations when adopted. At the same time, we recognize a very practical problem—how to be fair without unduly burdening the procurement process with APA-type rulemaking procedures. Subjecting the process of issuing procurement regulations to the APA procedures has the potential for blocking procurement actions by litigation over whether an agency complied with the rulemaking requirements.

Current Practices

Current agency practices for soliciting industry comment on proposed procurement regulations are extremely varied. Some agencies never solicit comment from industry; some do so occasionally; others, like DOD and to a lesser extent GSA, do so fairly regularly, but even they solicit comments from selected industry, professional, and institutional associations, and do not publish proposed regulations in the *Federal Register* for the benefit of individual contractors and the public. Agencies sometimes make exceptions in cases seriously affecting contractors, frequently solicit comment too late to be fully effective, and provide little or no rationale for proposed or adopted changes or for rejecting industry recommendations.[34]

Some agencies have voluntarily adopted APA rulemaking procedures for their agencywide procurement regulations following the Administrative Conference action; however, the major procuring agencies have not.[35] The agencies that have are not necessarily complying with the APA since strict application of the APA definition of "rules" [36] to contract matters would involve more than agencywide procurement regulations. Many implementing and collateral regulations within an agency would fall within the APA definition of "rule." Accordingly, the limited voluntary compliance rendered by some agencies does not indicate what the full impact of the APA would be if its rulemaking procedures were made applicable to procurement regulations.

Problems With Current Practices

The general practice of soliciting industry comment, after the Government tentatively has agreed upon a proposed change, discourages industry. It feels handicapped in having to overcome hardened attitudes. Industry also questions whether regulations can be fair when they are formulated solely by representatives of procuring agencies.

There also has been criticism that "mandatory" and "standard" clauses prescribed by procurement regulations have seriously eroded the bargaining process in contracting. Critics say that the only real opportunity industry has for negotiating changes to mandatory contract clauses, cost principles, and other significant contract elements is through meaningful participation in the rulemaking process.

We have concluded that the present varied practices of agencies in soliciting comments on proposed regulations in some cases and not in others do not meet minimum standards for "promoting fair dealing and equitable relationships among the parties in Government contracting," [37] as set forth in the Act establishing this Commission. There is a pressing need for a regularized system of participation by con-

[32] Grossbaum, *Procedural Fairness in Public Contracts: The Procurement Regulations;* 57 *Va. L. Rev.* 171 (1971).

[33] S. 3569, 91st Cong., 2d sess. (1970); H.R. 8369, 92d Cong., 1st sess. (1971); S. 1413, 92d Cong., 1st sess. (1971), the Kennedy Bill.

[34] A pointed example of not soliciting industry comment involved the Navy "anticlaims" clause promulgated in Navy Procurement Circular No. 15, Mar. 6, 1970, which raised a hue and cry by industry and interested bar groups because there was no opportunity for industry to evaluate and offer comments on the clause. See BNA *Fed. Cont. Rep.*, No. 341, Aug. 31, 1970, pp. K–1 to K–3.

[35] DOD, GSA, NASA, and AEC have not gone along with the Administrative Conference's request, as part of its recommendation, that agencies voluntarily adopt such procedures.

[36] 5 U.S.C. 551(4) (1970).

[37] See Public Law 91–129, sec. 1(11).

Conclusions

There is a need to establish criteria and procedures within the executive branch to give contractors and other interested parties an opportunity to comment on proposed procurement regulations during their development. Adoption of APA rulemaking as a means of achieving such outside participation is fraught with many administrative difficulties and possibilities of delaying litigation which offset the minimal benefits attained by APA's requirements of notice and opportunity to comment. The benefits of meaningful outside participation during the development of procurement regulations can be attained much more easily through executive branch action.

In lieu of inflicting the uncertainties of the APA on the procurement process and the agencies, we favor a requirement that the Office of Federal Procurement Policy establish criteria for participation in development of procurement regulations. Among other things, the office could:

- Distinguish between ASPR, FPR, and agency-level regulations and lower-level regulations
- Distinguish between matters such as bid solicitation, contract clause requirements, and award and selection procedures which directly affect contractors and matters such as internal management and organization requirements which only indirectly affect contractors
- Provide for means, alternative or supplementary to the *Federal Register,* of giving notice of proposed rulemaking
- Identify the parties eligible to participate in procurement rulemaking
- Consider the extent to which its rulemaking procedures should be mandatory, preferential, or wholly optional. (The purpose would be to foreclose or minimize the potential for litigation over a failure to comply.) [43]

Balancing the public against the individual interests involved, we question whether a pending procurement for an urgent requirement should be delayed or upset by litigation—for example, to enjoin or invalidate an award on the ground that the agency incorrectly interpreted and relied on one of the vague exceptions from the APA rulemaking requirements and, therefore, did not first publish the regulation in the *Federal Register* for comment. In lieu of court review, the Office of Federal Procurement Policy could consider alternative informal administrative procedures (for example, providing for reconsideration of a noncomplying promulgation in response to a petition for a change in the regulation or recognizing that in this as in other areas aggrieved parties can bring the matter to the attention of higher authority within the agency or elsewhere within Government).

Finally, placing the authority in the Office of Federal Procurement Policy would allow the flexibility needed to adapt and refine procurement rulemaking procedures in the light of experience and future developments.

THE LEGAL FORCE AND EFFECT OF PROCUREMENT REGULATIONS

A doctrine of law (the "Christian Doctrine") has developed in the Court of Claims and other Federal courts which generally holds that certain procurement regulations (generally summarized as those that implement a basic and specific procurement law or policy and other regulations which are for the benefit of both the Government and the contractor) have the force and effect of law and must be included in or applied to a contract, either actually or by operation of law, and neither the Government nor the contractor can waive them.[44] This

of general applicability has a substantial impact on the regulated industry, or an important class of the members or the products of that industry, notice and opportunity for comment should first be provided.

The court's language, which includes terms such as "substantial impact" and "important class" to define when a proposed regulation requires APA rulemaking, also is subject to varying interpretations by reasonable persons.

[43] For example, see *Ballerina Pen* v. *Kunzig,* 433 F.2d 1204 (1970); *Blackhawk Heating & Plumbing* v. *Driver,* 433 F.2d 1137 (1970). In this regard, a distinction should be made between questions involving noncompliance with rulemaking procedures and questions involving substantive authority for regulations or failure to comply with requirements in matters other than rulemaking.

[44] For a detailed analysis, see the research report submitted to the Commission by Herman M. Braude, John Lane, Jr., and Frank Krueger for Study Group 3, *The "Christian Project—The Force and*

CHAPTER 5

The Procurement Work Force[1]

The procurement process is a support function—not an end in itself. However, its importance within the Federal establishment cannot be minimized because the organizations and personnel engaged in performing the procurement process represent the means by which Federal objectives and missions are accomplished. To the extent that these organizations and personnel operate at less than optimum level, the effectiveness of the process and the realization of national objectives suffer.

Our studies revealed that the Federal organizations and personnel responsible for procurement generally have done and are doing a good job.

ORGANIZATION

Place of Procurement in Agency Organizations

Recommendation 12. Reevaluate the place of procurement in each agency whose program goals require substantial reliance on procurement. Under the general oversight of the Office of Federal Procurement Policy, each agency should ensure that the business aspects of procurement and the multiple national objectives to be incorporated in procurement actions receive appropriate consideration at all levels in the organization.

An in-depth analysis was made of the organizational structures of 14 of the largest executive agencies of the Government. To accomplish their missions these agencies rely heavily on procurement. Our analysis gave particular attention to the organizational relationship of procurement to mission-oriented functions.

The official responsible for procurement reports to the head of the agency, or ranks with other functional managers, in only three[2] of the 14 agencies. In the other 11 agencies, he is three to seven levels removed from the head of the agency and is well below the level of other officials with whom he must interface.

The procurement officials of these agencies report organizationally to an Assistant Secretary for Administration, who may be responsible for as many as ten distinct agency functions. The word "procurement" or "grant" seldom appears in the title of primary offices; but the procurement function is found as one of several responsibilities in an activity such as an "office of general services." Little direct top management attention is devoted to procurement or grant problems and the lack of understanding of the importance of the procurement function by agency heads is apparent.

Within the civil agencies, program technical functions were readily identifiable; they were universally placed in a dominant position;

[1] Study Group 5 (Organization and Personnel) made some analyses of the grants process; the group found that the problems of organization and personnel encountered in the administration of grants are basically the same as those in procurement. Federal expenditures for procurement and grants in fiscal 1972 exceeded $96 billion (about 41 percent of the Federal budget).

[2] Study Group 5, *Final Report*, appendix I, p. 619. The 14 agencies covered by this phase of the study were: Departments of Agriculture, Defense, HEW, HUD, Labor, and Transportation; and AEC, AID, EPA, GSA, NASA, NSF, OEO, and TVA. The three agencies referred to are DOD, GSA, and TVA.

(with rare exceptions) knowledge of applicable laws, Executive orders, and regulations essential to the proper performance of the contracting function.

The contracting authority being exercised generally resides in the "position" occupied. This is particularly true in the research and development and in the socioeconomic projects which are accomplished through contractual arrangements with non-profit as well as profit-making organizations. The positions of project officers, program managers, division directors, branch chiefs, etc. included in their "position description" authority to contract for "such services as required." The occupants of these types of positions are generally selected on the basis of their expertise in the particular mission to be accomplished. The contracting aspects, generally involving substantial expenditures of appropriated monies, are consummated by personnel within the specific organization whose experience, education, etc. is technically oriented rather than procurement oriented. . . . Where this procedure of delegation of contractual authority was employed, no provisions were set forth in the activities' procedures for determining the capability or qualification of an individual authorized to sign contracts in the name of the United States Government. . . .[7]

The inadequacy of the delegation of approval authority to contracting officers is a major cause of the dilution and diffusion of his inherent responsibilities. Concern over the role of the contracting officer is not new. Similar concerns were expressed by the Commission on Organization of the Executive Branch of the Government (the Hoover Commission) in 1955. That commission was concerned primarily with the practices that constrained the judgment of the contracting officer and recommended strengthening the role of the contracting officer "in the interest of more expeditious and effective buying." [8]

The Comptroller General's 1970 Report, despite the changes that had occurred in the 15 years that intervened, emphasizes the same theme:

> There is a need to develop a competent procurement work force *with the capacity for exercising more initiative and judgment in making procurement decisions. The mass of detailed instructions currently in use to guide Government procurement personnel is no substitute for a highly competent and motivated work force.*[9] (Emphasis added)

We endorse this conclusion as it applies to DOD, but we would extend it throughout the Government. As discussed in Part J, there are 4,000 provisions of Federal law, reams of interpretive documents, and thousands of pages of regulations and instructions relating to procurement. We have made recommendations regarding these matters in earlier chapters, but the success of any solution will depend largely on the effectiveness of the procurement people who will be doing the work. Accordingly, agencies must recognize the impact of organizational location on effective performance of the procurement function. Further, agency heads should delegate authority to place contracts and grants to specifically designated individuals who are qualified by training, ability, and experience to carry out the responsibilities involved.

It is significant to note that eight of our 13 study groups made recommendations with respect to the role of the contracting officer. The central point of agreement was that the contracting officer's authority over the business aspects of the contract, and as Federal spokesman to the contractors, must be clearly understood and effectively enforced at all management levels.

Great changes have taken place in procurement in the last 25 years. The complexity of today's procurement calls for a broad engineering and technical support base. Specialists in fields such as engineering, the physical sciences, auditing, and law must participate and, indeed, may dominate in some procurements or at various states in others. The role of the contracting officer is not to preempt these specialists; rather it is one of resolving

[7] Note 3, *supra.*, p. 80–81.

[8] U.S. Commission on Organization of the Executive Branch of the Government, *Task Force Report on Military Procurement*, U.S. Government Printing Office, June 1955, p. 67.

[9] U.S. Comptroller General, Report B–164682, *Action Required to Improve Department of Defense Career Program for Procurement Personnel*, Aug. 18, 1970, p. 5.

The Office of Management and Budget (OMB) has an effect on personnel policies through its manpower and budgetary responsibilities. OMB also has a responsibility which it has never exercised Government-wide "to plan and develop programs to recruit, train, motivate, deploy and evaluate career personnel." [13] The Civil Service Commission [14] is responsible for general personnel policies and standards, investigations, retirement, personnel management evaluation, and intergovernmental personnel programs and management services. Federal agencies are responsible for carrying out personnel activities in accordance with the policies of OMB and the Civil Service Commission. Finally, managerial elements within agencies are responsible for ensuring the availability of qualified staff to carry out the procurement process efficiently.

Personnel management is not a matter for personnel or manpower people alone, but for personnel, manpower, and procurement management people working together. Achieving an effective personnel management program within this framework requires close cooperation and coordination between personnel offices and operational elements. We found cooperation and coordination to be inadequate as evidenced from our experience in trying to obtain satisfactory data on the existing work force and in the results of our comprehensive evaluation of the overall work force situation and its prospects for the next decade.

The management officials directly responsible for procurement—at the highest levels in the executive branch and within each agency as well as procurement managers supervising the work—must exercise the leadership required to maintain a work force competent to cope with the size and complexity of the procurement task. Analysis of the statistics developed by Study Group 5 [15] regarding age distribution and retirement potential, coupled with its findings on the extent and adequacy of existing training opportunities, make this a matter requiring immediate attention in a long-range perspective.

The Office of Federal Procurement Policy must not usurp the manpower roles of either the Civil Service Commission or the procuring agencies. The Commission should continue to promulgate overall manpower and personnel policies and the agencies should manage their own work forces. The Office of Federal Procurement Policy must, however, provide leadership in:

- Determining and providing for the overall procurement personnel needs of the Government
- Providing for Government-wide activities (or Government-wide use of individual agency activities) whenever necessary to prevent redundant or inconsistent efforts
- "Bringing heads together" when progress is stymied.

Our study revealed that existing personnel management information systems are inadequate and are unable to provide current information (vital statistics on positions and personnel) on the procurement work force. Data from existing sources was found to be incomplete, inaccurate, and not current. It was impossible to accumulate sufficient information from the Federal agencies to study or analyze the characteristics of the overall procurement work force. We therefore used a questionnaire in order to develop the requisite information.

With greater emphasis being placed on the procurement function and the stated need for improving the quality, efficiency, and economy of Government procurement organizations and personnel, it is imperative that a comprehensive Federal procurement personnel information system be implemented. This system should cover all procurement and procurement-related personnel (for example, lawyers, engineers) who spend 50 percent or more of their time in the procurement process.

Recruiting and Trainee Programs

Recommendation 16. Establish a recruiting and trainee program to assure development of candidates for procurement positions in all agencies, at all levels, and in all required disciplines. Special attention should be given to college recruitment to obtain

[13] *U.S. Government Organization Manual, 1972–73*, p. 71.
[14] *Ibid.*, p. 517 ff.
[15] Note 10, *supra*.

ance between employee tenure and promotion rights and long-range needs of the agencies.

Recommendation 18. Establish grade levels together with job prerequisites to reflect the authority and responsibility vested in procurement personnel.

Recommendation 19. Establish a rotation program to provide selected future procurement management personnel with a variety of related job experiences and individual assignments throughout the Government and in various locations.

Recommendation 20. Structure career development, promotion, and reduction-in-force programs to reflect a longer-range viewpoint of what is best for the overall needs of the agency and of the Government.

TENURE AND PROMOTION RIGHTS

Government employees have substantially more stability in their employment than is possible in the private sector. This is true because the Civil Service law and implementing regulations are designed to remove the questions of tenure and promotion from political control. The rules of employment for the civil servant place heavy emphasis on longevity and numbers of people supervised as qualifications for promotion and increased responsibility.

We endorse the objectives of confining political control to those few policy positions where it is essential and of maintaining a strong work force capable of professional performance regardless of party politics.

GRADE LEVELS

In two important areas, grade levels and reduction-in-force procedures, we believe the current Civil Service regulations and agency implementation actions do not build and maintain the procurement work force in a manner that best serves the long-range interests of the Government or its employees.

Under Civil Service standards the highest level a nonsupervisory contract negotiator can attain is GS–15. However, personnel in most agencies believe the description of duties and responsibilities in the Civil Service position classification standards for the GS–13 level, the so-called "journeyman" level, are such that it is impossible to rate an employee above that level unless supervisory duties are assigned.

The Air Force recently completed a study that compared grades of engineers and procurement personnel in System Project Offices (SPO) which handle only large major system acquisition programs. Excerpts from the study indicate that:

> . . . Another contributing factor to these problems may be the lack of professional recognition (and consequently lower grade levels) of the procurement function in relationship to other career fields within the total acquisition process. To deal effectively with other professionals requires parity; psychological and actual. The Department of Defense analyzed the key personnel assigned to 24 specific project managed weapon systems within the military services. Of the 1506 personnel files received for review, 350 military and 1156 civilian, it was found that "60 percent of the total civilian work force in those project offices were engineers, while only slightly over 10 percent were in the procurement function." The remainder of the work force consists of administrative, fiscal and supply personnel. (These figures must be viewed in the context that the SPO's do not do any engineering per se; it's all contracted out.) One must ask if the business management function is well served by this disparity of manning emphasis. This is not a criticism of the people; they do the best they can; it is the system that is suspect.
>
> . . . Another facet is grade disparity within the SPO. A grade comparison made of engineers, who constitute the majority of personnel assigned, and procurement personnel, also gives evidence of a further disproportionate structure between these career fields in these project offices. Over 16 percent of the engineers are GS–15s or higher vs. 11 percent in procurement with none above GS–15, as shown in the following:

REDUCTION IN FORCE

Generally, reduction-in-force (RIF) procedures eliminate the least senior employee in an occupational series and grade level, giving consideration to other statutory requirements such as the Veterans Preference Act and performance ratings.[23] If a position in one occupation and grade is eliminated and the incumbent is otherwise qualified, he may displace another employee with less seniority at the next lower grade, who may in turn displace the next less senior employee in the next lower grade, and so on.

This procedure may require an agency to lay off outstanding performers having a high potential for professional development, while retaining average or even marginal employees, some of whom may be long past the combination of age and years of service required for retirement.

Reduction-in-force procedures also may have a devastating effect on long-range training or career development programs. Although an employee is protected from reduction-in-force while in trainee status, once he completes his training he becomes the most vulnerable employee. Thus, not only may the funds spent on his development be wasted (if he does not secure another Federal position for which he was trained), but an overall training plan may be completely negated.

In view of these limitations and problems arising from current reduction-in-force procedures, the agencies, together with the Civil Service Commission, should make provision for greater recognition of relative job performance in determining the retention rights of employees. The practical effect of the current performance rating system and reduction-in-force procedures is that there is inadequate recognition of merit and of the needs of the agency in determining which employees will be retained.

Agencies should give increased emphasis to those programs which are designed to place employees in position vacancies for which they are qualified rather than extending the chain reaction of employees "bumping" others throughout an entire organizational structure. A "pool" should be established within the Civil Service Commission and/or geographical areas whereby employees designated for reduction-in-force would be "pooled" for a period of time to facilitate matching displaced personnel with vacancies available elsewhere throughout the entire Government.

[23] 5 U.S.C. 3502 (1970).

TRAINING PROGRAMS AND FORMAL EDUCATION OPPORTUNITIES

Recommendation 21. Establish a Federal Procurement Institute which would include undergraduate and graduate curricula, procurement research programs, executive seminar programs, and other academic programs.

Existing schools, courses, and formal education programs—some of which are excellent—do not adequately provide the special training needed to sustain the highly competent procurement work force required to handle the major contracting efforts of the Government. Most college curricula treat marketing in some depth but similar treatment of procurement matters is unusual. Most of the Government's schools are devoted either to specialty fields or to a basic approach. Formal education opportunities for civilian employees are rare and seldom have more than an indirect relationship to procurement management needs.

Government Schools

Government schools and programs of instruction in the procurement area vary significantly from one agency to another. We identified 12 Government schools, which conducted 194 procurement or procurement-related courses. These 12 schools are spread across four separate Federal agencies and organizations. The Department of Defense, because of its major role in procurement, has nine of the 12 schools; and there is one each in the Federal Aviation Administration, Department of Agriculture, and General Services Administration. DOD has the most extensive procurement education and career development programs within the Government.

study and research at the Institute or related institutions.

- Maintain liaison with professional organizations; participate in intergovernmental and international procurement conferences and related activities.

In the Field of Education:

- Formulate comprehensive education and training plans in cooperation with all agencies.
- Monitor education and training efforts throughout Government, industry, and the academic community, to include studies of the appropriateness and adequacy of such efforts.

Sponsor and publish studies and research materials relating to education for procurement operations and management.

Sponsor training for the faculties of schools instructing in procurement and related subjects.

Assist universities that wish to develop bachelor degree programs in the field of procurement.

Develop and conduct advanced degree programs in procurement, available to State and local governments and to contractor personnel.

Develop and conduct executive seminar programs for procurement management personnel.

The Institute must evolve in well-planned phases. During its initial phase, the Institute might not teach, but would conduct workshops and seminars for faculty from the various Government and civilian schools that now conduct procurement courses. Individual training should continue to be the responsibility of each agency, but the Institute should begin to coordinate procurement training on a Government-wide basis. It might also encourage, through grants and scholarships, advanced research and publication of texts to help establish the base of published data and the cadre of educators needed to support a broader program.

The Institute should eventually include a Graduate School where both Government (Federal, State, and local) and industry may send students for programs in Federal procurement management. A representative group of programs should be made available at the masters and doctorate levels. The Institute should offer a Fellowship Program (similar to the Sloan and Princeton programs) permitting outstanding individuals to do independent research. Such a program could be operated in conjunction with a Procurement Research Laboratory for the Office of Federal Procurement Policy and individual agencies. Executive seminars should be conducted to enable high-ranking Government and industry personnel to participate in procurement programs similar to the general programs held by the Brookings Institution and the Federal Executive Institute.

Maximum use should be made of approved university courses. Of particular importance will be the development of curricula that provides basic information for prospective students.

Degree credit for procurement courses and related courses conducted by both Government and civilian schools should be provided. Courses taken at several different schools and locations should qualify for credit toward a degree.

CIVILIAN AND MILITARY PERSONNEL ASSIGNMENTS IN DOD

One procurement problem, unique to DOD, requires comment. The mix of military and civilian personnel in the top and middle procurement management positions in DOD ranged from two percent military in the Defense Supply Agency to 33 percent in the Air Force.[26]

Each military service has its own career development and training requirements system which, as previously noted, differs from other military systems and also from those established by DOD for the civilian work force. The criteria[27] for designating management positions as either military or civilian provide that:

- Military personnel normally will be assigned to management positions when re-

[26] Note 3, *supra*, p. 680.

[27] Department of Defense Directive 1100.9, *Military-Civilian Staffing of Management Positions in the Support Activities*, originally dated Apr. 24, 1957, and reissued Sept. 8, 1971.

and military procurement career development and personnel management programs to obtain optimum utilization of the total personnel assets available and (2) requiring at the option of the agency, civilian procurement personnel, upon reaching journeyman level, GS–12, to agree to geographical job relocation for career development, as a condition to higher advancement and to satisfy the need for mobility.

In addition, the following actions should be taken by the military departments:

- Thoroughly evaluate designated procurement/contract administration and program management jobs to ensure that the professional requirements of such jobs are matched with personnel possessing such required professional qualifications.
- Eliminate such dual staffing of positions as may still exist. Staffing should be accomplished with either a civilian or military person, depending primarily upon the professional requirements of the position(s) in question.
- Ensure that the tour lengths of military personnel engaged in the procurement process are extended to provide for an average tour length of at least three to five years and for longer periods to stabilize major system program manager assignments. In connection therewith, encourage greater specialization and subspecialization of military personnel in procurement or procurement-related endeavors. Such action is deemed desirable to reduce excessive current turnover rates and ensure that military procurement managers are well trained and experienced for procurement assignments.

SUPPLEMENTAL VIEWS

The basic text describes deficiencies which exist relative to the ability of the various agencies to optimally utilize total personnel assets. While subscribing to the recommendations advanced therein, certain Commissioners* hold the view that additional steps are in order to precipitate quantum improvement in certain areas in the field of personnel management:

- Within the Department of Defense, desirable actions already underway should be expanded to more fully integrate civilian and military procurement career development/personnel management programs.
- In furtherance of the above, DOD, in concert with the Civil Service Commission where appropriate, should consider establishment of a "Defense Executive Procurement Service," which is envisioned to include certain personnel in super-grade and general/flag officer ranks assigned to certain designated managerial posts. Those who enter this "service" should be chosen by selection boards upon application by the individuals or by invitation of their superiors. Military and civilian personnel would receive equal consideration for entrance, and their promotion and assignment rules would be laid down by the Secretary of Defense and Service Secretaries. (Promotion by selection board and rates of pay perhaps set at any increment falling between minimum and maximum limits which might be established.)

Operation of the Defense Executive Procurement Service as envisioned would serve to provide greater stimulus toward personal excellence. Many assert such excellence is lacking, if not actively stifled, as a result of the manner in which certain disincentives operate within the framework of current Civil Service and military personnel policies.

An Executive Service would permit selection, placement, and retention of thoroughly qualified and motivated people in those key procurement management positions demanding such incumbents.

*Commissioners McGuire, Sampson, Sanders, Staats, and Webb.

CHAPTER 6

The Government Make-or-Buy Decision

POLICY

The Government relies heavily on contractors to provide goods and services needed to support its missions. Historically, Government policy has favored contracting for goods and services rather than providing them in-house. However, only limited expressions of this policy appear in the statutes [1] and executive branch procedures for its application have been subject to controversy.

Bureau of the Budget (BOB) Bulletin 55–4 (January 1955) was the first executive document to state the Government policy of reliance on the private sector. With minor changes, this statement was repeated in Bulletin 57–7 (April 1957) and Bulletin 60–2 (September 1959). BOB Circular A–76 (March 1966, revised August 1967) replaced Bulletin 60–2 and is currently in force; it states that the Government should rely on the private sector for needed goods and services except when:

- Use of a commercial source would delay or disrupt an agency program
- Direct performance is required for combat support, military training, or mobilization readiness
- The product or service is not available from a commercial source
- The product or service is available from another Government agency
- Procurement from a commercial source will result in higher cost to the Government.

From time to time Congress has shown concern over current interpretation and implementation of the policy. Businessmen charge that many goods and services are provided by Government agencies in direct competition with the private sector, whereas Government employee organizations contend that work which should be done by Civil Service personnel is contracted out. These and other difficult questions arise in deciding whether to "make or buy" in specific cases.

[1] See Part J, Appendix A.

Expression of Policy

Recommendation 22. Provide through legislation that it is national policy to rely on private enterprise for needed goods and services, to the maximum extent feasible, within the framework of procurement at reasonable prices.

For almost 40 years congressional committees have studied various aspects of Government activities that are or may be in competition with private enterprise. The first extensive study was made in 1932 by a special committee of the House of Representatives. It recommended that the House create a standing committee on Government competition with private enterprise.[2] Later studies of various aspects of the problem have been made by the Senate and House Appropriations Committees, the House Armed Services Committee, the Senate and House Committees on Government Operations, and the Senate Select Committee on Small Business.

In the early 1950's, the Intergovernmental Relations Subcommittee of the House Committee on Government Operations studied various aspects of Federal supply management,

[2] U.S. Congress, House, *Government Competition in Private Enterprise*, H. Rept. 1985, 72d Cong., 2d sess., 1933.

ment Operations held hearings on Government policy and practice with respect to contracts for technical services.[10]

The next hearings related to these issues held by the Special Studies Subcommittee of the House Committee on Government Operations in June 1967, focused mainly on NASA use of support service contracts.[11] GAO and the Civil Service Commission were critical of the extent to which NASA had relied on such contracts. NASA defended its practice on grounds of the need for rapid build-up and the mandate of the National Aeronautics and Space Act to make maximum use of the scientific and engineering resources of the United States.

The questions of legality and comparative cost were major issues. Further hearings by this subcommittee in early 1968 dealt with cost comparisons for support services[12] and resulted in recommendations that Circular A–76 be revised to include support services, but the recommendations were not adopted by BOB.

This lengthy history of congressional and executive branch efforts to develop and implement an effective "make-or-buy" policy is indicative of the complexities of the problem. We believe, as a first step toward its resolution, there should be a clear expression in law of the Government's policy for relying on the private sector for goods and services.

Implementation and Enforcement of Policy

Responsibility for implementation of Circular A–76 is assigned to the agencies and departments of the executive branch, most of which have issued implementing instructions. The circular also requires that all Government commercial and industrial activities[13] be inventoried and reviewed to ensure that their continued operation is in accord with the policy and guidelines provided.

Many examples of Government commercial and industrial activity can be cited; the rationales for the creation of and continued operation of such activities are as diverse as the activities themselves. Government activities that provide goods or services for *public* use, such as money (bills and coins), electric power, printed products, information and educational services,[14] and airports are excluded as not falling under the definition of a Government commercial or industrial activity.

In 1971, the Office of Management and Budget (OMB) requested a special report from the agencies on the status of their commercial and industrial activities. Information submitted in response to this request is shown in table 1.

The reports to OMB showed that:

- 2,899 activities (16 percent) had not been reviewed, although Circular A–76 required such reviews to be completed by June 30, 1968.
- With more than 15,000 activities reviewed, only 99 were discontinued or curtailed as a result of review.
- Of the 55 new starts proposed since October 31, 1967, 44 were approved, 9 were pending, and two were disapproved.

In early 1972, GAO reported that reviews of commercial and industrial activities by the military departments had not been effective.[15] The following specific deficiencies were cited:

> Except in a few cases where cost studies had been made, there were no explanations supporting local recommendations that in-house performance of activities be continued. Recommendations often were based on the reviewer's personal knowledge, and there was no evidence of the factors that had been considered.
>
> Although the Air Force and the Navy spent $1.7 billion for in-house, depot-level maintenance in FY '69, they did not review these activities as required by Circular A–76.

[10] U.S. Congress, Senate, Senate Committee on Government Operations, *Government Policy and Practice with Respect to Contracts for Technical Services—Status Report*, 90th Cong., 2d sess., May 17, 1968.

[11] U.S. Congress, House, Committee on Government Operations, *Support Service Contracts*, hearings before a subcommittee on Government Operations, 90th Cong., 1st sess., June 21, 1967.

[12] U.S. Congress, House, Committee on Government Operations, *A Cost Profile for Support Services*, hearings before a subcommittee of the Committee on Government Operations, 90th Cong., 2d sess., 1968.

[13] Circular A–76 defines a "Government commercial or industrial activity" as "one which is operated and managed by an executive agency and which provides for the Government's own use a product or service that is obtainable from a private source."

[14] Information and educational services provided to the public by Government include: books, bulletins, and brochures on agricultural topics, boating safety, fire prevention, libraries, museums, zoos, and so on.

[15] U.S. General Accounting Office, Report B–158685, *Better Controls Needed in Reviewing Selection of In-house or Contract Performance of Support Activities*, Mar. 17, 1972, pp. 1–2.

menting the policies, under the direction of a senior official in the Executive Office of the President, is proposed in Dissenting Recommendation 1 (see below). The entire Commission agrees (1) that stronger and more consistent implementation must be obtained and (2) that the method proposed in Dissenting Recommendation 1 would be *one* way of achieving that objective. However, the majority preferred not to specify a particular method in a formal recommendation, believing that the executive branch should have a free choice of methods in order to best accomplish the goal.

Cost Comparison Threshold

Recommendation 23. Revise BOB Circular A–76 to provide that Federal agencies should rely on commercial sources for goods and services expected to cost less than $100,000 per year, without making cost comparisons, provided that adequate competition and reasonable prices can be obtained.[16]

Circular A–76 does not require a cost comparison whenever the products or services involved cost less than $50,000 annually and there is reason to believe that adequate competition exists. Putting the cost comparison threshold at this level requires relatively costly administrative actions for fairly low dollar-value activities with little potential for significant savings. In furtherance of the policy of reliance on the private sector, the threshold should be increased to $100,000.

Cost Comparison Guidelines for Existing Activities and New Starts

Circular A–76 lists five exceptions to the policy; four of these do not require a cost comparison. When one is required, the guidelines set forth in the following recommendation should be used.

Recommendation 24. Base cost comparisons on:

(a) Fully-allocated costs if the work concerned represents a significant element in the total workload of the activity in question or if discontinuance of an ongoing operation will result in a significant decrease in indirect costs.

(b) An incremental basis if the work is not a significant portion of the total workload of an organization or if it is a significant portion in which the Government has already provided a substantial investment.[17]

The existing guidelines calling for the use of incremental cost comparisons have been a source of much controversy. Under BOB Bulletin 60–2, Government commercial and industrial activities were permitted on the basis of relative cost only when "the costs are analyzed on a comparable basis and the differences are found to be substantial and disproportionately large." Circular A–76 guidelines are based on relative economy of operation. With respect to cost comparisons, the Circular provides as follows in section 7(c)(3):

> An activity should be continued for reasons of comparative costs only if a comparative cost analysis indicates that savings resulting from continuation of the activity are at least sufficient to outweigh the disadvantages of Government commercial and industrial activities. No specific standard or guideline is prescribed for deciding whether savings are sufficient to justify continuation of an existing Government commercial activity and each activity should be evaluated on the basis of the applicable circumstances.

These guidelines are interpreted differently by each agency; they include intangible factors as well as calculable out-of-pocket costs, and generally require use of cost-accounting data that are not available to many agencies.

Although relative cost is only one of the five criteria which justify exception to the policy expressed in Circular A–76, the implementing instructions of some agencies appear to place inordinate emphasis on it. For example, DOD instructions state:

> DOD components will be equipped and staffed to carry out effectively and economically those commercial or industrial activities which must be performed internally in order to meet military readiness requirements. All other required products or services will be obtained in the manner least costly to the

[16] See dissenting position, *infra*.

[17] See dissenting position, *infra*.

For purposes of compatibility with previous recommendations, and based on the same rationale, the above definition should be amended to cover any case where the new capital investment or additional annual operating cost is $100,000 or more.

Circular A–76 stipulates that a new Government commercial or industrial activity will not be initiated on the grounds of relative economy unless the savings, compared to commercial performance, is greater than a specified differential. While the amount of this differential should vary in individual circumstances with the amount of investment and risk involved, the circular prescribes that it normally should be at least ten percent. Experience indicates that, once an in-house operation has been established, and a substantial start-up investment has been made, conversion to contract seldom occurs. In view of the importance of this original "new start" decision, we believe a higher differential is desirable to strengthen the general policy of reliance on private enterprise, although a certain amount of flexibility is needed to deal with factors such as risk and uncertainty.

Dissenting Position

A number of the Commissioners* do not fully support the concept presented as the Commission position. They do agree with the need for a statutory expression of policy as embodied in Recommendation 22 of the Commission's position but would provide for specific guidelines for implementing the policy. The dissenting Commissioners further believe that cost comparisons should not be required, but should their use continue, they suggest that the guidelines cover ongoing activities as well as new starts. Their recommendations and reasons therefor are discussed in the following paragraphs.

IMPLEMENTATION

While the report adequately points out the need for stronger implementation of the policy of reliance on the private sector, the Commission's recommendations do not adequately treat with existing Government activities. The dissenting Commissioners believe that strong implementation including a thorough review of ongoing activities is imperative, as these activities have greatly proliferated in recent years. It is felt that a specific recommendation is required since Executive policy has been in existence for many years but has not been effectively implemented.

Dissenting Recommendation 1. Designate a senior member of the Executive Office of the President to devote his full time to the implementation of the policy of reliance on the private sector. He should be assisted by an interagency task force whose members also would be full time for a period of one to two years or until the program is thoroughly implemented. This task force would:

(a) Work with each principal agency to:

(1) Lay out a definitive time schedule covering the completion of the agency's inventory of commercial or industrial activities being performed in-house.

(2) Outline in order of priority the analyses to be conducted.

(b) Maintain a review of the actions of each agency on the program and examine the studies made by the agency of its major activities in order to offer assistance and advice.

COST COMPARISONS

We cannot support the concept of using cost comparisons and offer the following recommendation in lieu of Commission recommendations 23, 24, 25, and 26.

Dissenting Recommendation 2. Require Federal agencies to rely on the private sector except for those cases where:

(a) Such reliance would truly disrupt or significantly delay an agency program.

(b) In-house performance is essential for the national defense.

(c) The product or service is not and cannot be made available in the private sector and is available from a Federal source.

Take all practical steps to encourage and develop additional private sources in the unlikely event that sufficient competitive sources are not available in the private sector. Only

*Commissioners Beamer, Gurney, Horner, and Joers.

at a single time to maximize the use of invested resources that cannot be recaptured in any other way. The inability of Government to make short-term decisions and to phase out operations completely invalidates this comparison.

The need to guard against ever-increasing growth in the size of Government is manifest in recent history. At present, nearly one-fifth of the civilian work force in our country is on the payrolls of Federal, State, and local governments,[25] while many of our world competitors are supporting a public payroll that is substantially less than half of that proportion. There are good reasons for this imbalance, considering our responsibilities in the world community, but the obvious tax consequences emphasize the overwhelming need to reduce this burden and simultaneously increase the tax base. Reducing the number of Federal employees also promises a second-order reduction in expenses in that it is highly likely that many of the products and services currently provided by the Government would be found to be less than essential if they did not have the *appearance* of being free.

Relative cost considerations can be minimized or eliminated in favor of reliance on the private sector, but the interests of current Federal employees must be considered. Federal policy since the 1930's has supported employee rights and collective bargaining. The practice of contracting work to private firms became an issue around 1960. While the National Labor Relations Board (NLRB) has ruled that this practice is subject to collective bargaining, conflicting decisions have left the extent of management obligations unclear.

Federal labor relations are controlled by Executive Order 11491, which states that decisions or issues subject to collective bargaining will be made by the National Labor Relations Council. The Council is currently considering a request from a Federal shipyard union to rule that the contracting out practice is subject to bargaining.

There is a moral obligation on the part of the Government toward employees who accepted employment with the understanding that work would continue to be available to them. Any decision to discontinue a Federal activity in favor of a commercial source should include maximum consideration for displaced employees. Where possible, deactivation should be a gradual phase-out process through attrition and transfer to other Federal activities. Full advantage should be taken of provisions in current Civil Service regulations to assist employees whose positions are discontinued, including "bumping" rights, transfer and relocation assistance, severance pay, and special retirement considerations. In addition, the contractor who will assume performance of the work should be encouraged to offer employment to any Federal employee willing to leave Federal service.

Any requirement to base a "make-or-buy" decision on a cost comparison between the private sector and a Federal in-house activity would be contrary to a strong policy of reliance on the private sector.

COST DIFFERENTIALS

If cost comparison policies are to be continued (which the Commission proposes and we do not favor), they should at least include guidelines for ongoing activities as well as new starts.

Dissenting Recommendation 3. Establish a 15-percent cost differential favoring the private sector over ongoing activities. Of this figure, ten percent would be in support of the general policy of reliance on the private sector.

The present guidelines suggest no differential for evaluating relative costs of an existing Government activity, but merely state that savings must be sufficient to outweigh the disadvantages of Government ownership and operation. This provides no assurance of consideration of contracting out and contributes to the relative permanence of in-house activities. A more positive provision with a specific minimum differential might contribute to more effective policy implementation while retaining consideration of relative economy.

The five-percent flexible margin included in the recommendations is to cover State and local taxes foregone. If the actual State and local taxes can be accurately determined, then that amount should be used even if it exceeds that five-percent margin.

[25] *Business Week*, Sept. 9, 1972, p. 85.

CHAPTER 7

Timely Financing of Procurement

Efficient and economical procurement of goods and services requires thorough planning. Timing is the key factor in the planning process. The disruptions, inefficiencies, and waste caused by nonavailability of funds at the time they should be available are major impediments to efficiency and economy.

The record of regular appropriation acts over the ten-year period covering fiscal years 1964–1973 shows that of 129 regular appropriation acts approved by Congress only seven—one in 1964, two in 1966, two in 1967, one in 1968, and one in 1969—were approved prior to the beginning of the fiscal year on July 1. On the average, bills were 94 days late; the longest delay was 273 days, and 30 acts were passed 150 or more days after the fiscal year began.[1]

The disruptions to the procurement process from such delays are so serious that we concluded the subject had to be dealt with, although fully recognizing that funding delays have a significance that goes far beyond the procurement process. However, our discussion is restricted to the effects of delayed funding on procurement. The validity of our suggestions as applied to related problems is for others to judge.

THE PROBLEM OF DELAYED FUNDING

Recommendation 27. Initiate effective measures to make procurement funds available to the procuring activities in a timely manner.

(a) The executive branch should eliminate delays in the submission of authorization and appropriation requests.

(b) Congress should eliminate delays in its consideration of requests. Among the techniques which hold promise of providing substantial improvement, we believe each of the following deserves serious consideration by the Congress:

(1) Making greater use of authorization statutes covering periods of two years or more.

(2) Making greater use of authorizing legislation covering program objectives rather than annual segments of work.

(3) Making greater use of appropriations for a period longer than one fiscal year.

(4) Changing the fiscal year from July 1–June 30 to October 1–September 30.*

(c) The executive branch and its agencies should assure that apportionment, allocation, and allotment of appropriated funds are promptly made available to the procuring activities.

In directing our primary attention to the long series of delays in the passage of appropriation bills, we do not imply that this is the only funding problem nor do we intend to "point the finger" exclusively at Congress. Congress cannot deal effectively with either an authorization or an appropriation bill until authoritative proposals have been made by the executive branch. Moreover, many legislative stalemates cannot be overcome unless the ex-

[1] Data for fiscal years 1964–1972 from *Congressional Record*, Apr. 18, 1972, p. S6119; data for fiscal 1973 from *Calendars of the United States House of Representatives and History of Legislation*, Oct. 18, 1972.

*See dissenting position, *infra*.

involves deployments, combat operations, training rates, rebuild and transportation schedules, manpower programs, ship and aircraft operations, and so forth. At the same time contractors are at work producing goods and services for Defense. Industry manpower is engaged, parts orders and subcontracts have been let, and work is proceeding. Large parts of the Defense program are not subject to orderly change if decisions are delayed until the middle of the fiscal year.[3]

EXAMPLES OF INEFFICIENCIES CAUSED BY LATE FUNDING

Even the most routine procurements depend on ordering points that, in turn, depend on the rate of use and the delivery time. A delay in ordering frequently results in added expense for accelerated delivery, substitution of a more expensive or less efficient item, or the wasted expense incurred in stopping the work and restarting later.

Results for nonroutine procurements can be disastrously out of proportion to the item being procured. In one case, a six-month delay in fund availability delayed an atomic weapons test program for another three months because, when the funds did become available, it was too cold at the test site to pour concrete.[4]

The Department of the Army cited several problems that occur when delayed funding prevents the scheduled delivery of new equipment; such delays required old equipment to be kept longer than had been expected. The old equipment required repairs or even reconditioning to keep it going—an added expense that otherwise would have been avoided. Further expense resulted from the cost of transporting old equipment to depots for repairs and from paying overtime to shorten turnaround time at the repair depot.[5]

An example of an entire program delayed by a late appropriation was given in hearings before the House Appropriations Committee concerning Department of Defense (DOD) appropriations for fiscal 1972.[6] The delivery of missiles under the research and development phase of the procurement had been scheduled for completion by November 1, 1970. DOD planned to enter into a production contract on that date, well after the beginning of the fiscal year. However, the appropriation was not enacted until January 11, 1971, and the production contract could not be signed until January 18, 1971. To ensure continuity in the program and to prevent a break between the research and development and production phases of the program, the delivery of the missiles was stretched out. Had a break occurred, there would have been a loss of skilled personnel and a lack of continuity in the various support services (for example, utilities, guard, and custodial services). These actions, according to the testimony presented, increased the cost of the research and development and the production phases by more than four million dollars, but this was considered prudent in order to avoid even more costly alternatives.

The Bonneville Power Administration (BPA) representatives stated that operating under a continuing resolution hinders efficient program implementation because their activities are such that full advantage must be taken of favorable weather to assure availability of power. BPA finds that during the favorable construction season, delays in appropriations result in delays in awarding contracts.[7]

Contractors advised that late passage of appropriations forces them to work with short leadtimes, perform under difficult delivery schedules, reduce or curtail operations, and incur startup costs when the full operation is reinstated. On occasion, contractors spend their own money in order to meet contract delivery schedules. In this regard, one company representative advised that the impact of late appropriations was felt in three ways:[8]

1. We have been forced to work with extremely short leadtimes for bid and proposal preparation in many cases, and to perform tight, difficult and sometimes impossible delivery schedules.

2. Funding delays cause layoffs followed by

[3] U.S. Congress, Joint Committee on Congressional Operations, hearings on *The Federal Fiscal Year as It Relates to the Congressional Budget Process*, June 1971, p. 225.

[4] Study Group 2, *Final Report*, Nov. 1971, p. 101.

[5] *Ibid.*, pp. 97–98.

[6] U.S. Congress, House, hearings before a subcommittee of the Committee on Appropriations, 92d Cong., 1st sess., part V, May 12, 1971, p. 200.

[7] Study Group 2, *Final Report*, Nov. 1971, p. 100.

[8] *Ibid.*, pp. 104–105.

curately, there is no disagreement that the waste and inefficiency are most serious. We believe that the impact on procurement alone involves some hundreds of millions of dollars annually.

ALTERNATIVES FOR CONSIDERATION

During hearings in June 1971, the Joint Committee on Congressional Operations considered three primary alternatives for expediting the budget process.[12]

Lengthening the Period of Appropriations

One alternative was to appropriate for construction programs on a full-funding basis and to appropriate for regular ongoing functions of Government for two years. This procedure would reduce the congressional committees' annual workload on a balanced basis, thereby permitting review and approval of fewer authorizations and budgets each year without a substantial loss in congressional control. Hopefully, this, in turn, would permit acting on all bills prior to the start of the fiscal year. We found that such procedures would alleviate some of the procurement problems, since planning periods could be based on a two-year rather than on a one-year cycle.

Changing the Authorization Process

A former Director of the Bureau of the Budget suggested the following changes in the authorization process:

- Authorizations should be made effective for longer periods of time, at least two years and preferably five years, or for an indefinite period. For example, in the case of construction projects requiring three or four years to complete, Congress could authorize the entire project at the outset.[13]
- A greater portion of the authorizing legislation should be stated in program terms instead of in dollar amounts, leaving the annual amount of funds to be determined by Congress when it acts on the appropriations.
- Authorizing legislation which expires in one calendar year should be reviewed during the preceding year. In other words, renewals and extensions would be enacted in 1973 for authorizing legislation which expires in calendar year 1974.
- The rules of Congress should be amended to make it possible for appropriations to be considered when authorizations are not acted upon in a timely manner.

Many observers believe the root of the delay problem is in the authorization process, particularly the tendency to restrict authorizations to a single fiscal year or to a maximum dollar amount for the budget year, rather than consider them in terms of whole programs or integral segments of programs.

Many authorization provisions are in so-called "permanent" legislation, but during recent years there has been a growing tendency to require an annual enactment of an authorizing bill. The number of appropriations requiring annual authorization increased from 8.2 percent of the total in fiscal 1960 to 19.3 percent in fiscal 1972. The dollar amounts of appropriations requiring annual authorization for fiscal 1960 and 1972 were $6 billion and $32.9 billion, respectively.[14] Specific annual authorization acts are now prescribed for DOD procurement of military aircraft, missiles, naval vessels, tracked combat vehicles, naval torpedoes, other weapons, research and development, and construction. Annual authorization requirements also have been extended to appropriations for NASA, AEC, Foreign Aid, the Coast Guard, and the National Science Foundation.

The objective of having both an authorization and an appropriations process in Congress seems to be to provide one forum in which the program aims and the means of accomplishing them can be reviewed and another forum in which the annual dollar expenditures can be evaluated and compared with competing needs. Contrary to this objective, the more the au-

[12] Note 3, *supra*.

[13] See Part E for a further discussion of construction funding problems.

[14] U.S. Congress, Joint Committee on Congressional Operations, *Changing the Federal Fiscal Year: Testimony and Analysis, First Report*, 92d Cong., 1st sess., H. Rept. 92–614, p. 52.

permit a period of 12 months for congressional review and approval. However, as presented by the testimony on this proposal, if the new budget is to be based on actual data for the past year (to end in December) it could not be submitted until around April and half the added time would thus be dissipated.

This led to discussion of another alternative which would change the fiscal year from July 1–June 30 to October 1–September 30. On this basis a budget presented in January could contain actual data for the year ending on the preceding September 30, and Congress would have nine months instead of six months prior to the beginning of the budget year to consider and act on the proposals.

The improvement this could make in the cycle is obvious from data on dates of appropriations approvals over the last ten years.[17] As mentioned earlier, only seven out of 129 bills were approved prior to July 1 for fiscal years 1964–1973, but 55 bills were approved prior to October 1; in five of the ten years, more than half of the appropriation bills were enacted prior to October 1.

DISSENTING POSITION

One Commissioner* does not concur with the recommendation to change the fiscal year (Recommendation 27(b)(4)). He subscribes to the conclusion reached by the Joint Committee on Congressional Operations [18] that insufficient evidence exists to warrant changing the fiscal year.

SUMMARY

Unplanned funding delays—regardless of cause—lead to disruptions, substitute decisions, and temporary expedients that are both costly in themselves and inefficient in terms of the program objectives that procurement is supposed to serve. While procurement is not the only Governmental function affected, the problem affecting procurement is so serious that we consider its early solution imperative. Other considerations obviously are involved, but from examples we have seen of problems arising in other areas of Governmental activity, including the effects of late appropriations on State and local governments, school boards, and so on, the problem of late appropriations must be squarely faced and promptly resolved.

[17] Note 1, *supra*.

*Commissioner Sanders.

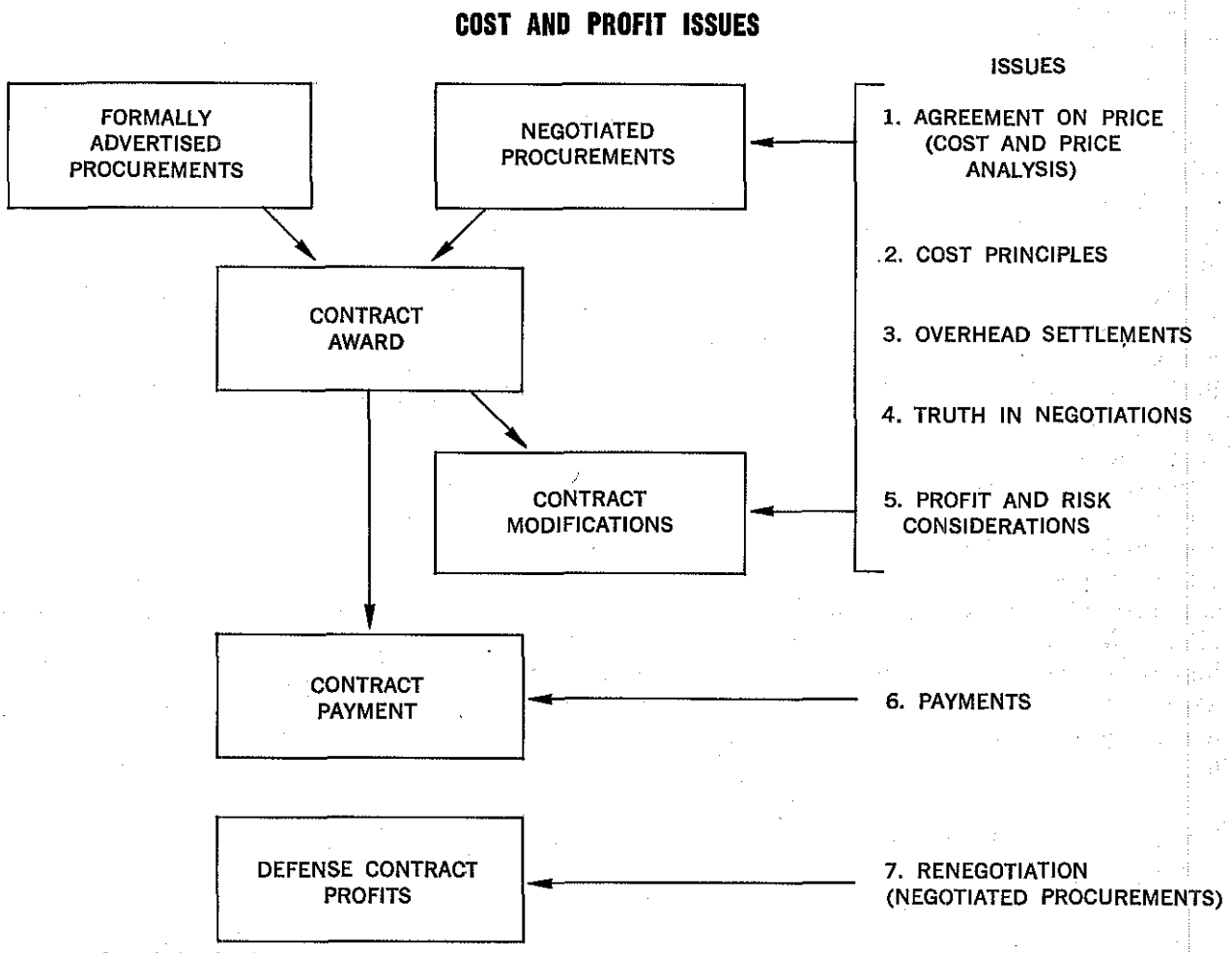
[18] Note 14, *supra*.

CHAPTER 8

Selected Areas in the Acquisition Process

COST AND PROFIT ISSUES

The negotiation of price agreements for negotiated procurements, including modifications to formally advertised contracts, usually involve cost and profit considerations. Figure 1 lists seven key cost and profit issues and shows their relationship to major stages of formally advertised and negotiated procurements. Truth in negotiations and renegotiation involve statutory considerations covered in Part J, Chapter 4. This section covers the five other cost and profit issues.



Source: Commission Studies Program.

Figure 1

tor's Weighted Average Share of Risk (CWAS) program, introduced in ASPR in 1966, is another example of variance in cost principles. It is based on the principle that a given profit center which has in excess of 65 percent (using a weighted scale) of fixed-price or commercial contracts should be exempt from a determination of "reasonableness" on specific cost elements delineated in ASPR 15–205. If such costs are not "reasonable" the contractor stands to lose more than the Government. No other agencies have adopted this system, yet this would seem to be sound for all agencies or for none. The contractor annually justifies his qualification for exemption, but it only applies to his dealings with DOD.

Other differences exist among the cost principles in agency procurement regulations. Many of them have persisted despite many attempts to attain consistency.[4] There is no good reason for different treatment of identical cost items simply on the basis of differences in the agencies involved. The Office of Federal Procurement Policy should promulgate cost principles for use by all agencies.

Settlement of Overhead Costs

Recommendation 29. Establish procedures for a single, final overhead settlement binding on all Federal contracts at a given contractor location.

In formally advertised procurement, overhead allowability is not an issue in the initial award since it is assumed that reasonableness has been determined by market competition. However, overhead allowability can be involved in modifications to such contracts.

In negotiated contracts, allowability of overhead costs generally requires a specific agreement. In all Government agencies, final overhead settlements are reached either by negotiated settlement or by audit determination.

If the *negotiated settlement* method is used, a contractor's proposal covering indirect costs for a period of time, usually a year, is audited, and a report that includes audit recommendations on acceptable and unacceptable costs is submitted to the contracting officer. Settlement negotiations follow and, depending on the overhead rate agreed on, contractor billings are adjusted.

Under the *audit determination* method, the Government auditor makes an after-the-fact final rate determination based on his review and evaluation of the reasonableness, allocability, and allowability of the cost involved in accordance with cost principles and contract terms. If the contractor and the auditor cannot agree on a final overhead rate, the contractor may appeal to the contracting officer and, if appropriate, to the agency board of contract appeals.

Under either method, final settlements seldom are made promptly, which results in long delays in closing-out completed cost-type contracts. The main reasons reported for the delays in final overhead settlements are:

- Differences in interpretation and application of Government cost principles
- Contractor appeals to contract appeal boards or to the courts
- Low priority accorded to overhead audit and settlement among contract actions.

The lack of uniformity in procedures and standards for overhead rate determinations may cause a contractor to have different determinations made for his contracts although cost elements are the same.

More consistency of treatment is needed in determining a contractor's final overhead rate. A single, final overhead rate that is binding for all Government contracts at a given contractor location should be required to eliminate the costly duplication of administrative procedures and reduce delays in the settlement of completed contracts.

Profit and Risk Considerations

Recommendation 30. Develop uniform Government-wide guidelines for determining equitable profit objectives in negotiated contracts. The Office of Federal Procurement Policy should take the lead in this interagency activity. The guidelines should em-

[4] Study Group 7, *Final Report*, Feb. 1972, pp. 343 et seq.

the exercise of management prerogatives, funding uncertainties that stretch out performance, and the disallowance of normal business expenses (such as bid and proposal and independent R&D costs) are some of the policies and practices that can limit potential profits.[10]

Unlimited liability contract clauses add to supplier risk without offering additional profit considerations. "Anticlaims clauses" minimize and control contractor claims by requiring early identification of constructive changes and by making the contractor responsible for defective specifications over which he had no control. Unless compensation for such risk is incorporated into the established profit objective, this "overreaching" by the Government results in an undue shift of risk to the contractor. This view is seldom shared by the "overreaching" agency.

Congress directed [11] the General Accounting Office (GAO) to study profits earned on negotiated contracts entered into by DOD, NASA, the Coast Guard, and AEC contracts to meet DOD requirements. GAO found [12] that profits measured as a percentage of sales were significantly lower than those earned for comparable commercial work done by the 74 large DOD contractors included in the study. When profit was considered as a percentage of the total capital investment, the difference in profit percentages between defense and commercial work narrowed considerably.

The GAO report [13] recognized the administrative problems involved in providing for consideration of total invested capital. The report recommended that the Office of Management and Budget (OMB) take the lead in interagency development of uniform Government-wide guidelines for determining profit objectives. The guidelines would emphasize the total amount of contractor capital required if effective competition is lacking. To develop these guidelines, OMB organized a Task Group in November 1971 consisting of personnel from AEC, DOD, GSA, and NASA. The Task Group has considered three or four approaches and has reviewed DOD policy development and test implementation. The work of this group is continuing.

Any system of profit guidelines must be closely monitored to determine the profit being attained on completed contracts. Because of the added impact on profit of other procurement policies, we believe the task of developing and monitoring Government-wide profit guidelines is consistent with the role of the Office of Federal Procurement Policy.

Payments

Recommendation 32. Establish contract payment offices to make payments for all Federal agencies in each of the ten Federal regional areas. This could be accomplished by a lead agency designated to formulate standard procedures to implement this recommendation.

The methods and timeliness of the payment for work performed by prime contractors and subcontractors have a significant impact on realized profit. Inconsistencies among agencies in the processing of vouchers cause confusion in submitting vouchers for payment. The fact that the Government does not recognize interest as a contract cost [14] makes late payment of vouchers a matter of great concern to contractors. A Government-industry study [15] of contract financing found delays in progress payments that ranged from 3 to 22 days. In addition to recommending improvement in the promptness of payments, the subcommittee recommended that progress payments be made less frequently and that costs of materials and subcontracts be paid only when the prime contractor pays his bills. These recommendations became effective for DOD contractors on January 1, 1972.[16] One industry executive [17] estimated that when this policy is fully implemented prime contractors would be paying out

[10] Each of these subjects is discussed elsewhere in the report.

[11] U.S. Congress, *Armed Forces Appropriation Authorization Act, FY 70*, Public Law 91–121, 91st Cong., Nov. 19, 1969.

[12] U.S. General Accounting Office, Report B–159896, *Defense Industry Profit Study*, Mar. 17, 1971, pp. 15–17.

[13] *Ibid.*, pp. 34–38, 41–45, 54–55.

[14] U.S. Department of Defense, Defense Procurement Circular No. 97, Feb. 15, 1972, makes provision for interest payment on claims arising from disputes when settled in the contractor's favor.

[15] U.S. Department of Defense, Industry Advisory Council Subcommittee to Consider Defense Industry Contract Financing, June 11, 1971, p. 16.

[16] U.S. Department of Defense, Defense Procurement Circular No. 94, Nov. 22, 1971.

[17] Richard Mulligan, Controller, TRW Systems Group, quoted in *Government Contracts Service*, supplement 11–71, Procurement Associates, Inc., p. A–3.

to extensive product data and management information for complex systems such as space vehicles, transportation systems, and nuclear powered ships.

The annual cost of acquiring product data and management information from contractors amounts to billions of dollars. The Blue Ribbon Defense Panel [22] reported that the cost to the Department of Defense (DOD) for management system application and related reports alone was about $4.4 billion in fiscal 1969.

Product Data

Recommendation 33. Establish standards and criteria for estimating costs and benefits of product data requirements. The need for product data should be determined on the basis of cost-benefit analyses. Selective after-the-fact reviews should be used as a basis for eliminating unnecessary requirements.

The Government needs data describing the product or service being furnished under a contract for a wide variety of purposes. Typical needs for even the simplest equipment include maintenance and operation manuals, replacement parts lists, and inspection or quality control data. If the product or service is complex or critical, the need for descriptive data tends to be urgent and voluminous. Although we do not question the legitimacy of these requirements, we believe that there is a tendency to acquire excessive or unnecessary data. We recognize that effective control of the quantity and cost of acquired data is an immensely difficult task. Nevertheless, the potential for vast savings clearly indicates the need for a continuing effort to minimize data requirements.

DOD has long recognized this potential for savings and has established a data management program. Prior to soliciting proposals for a new major program, a "data call" requests that the data needed from contractors be identified. The data call is directed to program management, engineering, training, maintenance, operations, supply, and other units concerned with the program.

Planners must use an "authorized data list" to select the information they require. New or revised data requirements must be separately identified and approved by the program/project manager. Frequently, a special board reviews such requirements. When finally approved, the consolidated data requirements become part of the contract.

EARLY ACQUISITION OF DATA

Despite the notable progress of the DOD data call program and the continuing efforts of other agencies, unnecessary and costly acquisition of data persists. In requests for proposals (RFP) for items not yet designed, agencies routinely require preservation, packaging, and transportability plans; field and depot support plans; personnel subsystem development plans and other planning information. The value of such data at that point is questionable, as the data have little impact on a decision to select one contractor over another.

The Government frequently acquires data for future competitive procurements. This policy, although sound in intent, is impractical when the data acquired cannot be effectively used by competitors. Further, when agency officials do not have a sound basis for deciding what specific data should be acquired, the result is a costly exercise that fails to establish additional competitive sources.

One technique which can help to reduce data requirements is to defer the delivery of data until a firm requirement can be economically determined based on actual operational needs. Delivery can be required at any point during performance of the contract or within two years from either acceptance of all items (except for data) on the contract, or termination of the contract, whichever is later.

Another technique is to defer ordering data at the time the contract is initiated. Under this method, when firm data requirements are determined, they are negotiated separately with the contractor; a specific delivery date also is negotiated.[23]

[22] Blue Ribbon Defense Panel, *Report to the President and the Secretary of Defense on the Department of Defense*, July 1970, appendix E (Staff Report on Major Systems Acquisition Process), p. 45.

[23] ASPR 9-502(b)-(c).

expected by their superiors, Congress, and the public to have instant, accurate information about all aspects of their programs. Congress also requires extensive information from agencies, much of which derives from that furnished by contractors. Despite the volume of information now furnished to Congress, it is the opinion of several congressional committee staffs [26] that additional or different information is still needed.

The Government program manager is continually frustrated by the lack of accurate and timely reporting by industry, even when management systems are specified in the contract and paid for by the Government. The contractor's ability to supply exactly what is required frequently is limited because his management methods and systems will not readily produce reports in the content and format specified.

CONTRACTOR PROBLEMS

Contractors have a difficult problem in attempting to satisfy various management system requirements simultaneously because the systems are not coordinated and frequently are incompatible. A contractor must have management systems and reports to run his business, but the information produced for his internal use often does not satisfy the management systems and reporting requirements imposed by the Government. Neither the Government nor industry is satisfied with the cost-benefit aspects of acquiring management information. Both feel that the costs involved are excessive and consume contract dollars that could be better used for other purposes.

Industry personnel generally acknowledge the need for and intent of management systems. They contend, however, that implementation of policy directives by procuring agencies does not always conform to the intent of the directed system and that the resulting benefits are not worth the cost. One contractor estimated that on a five-year contract, compliance with the required management systems provisions of his contract would result in an additional cost of $400,000 to $500,000.[27] He attributed these costs principally to two features of the system: prescribed work-level reporting in unnecessary detail and added direct costs.

Despite myriad reports routinely submitted by contractors, the Government often levies one-time special requirements for information, including numerous telephone requests. Although such requests may be legitimate, their frequency suggests that much information in routine reports may not be required or may not be usable in the form presented. This highlights the need for the Government to limit information requirements to those which are essential. Moreover, consideration should be given to the contractors' internal management systems in order to integrate information requirements to the maximum practical extent.

DOD/INDUSTRY STUDY OF MANAGEMENT SYSTEM REQUIREMENTS

In 1966, a joint DOD/industry committee [28] was organized to examine ways of insuring effective management of defense programs while minimizing the degree of control over industry. As a result of this effort, the number of management systems used by DOD has been reduced from 1,200 to 129, excluding those specifically required by standard ASPR clauses. These systems are identified in the Acquisition Management Systems List (AMSL).[29] Despite the reduction in the number of systems, the services have found that systems in the AMSL and the accompanying implementing directive [30] do not adequately reflect DOD acquisition management policies. As a result, the list is not effective for either planning or control purposes.

The Assistant Secretary of Defense (Comptroller) authorized the Air Force, at its request, to field test suggested improvements in the program for controlling management sys-

[26] Study Group 9 (Reports and Management Controls), *Final Report*, Oct. 1971, p. 72.

[27] *Ibid.*, p. 260.

[28] DOD–CODSIA (Council of Defense and Space Industries Association) Advisory Committee for Management Systems Control.

[29] U.S. Department of Defense, DOD Manual 7000.6M, *Authorized Management Systems Control List*, July 1970.

[30] U.S. Department of Defense, DOD Instruction 7000.6, *Acquisition Management Systems Control*, Mar. 15, 1971.

Government and provided to a contractor for use in the performance of Government contracts. Government property may be provided to contractors by two different methods: The Government may acquire the property and furnish it to a contractor; or the contractor may acquire the property and retain it under contract terms which vest title to the property in the Government immediately upon acquisition by the contractor. Under the Armed Services Procurement Regulation (ASPR), the two kinds of property are called "Government-furnished property" and "contractor-acquired property." [36] As the agency which furnishes the most property to industry, DOD is the agency with most experience of this kind.

Under the ASPR,[37] Government-owned property is categorized as material, special tooling, special test equipment, military property (for example, aircraft), and facilities (for example, production plants and equipment). It also includes such production aids as models, drawings, and reproduction data. Material includes property that may be incorporated in an end product or that may be consumed or expended in the performance of a contract (such as raw and processed materials, parts, components, small tools, and supplies).[38]

Government Policy

The general policy of DOD is that contractors furnish all material required for the performance of Government contracts; [39] however, exceptions are made when it is in the Government's interest. The Government may have to acquire materials and components and furnish them to contractors (1) to assure uniformity and standardization among different producers; (2) in the case of long-lead components, to expedite production of the end product by starting component production before the contract for the end product is awarded; or (3) to take advantage of Government priorities under a controlled materials system during a period of defense emergency that causes materials shortgages. The Government may want to use up its stocks of materials and special tooling, special test equipment, or other equipment,[40] rather than acquire more.

In accordance with a current defense policy to "stay out of the facilities business," [41] providing new facilities to contractors is limited to situations involving existing Government-owned, contractor-operated (GOCO) plants, planned mobilization requirements, and other special cases where there is no practical alternative.[42] Some equipment or plant improvements may be so specialized that their only possible use is for Government production. Because of the unpredictable nature of future Government requirements, contractors cannot always count on enough long-range business to fully amortize their investment in such special property. They, therefore, may be unwilling to provide it at their own expense and risk. In such cases, the Government may have no alternative but to finance the new facilities or to motivate the contractor to acquire the needed property.[43]

A recent GAO report to the Congress [44] stated that in June 1971 DOD-furnished plant equipment had declined to $4.1 billion from $4.6 billion in December. The $4.1 billion included $2.2 billion worth of industrial plant equipment (IPE) such as lathes, milling machines, and drills. The $1.9 billion balance was the value of other plant equipment such as machines costing less that $1,000, furniture, vehicles, and computer equipment.

The report stated that, although in March 1970 the military services and the Defense Supply Agency (DSA) were directed to require contractors to submit plans to phase out their use of Government-owned facilities, the Deputy Secretary of Defense has permitted deferment of these plans at contractor plants where mobilization base requirements are being developed and where phase out would be contrary to Government interests or would create an economic hardship for the contractor. As of June 30, 1972, DOD had received all

[36] ASPR 13-101.2.
[37] ASPR 13-101.1.
[38] ASPR 13-101.4.
[39] ASPR 13-201, 13-301.
[40] ASPR 13-201, 13-304(a), 13-306.1.
[41] In Mar. 1970, DOD initiated a program to phase out Government-owned facilities at contractor plants. Memorandum from the Assistant Secretary of Defense (I&L), Mar. 4, 1970, published as Item I, Defense Procurement Circular 80, June 22, 1970.
[42] ASPR 13-301(a)(i), (ii), and (iii).
[43] Study Group 9, *Final Report*, Dec. 1971, p. 143.
[44] U.S. Comptroller General, Report B-140389, *Further Improvements Needed in Controls Over Government-owned Plant Equipment in Custody of Contractors*, Aug. 29, 1972, p. 1.

curred in disposal as compared to the non-amortized portion of his investment.[50]

Negotiated Sale of Government Equipment

Recommendation 36. Enact legislation to authorize negotiated sale of surplus elephantine tools (such as heavy machine tools) and of equipment which is "excess to Government ownership but not to Government requirements," with adequate protection to the Government for its future needs when competition is not feasible. While the lack of such authority now appears to be a problem only for the Department of Defense, to provide for future contingencies the legislation should cover all agencies.

Although the current DOD policy is to get out of the facilities business, its efforts to do so have been hampered by lack of authority to negotiate sales to the contractor in possession of elephantine tools and equipment that are excess to Government ownership but are still needed on a part-time basis to fulfill Government needs. If a contractor owned the equipment and therefore could use it for non-Government work, the cost to the Government could be materially reduced.

Legislation to authorize negotiated sales in such cases has been before Congress for several years. Recently the House passed a bill[51] to provide for the disposal of Government-owned equipment by negotiated sales.[52] The bill:

- Restricts the procurement of production equipment for the purpose of furnishing it to contractors, unless it is necessary for mobilization requirements, it is determined by the Small Business Administration to be necessary to assist small businesses, or it is needed to meet essential needs for supplies or services that cannot be met by any other practical means.
- Authorizes the negotiated sale of certain production equipment to using contractors under terms which require the purchaser to maintain the equipment in good working order and available for use on Government contracts on a priority basis. (It is this second factor which DOD considers most important.)

Comprehensive studies have shown that in many instances Government-owned equipment is needed in its present location to meet current and projected military requirements, but that Government ownership would not be necessary if the equipment could be sold in a way which would insure its availability on a priority basis for use on Government contracts. H.R. 13792 would permit such sales. The bill stipulates that a fair market value shall be established by experienced GSA appraisers and that a sale shall not be made at less than fair market value. To facilitate surveillance of the program, the bill provides that the details and circumstances of the negotiated sales shall be reported promptly to Congress. Contracts for such sales would require that, for a period agreed upon, the property or its replacement will be available for defense needs on a priority basis.

Equipment now eligible for sale cost about $450 million and has a current market value of from $150 to $200 million. It is held by about 485 contractors, approximately 35 percent of whom are small businesses.[53] Transfer of title without change of possession will:

- Relieve the Government of administrative burdens and costs for management, control, maintenance, and protection
- Add property to State and local tax rolls in jurisdictions which now tax personal property
- Give the contractor greater flexibility in managing and using the property
- Give the contractor an incentive to modernize and improve the property to meet all production needs with benefits to the Government in the form of better contract performance and lower contract costs.

In the case of elephantine tools, even though

[50] To a limited extent such arrangements are embraced in the present ASPR provisions for multi-year contracting, under which a cancellation charge is paid the contractor in the event the full multi-year program is not completed. ASPR 1-322.1(a).

[51] H.R. 13792, 92d Cong., 2d sess., 1972.

[52] Reported in *Government Contracts Surveyed*, Sept. 1, 1972, p. 16.

[53] Based on Department of Defense survey. See testimony of Barry J. Shillito, Assistant Secretary of Defense (I&L), before House Armed Services Investigating Subcommittee, H.A.S.C. No. 92-60, 92d Cong., 1st sess., Oct. 7, 1971, pp. 14793-14795.

lems arising from the flow of requirements down through the tiers of subcontracts) result from actions of the prime contractor, others are the direct result of Government requirements. There are numerous contract clauses specified by Government procurement regulations that prime contractors must include in subcontracts, often without any change in wording; for example, the Notice and Assistance Regarding Patent and Copyright Infringement Clause,[58] and Contract Work Hours Standards Act Overtime Compensation Clause.[59] Some other standard prime contract clauses require that clauses "substantially conforming thereto" be incorporated into subcontracts; for example, those concerning military security requirements,[60] and safety precautions for ammunition and explosives.[61] Other clauses are silent as to their applicability to subcontracts but are applicable by operation of statute or regulation; for example, the Walsh-Healey Public Contracts Act [62] and Priorities Allocations and Allotment Clause.[63]

Some clauses make no reference to their applicability to subcontracts but impose obligations on prime contractors which cannot be fulfilled unless similar provisions are incorporated into subcontracts; for example, those regarding changes [64] and United States products (Military Assistance Program).[65] Some standard clauses are written solely for use in subcontracts; for example, the Subcontract Termination Clause [66] and the Subcontract Termination Clause—Cost Reimbursement Type.[67]

The Government should clarify the extent to which prime contract clauses apply to subcontractors and the manner in which they are to be applied and interpreted. Our recommendation to establish a coordinated Government-wide system of procurement regulations would provide a mechanism for accomplishing this.

Further, we believe it desirable to establish criteria for the guidance of prime contractors with respect to terms and conditions appropriate for particular subcontract situations. The development of a set of standard subcontract terms and conditions which prime contractors could use, as appropriate, would help avoid overimplementation of prime contract requirements.

[58] ASPR 7–103.23.
[59] ASPR 7–103.16.
[60] ASPR 7–104.12.
[61] ASPR 7–104.79.
[62] ASPR 7–103.17.
[63] ASPR 7–104.18.
[64] ASPR 7–103.2.
[65] ASPR 7–104.43.
[66] ASPR 8–706.
[67] ASPR 8–703.

Low Thresholds on Social and Economic Programs

The social and economic programs implemented through the procurement process create subcontract as well as prime contract problems. These problems are discussed in detail in Chapter 11 and in Parts D and E. Of particular concern are the low dollar thresholds at which these programs come into operation. At the time such social and economic program requirements were enacted, many subcontracts were exempt, but inflation and other factors have all but dissipated those exemptions. As noted in Chapter 11, we believe consideration should be given to raising the dollar thresholds for application of the social and economic programs implemented through the procurement process.

Inconsistency in Subcontract Review and Approval

Later in this chapter we point out that there is no uniform subcontract approval policy applicable to all agencies. This causes duplication of Government review efforts, unnecessary contractor processing costs, and unnecessary Government administrative costs.

The different subcontract approval policies also have an impact on subcontractors by creating delays in their work and by subjecting them to variations in agency requirements, particularly where their work pertains to programs of several agencies. Our recommendation to establish a Government-wide policy for the review and approval of contractor purchasing systems and transactions, together with repeal of the statutory subcontract advance notification requirements, would mitigate subcontractor problems in this area.

prime contractors may have surveys of their operations for identical or essentially similar products or services performed by several prime contractors or higher-tier subcontractors.

Improvements in the development and implementation of Government quality assurance programs, while desirable, involve many complex factors. The procuring agency having program responsibility for a project is best able to determine the kind of quality assurance program required by its project. We believe this matter deserves in-depth consideration by the Office of Federal Procurement Policy with a view to consolidating the various Government quality assurance specifications into a single specification. This office should establish consistency in the interpretation of quality assurance requirements and should minimize, to the extent possible, the diversity of such requirements and number of plant surveys imposed on subcontractors.

Termination of Subcontracts

Termination clauses in procurement regulations require prime contractors and subcontractors to settle termination claims of their immediate subcontractors with the Government reserving the right to approve or ratify such settlements. Procuring agencies may authorize prime contractors to settle subcontractor claims of $10,000 or less without approval or ratification, and in some cases, they may increase the authorization to $25,000. Subcontractor termination claims can require processing through several tiers of subcontractors up to the prime contractor, and, where the amount of the claim exceeds the settlement authority of the prime contractor, on to the procuring agency. All of these higher contracting levels have to approve lower-tier claims, and each level can require additional detail and justification.

The $10,000 subcontract termination settlement authorization is one of long standing which has been so eroded by inflation and other factors that most termination settlements exceed the $10,000 authority. As a result, the majority of subcontract termination settlements require approval by procuring agencies. Where such approval is required, the time necessary for settlement is increased significantly, many settlements taking more than a year to process.

We have recommended increases in the small purchase procedure authorization. We believe the Office of Federal Procurement Policy should examine subcontract termination settlement authorization levels and determine whether higher levels should be established on a Government-wide basis.

Disputes

The handling of disputes arising under subcontracts has been a matter of longstanding controversy. Although such disputes often are related to Government actions or inactions, the lack of contract "privity" between a subcontractor and the Government generally has barred direct legal recourse against the Government. Most agencies bar the inclusion of a disputes provision in subcontracts that would permit subcontractors to use the boards of contract appeals to resolve disputes with the Government. Subcontractors, however, can obtain access to the boards when the prime contractor will sponsor their claims and the claims are redressable under the prime contract.

This sponsorship approach often works imperfectly. Although the Government's legal rights and liabilities are governed by the terms of the prime contract, inadequate Government specifications, change orders, delays in making Government property available, and many other Government actions can and do affect subcontractor costs. Requiring the subcontractor to seek relief through the prime contractor can result in conflict of interest situations and inhibit the ability of the subcontractor—the real party in interest—to obtain a speedy resolution and adequate relief.

Although inequities can exist under the present sponsorship approach, it does not appear to have as many drawbacks as a system which would permit direct recourse against or access to the Government. Establishing a subcontractor right to direct recourse against the Government, or permitting the use of agency

quirements of the Truth in Negotiations Act.

Other recommendations to permit greater use of multi-year procurement, to have the Government act as a self-insurer for loss of or damage to defective supplies, and to provide indemnity protection against catastrophic accidents would improve the subcontractor situation by providing greater stability of operations and by eliminating the fear of certain types of losses which could be economically disastrous.

Additional recommendations, which would benefit subcontractors as well as prime contractors by reducing administrative costs and by providing greater certainty on Government work, include the establishment of: standards and criteria for estimating costs and benefits of data requirements and for prescribing management controls, Government-wide principles for allowability of costs, uniform profit policies, and raising the jurisdictional amount of the Renegotiation Act.

We believe the implementation of the recommendations discussed above would alleviate the problems of subcontractors under the Government procurement system.

REVIEW OF CONTRACTOR PROCUREMENT SYSTEMS AND TRANSACTIONS

Recommendation 37. Establish a Government-wide policy for the review and approval of cost-type prime contractor procurement systems and transactions.

Contractor procurement includes subcontracting of work to be performed as well as acquisition of materials and services required to do contract work. Both types of procurement actions are generally referred to as subcontracts.

The requirements for review and approval of contractor procurement systems and transactions stem primarily from agency policies, although there are statutory requirements for advance notification of certain transactions under cost-type contracts. While there is a relationship between the various purposes for reviewing contractor purchasing systems and transactions, the factors to be considered are sometimes different.

Depending on the type of prime contract, the Government's interest in subcontracts may involve deciding whether subcontracting will be permitted, how subcontracts are made, and what they will cost. A contractor's purchasing system, for example, may be an important consideration in the selection process. It also may be important after award in determining what types—and amounts—of transactions must be submitted for review and approval by the contracting officer. When the selection of a contractor over his competitors involves, for example, consideration of his facilities and personnel, the Government has a natural desire to control subcontracting. In other contract situations, construction, for example, it is generally understood that much of the work will be subcontracted. Even here there is often an interest in how and to whom subcontracts are awarded.

Subcontracts for supplies and services can affect performance of the contract work or agency program schedules. In cost-type contracts in particular, subcontracts impact the total cost to the Government and involve the procuring agency in issues with respect to fair treatment of those participating in Government work.

Both the Armed Services Procurement Act (ASPA) [71] and the Federal Property and Administrative Services Act (FPASA) [72] require that cost-type contracts shall contain a provision for advance notification to the procuring agency by the contractor of any cost-plus-a-fixed-fee subcontract and of any fixed-price subcontracts in excess of $25,000 or five percent of the estimated cost of the prime contract. This requirement originated in a 1948 Senate amendment to ASPA and reflected growing concern in Congress over the importance of subcontracting in Government procurement.

Building on this statutory base, both ASPR and FPR have evolved requirements for the review and approval of contractor procurement transactions. ASPR requires advance notification and consent (approval) [73] of subcontracts

[71] 10 U.S.C. 2306(e) (1970).
[72] 41 U.S.C. 254(b) (1970).
[73] DOD generally uses the term "consent" in lieu of "approval" (ASPR 23-200).

under some fixed-price prime contracts, as well as under cost-type and time-and-material contracts. It prescribes contract clauses and identifies types of subcontracts and monetary amounts which are subject to control and provides criteria for use by the contracting officer in giving consent (approval) to proposed subcontracts.[74] FPR contains criteria for the inclusion of subcontract advance notification and approval provisions in some contracts. It also contains factors to be considered in the evaluation of subcontracts submitted to the procuring agency. It does not prescribe subcontract notification or approval clauses and, except for the statutory requirement, does not specify types of subcontracts or monetary amounts which are subject to control.[75]

Both ASPR and FPR provide for review and approval of contractor purchasing systems as a partial substitute for review and approval of individual transactions; however, only ASPR provides specific criteria and guidance concerning the method and extent of such reviews and the effects of an approved system on the treatment of individual transactions. Figure 2 shows the general DOD requirements for advance notification or consent of contractor procurement transactions and shows the differences in requirements between an approved and unapproved system.

DOD has instituted a contractor procurement system review (CPSR) concept. This concept is based on a review of a contractor's total procurement system to evaluate the efficiency and effectiveness of the methods and procedures used in acquiring supplies and services. It is used generally for contractors who are expected to have yearly sales to the Government in excess of $5 million under cost-type and time-and-material contracts, fixed-price with escalation contracts, or noncompetitive negotiated contracts regardless of contract type. Such reviews examine the degree of price competition obtained, pricing policies and techniques, methods of evaluating subcontractor responsibility, treatment accorded affiliates and other firms having a close relationship with the contractor, and attention given to the management of major subcontract programs. The ultimate responsibility for granting approval rests with the contracting office; however, the reviews are usually conducted by procurement management analysts and may be evaluated by a Contractor Procurement System Review Board which makes recommendations to the contracting officer. The program also provides for annual and special reviews after a contracting officer's initial approval.

Our studies indicate that the reviews are handled differently by the Army, Navy, Air Force, and Defense Contract Administration Services (DCAS). In DCAS and the Air Force the reviews are made through an ad hoc team approach, consisting of field procurement management analysts with support from professional specialists such as auditors and quality assurance personnel. The Army conducts reviews with special teams, and the Navy retains the responsibility at the procuring activity level. DCAS, which has the largest program, had 140 of 171 contractors with approved systems as of December 1971.[76]

Most of the civilian agencies are beginning to examine procurement systems evaluation techniques as a substitute for the review and approval of individual transactions. However, NASA has policies similar to DOD, and normally utilizes DOD to conduct such reviews.[77] AEC also has established criteria for the review and approval of cost-type contractor procurement policies and methods.[78]

A 1970 GAO report on the DOD contractor procurement system review program found that the concept is generally sound but that the program was not being implemented effectively.[79] The report included recommendations for (1) improving the planning and performance of the reviews; (2) developing standards for approval or disapproval of systems; (3) better utilization of reports within Government; (4) expanding the criteria to include more contractors; and (5) performing annual in-depth re-

[74] ASPR 23-200 et seq.

[75] FPR 1-3.900 et seq.

[76] Defense Contract Administration Services, *Contractor Procurement System Review Program Annual Report 1971*, Apr. 26, 1972, p. 9.

[77] NASA PR 23.100 et seq.

[78] AECPR 9-59.000 et seq. Pursuant to the authority contained in 602(d)(13) of the Federal Property and Administrative Services Act, AEC has waived the statutory requirements for advance notification of subcontracts under cost-type contracts when the prime contractor's procurement system and methods have been reviewed and approved. AECPR 9-3.901(b).

[79] U.S. Comptroller General, Report B-169434, *Need to Improve Effectiveness of Contractor Procurement System Reviews*, Aug. 18, 1970, p. 9.

CHAPTER 9

Procurement of Professional Services

This chapter deals with the problems of contracting for professional services. These services relate to such fields as accounting; management, economic, market, and systems analyses; program evaluation; industrial engineering; and operations research. The product furnished generally is a report which sets forth findings and recommendations for solutions to problems, suggestions for improving operations, evaluations of program results, suggestions for alternative means to achieve agency objectives, etc. The discussion excludes architect-engineer (A–E) services, which are discussed in Part E because of their close interrelationship with construction.

For some time, Government agencies have engaged professional firms to perform such services in order to supplement "in-house" capabilities. The types of firms engaged are companies, partnerships, or corporations—both profit and nonprofit. Early in our work, we were advised that the use of such professional firms had increased significantly in the past 10 to 15 years and that many problems are adversely affecting their use.

Scope of Professional Services

While we found that precise or comprehensive data on the use of professional services was not available from official sources, we did obtain many indicators of their magnitude and importance.

Table 1 is a summary of data (based on 1967 statistics) compiled by The National Council of Professional Services Firms in Free Enterprise on "private, for-profit firms, engaged in consulting, design, analysis, and research work."

The Council estimated that about one-third of the activity of this "industry" is devoted to the Federal sector. On this basis, professional services, excluding A–E services, performed annually by "for-profit" organizations amounted to $1.8 billion.[1] Universities, foundations, and other nonprofit organizations that perform very similar projects are not included in these data.

[1] The Council data do not include amounts spent on basic research and R&D for major systems and other hardware.

TABLE 1. DATA ON PROFESSIONAL SERVICE FIRMS

Type of service	*No. of firms*	*Total revenue (billions)*	*Percent of revenue*
Architect-engineer	6,300	$3.60	40
Computer software (analysis and programming)	1,800	2.70	30
Management consulting and social sciences	2,000	1.35	15
Systems analysis	250	1.08	12
Research and development (mainly laboratories)	100	0.27	3
Total	10,450	$9.00	100

Source: Memorandum of interview by representatives of the General Accounting Office with officials of The National Council of Professional Services Firms in Free Enterprise, Oct. 4, 1972.

The procedures followed are like those used for other competitively negotiated contracts; that is, a request for proposal (RFP) is issued and the requirement is announced in the *Commerce Business Daily*. Written proposals are presented by all interested offerors, negotiations are conducted, and an award is made.

Our study identified a number of problems which result in unnecessary costs, discourage participation by many qualified firms, and result in products of low utility. The remainder of this chapter discusses these difficulties and suggests ways to minimize them.

Inadequacies in Requests for Proposals (RFPs)

The RFP is intended to describe the agency's needs and to invite contractors to submit proposals stating how they would fulfill the needs if awarded a contract. We found that the language of many RFPs is vague and ambiguous thereby substantially reducing the likelihood that the services rendered will be useful and raising serious doubts as to whether the agency's managers will be ready to act on the study results. Such language makes it difficult for prospective contractors to respond intelligently to an RFP and for the agency to select a suitably qualified firm.

Representatives of consulting firms universally complained about the large number of proposals they must prepare in the effort to obtain contracts. The preparation of proposals is a costly process that adds to the overhead of competing firms and increases the cost to the Government. Solicitation of 16 to 20 firms is not unusual and, in one instance, an agency sent RFPs to 250 firms. We determined that a bidder's cost in preparing a proposal might constitute as much as 25 percent of the contract amount and, in some cases, the total cost of preparing proposals by all bidders exceeds the contract amount. Proposal costs are so significant that many potential competitors are reluctant to bid before first trying to obtain hard intelligence regarding the likelihood of the contract being let and the genuineness of the competition.

Cumbersome and costly RFP procedures produce undesirable consequences. First, competition is reduced because only a small number of organizations can sustain the overhead costs of keeping a cadre of proposal writers on the payroll. Second, the procedure fosters "brochuremanship" which may result in proposals high on promises but low on performance. They also tend to weaken confidence in the integrity of the procurement process, especially when it is recognized that the cost of preparing proposals ultimately is added to the indirect or overhead costs paid by the Government.

CONCLUSIONS

To overcome these wasteful aspects of present RFP procedures, means must be found to promote competition and avoid favoritism while assuring that the contractors selected are fully qualified to meet the Government's needs.

In part, these problems are generated by the existing requirement to solicit a "maximum" number of sources. In Chapter 3, we recommend a change in the basic procurement statute to require that only an "adequate" number of sources be solicited. We also recommend in Chapter 3 revised criteria for the use of sole-source procurement. We believe these revisions should be accomplished by including appropriate guidelines in the procurement regulations as follows:

- Agency officials must clearly define the tasks to be performed in requests for proposals.
- If many firms can furnish the contemplated professional service, the agency should be authorized to obtain brief preliminary data on their capabilities, availability, and desire to perform the work and, on the basis of this information, to select an appropriate number of firms, perhaps three to eight, to prepare detailed proposals. In this connection the Office of Federal Procurement Policy could assist agencies in developing lists of prospective bidders.

Procurement of studies or surveys other than those negotiated under the three exceptions above: 10 U.S.C. 2304(a)(10); 41 U.S.C. 252(c)(10).

- As a means of circumventing personnel ceilings
- As a technique for avoiding decisionmaking.

The Blue Ribbon Panel which studied the management practices of the Department of Defense in 1970 found, in respect to contract studies, that:

> There is no effective control of contract studies within the Department. While each study must be justified to get funding, there does not appear to be, at any point, an effective mechanism for establishing a relative need for the study, or for determining the extent to which the subject area has been studied previously. It appears from reviewing completed studies, that many of them are not objective analyses to provide inputs to the decision process but are rather performed to support positions known to be held by the contract organizations.

The following recommendations of the Blue Ribbon Panel on this point should stand as a model that other agencies should consider:

- Establish procedures to review and validate requirements for contract studies.
- Establish a central control record of contract studies to include subject, purpose, cost, significant finding, and an assessment of the quality of the work and the utility of the product.
- Establish procedures for contracting for studies to provide adequate safeguards to assure that the Department gets a product that is relevant and responsive to the requirement; assure a close working relationship between the contracting officer and the technical representative; and develop criteria for selecting contractors that will assure competent and objective support to the Department.[4]

Summary

Improvements in the acquisition of professional services are important, not only because of the growing size of these procurements but also because such services, properly employed, are essential to effective program administration. Moreover, the analyses and recommendations flowing from these professional services contracts frequently are the basis for sizeable additional expenditures of Federal funds.

Our recommendation and other suggested actions should bring about the desired improvements. However, they should be supplemented by periodic reviews of agency practices and procedures by the Office of Federal Procurement Policy in order to assure that the problems noted are being corrected and that further actions are initiated where necessary.

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[4] Blue Ribbon Defense Panel, *Report to the President and the Secretary of Defense on the Department of Defense*, July 1970, pp. 158–160.

CHAPTER 10

Field Contract Support

GOVERNMENT-WIDE CONTRACT SUPPORT

Recommendation 39. Establish a program to coordinate and promote interagency use of contract administration and contract audit services; and use, to the fullest extent possible, for comparable contract support requirements, the services of those Federal agencies charged with performing designated support services for the general public at contractors' facilities.

Several Federal agencies maintain extensive field organizations to provide contract support. Other agencies provide in-plant inspections of products intended for public use. To the extent of their capabilities, these agencies should be used to provide field contract support services for all Federal agencies.

Field contract support services may include one or many steps in the administration of contracts, such as pre-award surveys, plant clearance, industrial security, equal employment opportunity contract compliance reviews, small business assistance, price and cost analyses, production surveillance, safety, property administration, quality assurance, transportation, contractor payment, contract audit, and contract termination.

At present, many agencies fail to take full advantage of available field contract support. These failures are attributable to two main causes: (1) interagency use of field contract support is not mandatory and (2) there is no focal point in the executive branch for coordinating field contract support.

In the Department of Defense (DOD), the Defense Contract Administration Services (DCAS) and the Defense Contract Audit Agency (DCAA) have reduced the number of activities and personnel needed to administer DOD contracts. Although DCAS and DCAA can perform similar services for civilian agencies, they are being used to do so only to a limited extent.

Civilian agency use of DCAS generally has been limited to sporadic quality-assurance requirements. There has been a greater tendency to use the services of DCAA; it currently does work for about 22 Government agencies.[1] Many agencies, however, still make their own contract audits or, in some cases, have them made by commercial auditors. NASA, however, regularly uses the services of DCAS and DCAA, and the services have proven to be reliable and effective.[2]

Some agencies do not use inspection services available from other Government agencies, and contractors often complain that there is much duplication of agency inspection. For example, the Department of Agriculture (USDA) and the Food and Drug Administration (FDA) are required by law to inspect and grade food for the public or as a reimbursable service to the food industry. When Government agencies contract with the segment of the food industry served by USDA and FDA inspectors, they usually do not use these inspection services.

A Government-wide program for interagency field contract support would provide a means for maximizing the use of present resources and minimizing the demands on suppliers. To be fully effective, the program must

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[1] U.S. Department of Defense, *DCAA Annual Report, Fiscal Year 1971*, p. 8.

[2] Study Group 5, *Final Report*, Feb. 1972, p. 326.

TABLE 1. DOD PLANT COGNIZANCE ASSIGNMENTS, MARCH 1972

	Army	*Navy*	*Air Force*	*DCAS*	*Total*
November 12, 1964	10	17	24	41	92
1965–1972					
Transferred out	7	4	7	2	20
Transferred in	2	2	2	14	20
Established new	0	0	0	4	4
Dissolved	0	0	0	23*	23*
Net March 1972	5	15	19	34	73

*Represents discontinuance of plant residencies. In most cases responsibility for support of a particular plant was reassigned to a DCAS district or area office.

Source: (1) *DOD Directory of Contract Administration Services Components* (DOD 4105.59H), Mar. 1972.
(2) Commission Studies Program.

tor is also doing business with civilian agencies.[5]

The military services are wary of the erosion of their technical control and direction over major weapon system programs. We understand this concern and fully support the program manager's prerogative to position required technical personnel in the contractor's facilities. However, many tasks performed in field offices are important to the success of a program but are not of continuing concern to the program manager. Performance of these tasks by a field contract support team complements program personnel assigned to a contractor's facility.

DCAS has been a major asset for DOD and industry and can, if expanded, service the plants now under cognizance of the military services, improve DOD contract administration, and reduce costs.

Separate DCAS from DSA

Recommendation 41. Remove the Defense Contract Administration Services organization from the Defense Supply Agency and establish it as a separate agency reporting directly to the Secretary of Defense.

When DCAS was formed, the Secretary of Defense placed DCAS under the Defense Supply Agency (DSA). The selection of DSA, rather than one of the services, was a reasonable assignment since DSA was already jointly staffed and had a defensewide mission.

Federal and industry officials generally agree that DCAS performs its mission effectively. However, many procuring agencies are reluctant to assign contracts to DCAS and some agencies that do assign work to DCAS fail to use the full range of its available services. The reasons given generally relate to DCAS' location in DSA and concerns that by reason of its location DCAS would not give sufficient emphasis or priority to their needs.

Whether these concerns are real or imagined, the assignment of a contract administration and a wholesale supply mission to DSA inhibits the attainment of the full benefits of central management of contract support. Requiring two major mission elements to compete for resources and management attention within a single organizational framework creates problems involving priority of management attention.

Locating DCAS in DSA was influenced by the potential economies inherent in attaching the new organization to an established administrative base. DCAS and DSA would share headquarters support services such as personnel, public affairs, counsel, administrative support, comptroller, manpower use, and systems planning. Although the two functions were to be accorded equal organizational status with a Deputy Director of Supply and a Deputy Director for Contract Administration Services, this has not been done. The Deputy Director of DCAS reports to the Director/Deputy Director of DSA in the same manner as the Executive

[5] The proliferation of regulations is discussed in detail in Chapter 4.

Directorates of the DSA headquarters (see fig. 1).

A more forceful, integrated, and responsive DOD contract support program would result if DCAS were a separate agency reporting directly to the Secretary of Defense. As a separate agency, DCAS would have the status and independence that the military departments consider necessary to provide them with fully responsive support.

Consolidate DCAS and DCAA Into a Single Agency

Recommendation 42. Consolidate the Defense Contract Administration Services and Defense Contract Audit activities into a single agency reporting directly to the Secretary of Defense.*

Organizationally two different approaches were taken when DCAS and DCAA were established. DCAS was placed under an existing organization (DSA), but DCAA was established as a separate agency. Allegedly, the necessity to preserve the auditor's "independence" was the overriding reason for affording DCAA separate status. This reason evidently was considered to outweigh the advantages of bringing together, in a single organization, all the skills needed to support the contracting officer. Regardless of the reason, the organizational separation of DCAS and DCAA continues to cause unnecessary friction.

Interface problems between DCAS and DCAA have persisted since their establishment. Contract administrators and buying office personnel resent the fact that auditors enjoy a separate command channel. They believe that this independent status often prevents the auditor from performing in an "advisory" role as a member of the contracting officer's team. Rather, they feel that the auditor often "judges" the procurement decisions of the contracting officer.

Contract administration and buying personnel resent the situation that permits the auditor to submit a dissenting report through an audit organization to the Secretary of Defense level. Relatively few actions have, in fact, reached the Office of the Secretary of Defense for decision. It was clear, however, that the mere existence of this mechanism, whether used or not, is a constant source of irritation.

DCAA, however, believes that the roles and relationship of auditors to contracting officers (including administrative contracting officers [ACOs] are defined in the ASPR and FPR; and it is clearly the province of the contracting officer to make the ultimate judgments in reaching reasonable and prudent contract pricing decisions. DCAA believes that if auditing were to be organizationally responsible to officials charged with making pricing decisions, its effectiveness would be reduced. Similar views were expressed by audit personnel in the civilian agencies. However, we noted that *contract auditing* in these agencies is not separated from the *internal audit* function. These auditing organizations, as independent arms of the agency heads, are responsible for auditing internal agency operations as well as contractors. This contrasts with DCAA whose mission is limited to the review of contractors' records and does not include the review of Federal agency performance. DCAA is not an inspector general or an agency charged with investigating fraud.

Individual industry representatives and associations have publicly criticized the organizational separation of auditing from the other field contract support functions within DOD. They point out that the existing structure presents yet another Government agency that contractors must deal with in pricing, overhead determinations, accounting system reviews, etc. They believe this arrangement places an unnecessary and costly burden on industry and seriously inhibits the Government's goal of achieving "unified team action" in providing contract support to its procuring agencies. We found through extensive interviews and questionnaires that these views were shared by a broad cross section of industry.

A succession of ad hoc committees and task forces have studied the issues and made recommendations to resolve the problems involved. The 1969 Logistics Management Insti-

*See dissenting position, *infra*.

(ii) Of such nature that they may be acceptable in whole or in part, but the decision needs to be based on knowledge and/or skill possessed by the contracting officer or negotiator, or their engineering and other technical assistants.

Fourth, the contract auditor has very little authority, as such; only the responsibility to provide for others a professional type of service which is vital to the conservation and protection of public funds . . . [Italics supplied]

The foregoing clearly indicates that contract auditing exists to provide a professional advisory service to procuring agencies in the placement and administration of contracts. This is also the goal of the field contract administration services organization. DCAA does not audit the internal operations of any Government activity. In this sense, it is not engaged in the traditional internal audit function—nor would it be if DCAA were merged with another organization. In terms of independence, the contract auditor is completely separate, as he must be, from the contractors whom he audits. Here again, this independent status would be preserved if DCAS and DCAA were combined.

A great number of combined skills must be brought to bear in order to support the contracting officer. Toward this end, the professional independence of engineers, lawyers, production specialists, quality assurance technicians, and others is necessarily subordinated. Contract auditing should not be an exception. Although contract auditors might appear to suffer from loss of status if DCAS and DCAA were to be combined, this is largely a problem of attitudes that is not any more serious than the existing problem.

Sound management practices recognize the advantages of grouping mutually supporting activities in a single organization. The contract auditing function is a mutually supporting skill that belongs in DCAS. This arrangement would promote a single line of responsibility between procuring and field support activities and would provide a much clearer and more responsive channel to DOD contractors.

These benefits, together with the potential cost savings that would accrue from consolidating DCAS and DCAA, outweigh the possibility that the objectivity and independence of contract auditing would be eroded.

DISSENTING POSITIONS

A number of Commissioners* do not support the consolidation of DCAS and DCAA into a single agency. Their views on this recommendation are as follows:

The majority opinion is that the Defense Contract Administration Services and the Defense Contract Audit Agency activities should be consolidated into a single agency reporting directly to the Secretary of Defense. The majority believes that the contract administration community generally resents the fact that audit personnel enjoy a separate command channel and can submit a dissenting report through audit channels. They also believe that a merger of the two organizations would result in savings by eliminating duplicate staff functions and through space and administrative savings.

GAO, in a report to the Chairman, Select Committee on Small Business (B–166470, April 21, 1969), on a similar proposed merger stated its views that, regardless of the type of organization ultimately decided upon, the DCAA auditor should continue to have complete independence in determining the scope and depth of the review necessary for reporting his findings and conclusions concerning a contractor's incurred and estimated costs.

The Secretary of Defense believes that it is not in the public interest or the interest of the Department of Defense to destroy the independence of the DCAA or to change the organizational arrangement under which DCAA reports directly to the Secretary of Defense. In 1969 the Logistics Management Institute proposed a merger of DCAS and DCAA which was rejected by the Department of Defense. Both the Senate and House Appropriations Committees expressed strong opposition to this proposal.

GAO believes that the consolidation of DCAS and DCAA would inevitably result

*Commissioners Chiles, Holifield, Staats, and Webb.

CHAPTER 11

National Policies Implemented Through the Procurement Process

The magnitude of the Government's outlays for procurement and grants creates opportunities for implementing selected national policies. The opportunities lie in the disciplining effect which the Government can exert on its contractors and grantees. It can require, for example, that suppliers maintain fair employment practices, provide safe and healthful working conditions, pay fair wages, refrain from polluting the air and water, give preference to American products in their purchases, and promote the rehabilitation of prisoners and the severely handicapped. However, the pursuit of these opportunities also creates problems in the procurement process.

The enormity of the dollar figure involved ($57.5 billion [1] for direct procurement and $39.1 billion [2] for grants in fiscal 1972) makes the procurement process appear to be an attractive vehicle for achieving social and economic goals. The procurement process also draws attention because its flexible regulatory system makes it readily adaptable to the implementation of diverse policies. However, its effectiveness in accomplishing such goals is perhaps overrated; for example, even though a large share of the Government procurement dollar is spent for commercial products, sales to the Government amounted to less than two percent of the Nation's total commercial sales in 1967.[3]

The problems engendered by use of the procurement process in the implementation of national goals are that procurement becomes more costly and time-consuming with the addition of each new social and economic program. The cumulative effect of programs already imposed on the procurement process and the addition of those contemplated could overburden it to the point of threatening breakdown. At the very least, the imposition of national goals and objectives on the procurement process, as beneficial as they may be, add numerous obligations and administrative complexities for Government contracting officers. Legitimate questions arise as to how much of the extra costs and other burdens of social and economic programs should be absorbed in the procurement process and how much should be supported by more explicit means.

The procurement process is only one means, and in the main a supplemental one, for achieving social and economic objectives. The Government grants tax benefits, licenses, and privileges; makes direct grants of money and equipment; and uses other instruments to achieve national purposes by encouraging certain types of conduct and discouraging others.

The cost burden in extra time and money of pursuing nonprocurement objectives through the procurement process cannot be precisely measured, although we can say with certainty that these costs are significant. For some programs, incremental costs of administration can be identified, as when a line item is requested for administration of fair employment prac-

[1] See Appendix D.

[2] U.S. Office of Management and Budget, *Special Analyses of the United States Government, Fiscal Year 1973*, table P–9, Federal Aid to State and Local Governments, p. 254.

[3] *1967 Census of Business*, vol. III, Wholesale Trade Subject Reports, table I, Wholesale Trade Sales by Class of Customer, 1969, p. 4–1, indicates sales to the Government constitute about 1.6 percent of the total sales in wholesale trade.

An awareness of the potential of the Government contract as a means for promoting social and economic objectives developed during the depression of the 1930's. In the face of high unemployment and depressed wages, Congress enacted the Buy American Act [11] and most of the labor standards legislation relating to public contracts, including the Davis-Bacon Act,[12] the Walsh-Healey Public Contracts Act,[13] and the Copeland "Anti-Kickback" Act.[14] While the Buy American Act, with its procurement preference for domestically-made products, sought to protect American industry and promote jobs, the labor standards legislation was aimed largely at protecting workers from exploitation by unscrupulous employers. This period also produced the Federal Prison Industries Act [15] and the Wagner-O'Day Act [16] which established preferences for products produced by Federal prisoners and by the blind.

The exigencies of war mobilization also have given impetus to the use of the Government contract for accomplishing objectives other than procurement. Executive orders requiring nondiscrimination in employment by Government contractors are among measures which originated during World War II when maximum use of the Nation's manpower and resources was a chief concern.[17] This concern also gave birth to the program begun in 1952 for placing Government contracts in labor surplus areas.[18] Certain of these programs gained new emphasis in the late 1960's as part of the broader Government effort to provide more jobs in the inner cities. In 1967, the procurement preference for "areas of persistent or substantial labor surplus" was expanded to include a new preference category, "sections of concentrated unemployment or underemployment," aimed at reducing urban unemployment.[19] Similarly, although Section 8(a) of the Small Business Act [20] is aimed at small business generally, it has become the instrument of a special Government program to create and upgrade minority-owned business firms.

The 1960's was also a period of expanded labor-related legislation designed to close some of the gaps in the legislation of the 1930's. An amendment to the Davis-Bacon Act in 1964 broadened the prevailing wage concept to include certain fringe benefits as well as actual wages.[21] The Service Contract Act of 1965 [22] extended to service employees of contractors the wage and labor standard policies established by the Davis-Bacon Act and the Walsh-Healey Public Contracts Act. Like the Walsh-Healey Act, this law also required safe and sanitary work conditions for service employees. In 1969, the Contract Work Hours Standards Act was amended to give the Secretary of Labor authority to promulgate safety and health standards for workers on construction contracts.[23]

Today, the procurement process increasingly is being recognized as a means of implementing Government policies. New and diverse national programs are being grafted upon the process at a rapid pace. For example, it was recently used to help meet the employment needs of Vietnam veterans by requiring Government contractors and subcontractors to list employment openings with appropriate State employment service offices [24] and to promote training opportunities in construction crafts by requiring the employment of apprentices and trainees on Federal construction projects.[25] New proposals are currently being advanced to incorporate into the process the Nation's efforts to mitigate air and water pollution.[26]

Other social and economic measures that will be implemented through the procurement process are the Noise Control Act of 1972 and the Vietnam Veterans Readjustment Assistance Act of 1972.[27] The Noise Control Act estab-

[11] 41 U.S.C. 10a–10d (1970).
[12] 40 U.S.C. 276a–276a–5 (1970).
[13] 41 U.S.C. 35–45 (1970).
[14] 18 U.S.C. 874; 40 U.S.C. 276c (1970).
[15] 18 U.S.C. 4124 (1970).
[16] 41 U.S.C. 46–48 (1970).
[17] Executive Order 8802, 3 CFR 957 (1938–1943 Comp.).
[18] Defense Manpower Policy No. 4, 32A CFR 33 (1972).
[19] *Ibid.*
[20] 15 U.S.C. 637(a) (1970).
[21] Act of July 2, 1965, Public Law 88–349, 78 Stat. 238.
[22] Public Law 89–286, 79 Stat. 1034. The purpose of the bill as set forth in S. Rept. 798, 89th Cong., 1st sess., Sept. 30, 1965, was "to provide labor standards for . . . the only remaining category of Federal contracts to which no labor standards protection applies."
[23] Public Law 91–54.
[24] Executive Order 11598, 3 CFR 161 (Supp. 1971).
[25] Statement by the President on "Combating Construction Inflation and Meeting Future Construction Needs," Mar. 17, 1971 (6 *Weekly Comp. of Pres. Doc.* 376 (1970), art. III, sec. B.4.
[26] In particular, see the Clean Air Act, 42 U.S.C. 1857 et seq. (1970) and Executive Order 11602 of June 29, 1971, pursuant thereto, 3 CFR 167 (Supp. 1971); the Water Quality Improvement Act of 1970, 33 U.S.C. 1151, 1151 note, 1155, 1156, 1158, 1160–1172, 1174 (1970).
[27] Public Law 92–540.

Program	*Authority*	*Purpose*
Employment Openings for Veterans*	Exec. Order 11598, 41 CFR 50–250, ASPR 12–1102	To require contractors to list suitable employment openings with State employment system to assist veterans in obtaining jobs
Covenant Against Contingent Fees*	41 CFR 1–1.500–509	To void contract obtained by broker for a contingent fee
Gratuities*	32 CFR 7.104–16	To provide Government with right to terminate if gratuity is given to a Government employee to obtain contract or favorable treatment
International Balance of Payment*	ASPR 6–805.2, FPR 1–6.8	To limit purchase of foreign end products and services for use abroad
Prison-made Supplies	18 U.S.C. 4124	To require mandatory purchase of specific supplies from Federal Prison Industries, Inc.
Preference to U.S. Vessels*	10 U.S.C. 2631, 46 U.S.C. 1241	To require the shipment of all military and at least half of other goods in U.S. vessels
Care of Laboratory Animals*	ASPR 7–303.44	To require humane treatment in use of experimental or laboratory animals
Required Source for Aluminum Ingot*	ASPR 1–327, FPR subpart 1–5.10	To eliminate excess quantity of aluminum in the national stockpile
Small Business Act*	15 U.S.C. 631–647; see also 41 U.S.C. 252(b) and 10 U.S.C. 2301	To place fair portion of Government purchases and contracts with small business concerns
Blind-made Products	41 U.S.C. 46–48	To make mandatory purchase of products made by blind and other handicapped persons
Duty-free Entry of Canadian Supplies*	ASPR 6–605	To further economic cooperation with Canada and continental defense
Use of Excess and Near Excess Currency*	ASPR 6–000 et seq., FPR 1–6.804–806	To provide preference in award to bidders willing to be paid in excess or near-excess foreign currency
Purchases in Communist Areas*	ASPR 6–401 et seq.	To prohibit acquisition of supplies from sources within Communist areas
Nonuse of Foreign Flag Vessels Engaged in Cuban and North Vietnam Trade*	ASPR 1–1410	To prohibit contractor from shipping any supplies on foreign flag vessel that has called on Cuban or North Vietnamese port after specific dates
Labor Surplus Area Concerns*	Defense Manpower Policy No. 4, 32A CFR 33 (Supp. 1972)	To provide preference to concerns performing in areas of concentrated unemployment or underemployment
Economic Stabilization Act of 1970	12 U.S.C. 1904 note	To stabilize prices, rents, wages, salaries, dividends, and interest
Humane Slaughter Act*	7 U.S.C. 1901–1906	To purchase meat only from suppliers who conform to humane slaughter standards
Miller Act*	40 U.S.C. 270a–d	To require contractor to provide payment and performance bonds on Government construction contracts
Convict Labor Act*	Exec. Order 325A, ASPR 12–201 et seq.	To prohibit employment on Government contracts of persons imprisoned at hard labor
Vietnam Veterans Readjustment Act	Public Law 92–540	To give employment preference to disabled veterans and veterans of the Vietnam era

*Indicates that the program has resulted in the issuance of a standard contract clause.
Source: Commission Studies Program.

Act	*Original enactment date*	*Agencies sharing responsibility with procuring activity*	*Problems*
			under another statute Federal prisoners may work for pay in local communities under work release programs.
Labor Surplus (Defense Manpower Policy No. 4)	1952	Office of Emergency Preparedness; Department of Labor	• Prohibition against payment of price differentials for award to labor surplus area concerns prohibits total set-asides and complicates procedures. • Program conflicts with small business program.
Equal Opportunity (Executive Order 11246)	1965	Department of Labor (Office of Federal Contract Compliance); Designated "Compliance Agencies"	• Contractor may be subject to review by several compliance agencies, particularly when he operates in more than one industry. • Complaint may result in contractor being investigated both by OFCC and EEOC for the same alleged violation. • Pre-award solicitations and requirements are numerous, confusing, and cause delay.
Service Contract Act (41 U.S.C. 351–357)	1965	Department of Labor; Comptroller General	• Wage determinations are often improperly made by using "median rates or slotted rates" as prevailing rates. • The act is often extended to cover professional engineering and technical employees although it applies only to service employees. • Rates applicable to the area of the procuring activity are applied if the place of performance is unknown. • Recent amendments may reduce competition between potential service contractors and have an inflationary effect. • Even the unrealistically low $2,500 threshold for wage determinations appears to have been eliminated by recent amendments.

Source: Commission Studies Program.

for resolving the conflicts.[31] In such cases the contracting agencies are forced to contend with the conflicts and provide some accommodation to all.[32] The latter situations, particularly, create significant problems for the contracting agencies and give rise to protests or other complaints. The complicated scale of set-aside preferences established under the procurement regulations for the small business and labor surplus area programs is a good example.

Under Defense Manpower Policy No. 4, preferential treatment is provided to areas of high unemployment by setting aside portions of procurements for negotiation with qualifying firms. The intention is to relieve economic distress and create jobs by directing Government contracts into such areas or to firms agreeing to perform a substantial portion of the production on those contracts in or near such areas. The small business set-aside program, in contrast, emphasizes preferential treatment for a different category of business firms. It permits normal competitive bidding and award procedures on procurements reserved exclusively for such firms.

Under the regulations, labor surplus set-asides are given priority over small business set-asides, so that when a contracting officer initiates a procurement he must consider first the possibility of a labor surplus set-aside, and then that of a small business set-aside. Within labor surplus areas, however, small businesses are given preference.

Another example is the use of Section 8(a) of the Small Business Act for assisting minority enterprises; this use also results in a conflict with other small business set-aside programs and has been the subject of legal challenges.[33]

promoting the rehabilitation of prisoners and providing employment opportunities for the handicapped is resolved by legislation in favor of Federal prisoner rehabilitation. The agency purchasing an item or service must look first to the Federal Prison Industries' schedule of products and then to the schedule of products made by the blind and other severely handicapped.

[31] For a review of the use of the procurement process in the furtherance of social and economic goals and particularly of conflicts between such goals see Roback, "Government Procurement as a Means of Enforcing Social Legislation," 6 *National Contract Management Journal* 13 (1972).

[32] In newly established procedures, the Department of Defense now makes total small business set-asides with a portion thereof reserved for small business firms which also qualify as labor surplus area concerns. See Defense Procurement Circular No. 102 (July 31, 1972).

[33] *Kleen-Rite Janitorial Services, Inc.* v. *Laird,* U.S. Dist. Ct., Dist. of Mass., Civil Action No. 71–1968–W; *Ray Baillie Trash Hauling, Inc., et al.* v. *Thomas S. Kleppe, Administrator, Small Business Administration, et al.,* U.S. Dist. Ct., Southern Dist. of Florida, Case No. 71–1030–Cir-JLK; *Pacific Coast Utilities Service, Inc.* v. *Laird,* U.S. Dist. Ct., Northern Dist. of Calif., Case No. C–71–1035.

[34] 15 U.S.C. 637(a).

Administrative Consequences

The social and economic programs implemented through the procurement process add many complicating factors. Agencies must determine the applicability of the programs to a proposed contract, determine the compliance status of the apparent successful bidder prior to award, and obtain and incorporate wage determinations in bid solicitations. Implementation of many of the programs requires special regulations and the addition of personnel to conduct investigations, make reports, and keep records.

The administrative problems are compounded by the division of authority between procurement and regulatory agencies. For example:

- The Secretary of Labor has a voice in agency contractor selections since under the Walsh-Healey Act he decides who is a "manufacturer or regular dealer" and is eligible for a Government contract.
- In the labor surplus area program, policy is the function of the Office of Emergency Preparedness; areas of eligibility are defined by the Department of Labor; and set-asides are made by the various procurement agencies.
- The Small Business Administration can conclusively determine that a small business firm has the capability to perform a contract where a procuring agency would otherwise reject its bid or proposal.
- Under the Section 8(a)[34] minority contracting programs, Government agencies enter into contracts with the Small Business Administration which in turn subcontracts the work to firms owned by disadvantaged persons.
- The Clean Air Act amendments of 1970 involve the President, the Administrator of the Environmental Protection Agency, and the procuring agencies in the process of adapting the procurement process to further the act's objectives.
- Some of the labor standard laws divide enforcement between the Department of La-

threshold of the Davis-Bacon Act to $25,000 on the basis that price increases subsequent to 1935 have made the current threshold out of date and the cost of administering contracts under $25,000 outweighs the benefits intended. The General Services Administration agreed with the proposed $25,000 threshold [41] as did the Department of Labor.[42] Of the agencies queried in our study program, the majority favored a threshold of $25,000, though suggestions ranged from $15,000 to $100,000.

The Comptroller General has proposed an increase in the Davis-Bacon threshold to an amount between $25,000 and $100,000. This proposal is aimed at reducing the Department of Labor's workload with respect to wage determinations. According to the Comptroller General, a reduction in the number of wage determinations required would permit the Department (1) to make more thorough investigations, (2) to conduct more frequent detailed onsite wage surveys, and (3) to resolve more adequately protests or problems that may arise in arriving at factual determinations without appreciably affecting the wage stabilization objectives of the act.[43]

The Copeland "Anti-Kickback" Act is a companion to the Davis-Bacon Act and should have a threshold corresponding to the Davis-Bacon Act.

A survey by the General Accounting Office has disclosed that the cost of Miller Act bonds is substantial [44] and that defaults are few. An increase in the act's threshold would increase competition in Government construction contracts by permitting contractors who cannot obtain bonds to bid.

The Service Contract Act always has required wage and fringe benefit determinations to be made for contracts exceeding $2,500 but allowed the Secretary of Labor to make "reasonable variations, tolerances and exemptions" from the act. In practice, such determinations seldom have been made for small dollar contracts. In fiscal years 1968 through 1970, wage determinations were issued for about 35 percent [45] of the contracts for which they were requested. Thus, in about 65 percent of the cases contracting agencies did not receive a wage determination but were required to wait 30 days before advertising for bids. The Department of Labor has stated that it does not have sufficient staff to make appropriate determinations in areas from which it lacks adequate information.[46] An increase in the threshold of the act to a more realistic level would minimize, if not eliminate, much unproductive delay in waiting for wage determinations that are never issued and still leave most service contract employees covered. Recent amendments to the act will gradually increase the range of contracts that must include wage and fringe benefit determinations; after fiscal 1977, they apparently will be required for every service contract, regardless of amount.

Foreign procurement constitutes a small proportion of total procurement and the bulk of foreign products purchased represents end items or materials not available in the United States. On that basis, we believe that the cost of administering the Buy American Act on contracts not exceeding $10,000 is unjustified.

Elsewhere in this report [47] we recommend raising the ceiling on small purchases from $2,500 to $10,000, a step which could save the Government millions of dollars in administrative costs each year. That change will not be fully effective, however, if the present thresholds for social and economic requirements implemented through the procurement process are retained. These requirements add administrative costs by necessitating additional time for making awards, increased requirements for contract provisions, and more personnel for their implementation.

In a meeting with representatives of organized labor, we were advised of Labor's strong opposition to any increase in the thresholds of labor laws implemented through the procurement process. The union representatives contended that such thresholds should be lowered

[41] Letter from A. F. Sampson, Commissioner Public Buildings, GSA, to George P. Shultz, Director, Office of Management and Budget, Mar. 17, 1971.

[42] Report, U.S. Comptroller General, B-146842, *Need for Improved Administration of the Davis-Bacon Act Noted Over a Decade of General Accounting Office Reviews*, July 14, 1971, p. 37.

[43] *Ibid.*, pp. 36–37.

[44] Estimated by the Comptroller General at between $16.5 and $20 million in fiscal 1970; between $20 and $24.5 million in fiscal 1971; and between $23 and $28 million in fiscal 1972. (U.S. Comptroller General, Report B-168106, ***Survey of the Application of the Government's Policy on Self-Insurance***, June 14, 1972, pp. 51, 54, 56.)

[45] Study Group 2, *Final Report*, vol. III, p. 1311.

[46] Letter from Leo R. Werts, Assistant Secretary for Administration, Department of Labor, to Elmer B. Staats, Comptroller General, Oct. 9, 1970.

[47] Chapter 3.

Sanctions for Violation

Recommendation 46. Revise current debarment policies to provide for uniform treatment for comparable violations of the various social and economic requirements and to establish a broader range of sanctions for such violations.

A number of the social and economic laws implemented through the procurement process expressly authorize or direct debarment of a contractor who fails to comply with the requirements of those laws imposed through his contract;[51] for example, Davis-Bacon Act, Walsh-Healey Act, and Service Contract Act. Others do not; for example, Executive Order 325A (convict labor), Defense Manpower Policy No. 4 (labor surplus area), and Miller Act. The Copeland "Anti-Kickback" Act does not itself provide for debarment but the regulations under it do. Executive Order 11246 authorizes debarment for violation of the equal employment opportunity requirements contained in Government contracts.

The standards for imposition of debarment and the period of debarment vary with the different social and economic programs. Under some programs an inadvertent violation of the requirements can lead to debarment; others require an "aggravated or willful" violation. The older laws provide for the debarment of contractors or subcontractors when they are found in violation of those laws by some administrative official such as the Comptroller General, Secretary of Labor, or an agency head. The newer laws such as the Water Control Amendments of 1972[52] and Executive Order 11602[53] (which provides for administration of the Clean Air Act[54] with respect to Federal contracts) require conviction of a violation of the act as a minimum basis for debarment. The Noise Control Act of 1972[55] contained similar debarment provisions as passed by the Senate, but all debarment provisions were deleted by the House before it passed the act.[56]

Some debarment provisions specify the period of debarment. Others specify a maximum period or an indefinite period that will end when the contractor demonstrates compliance with program requirements. The indefinite debarment period reflects the current trend.

Debarment is a severe sanction and can have serious economic consequences to contractors and their employees. If imposition of the sanction also results in termination or cancellation of existing contracts, ongoing procurement actions and agency programs may be affected. This can deter effective implementation of the socioeconomic objective, since both the procuring agency and the enforcement agency may be reluctant to take actions that may cause delays and increased costs. These situations would occur less frequently if the social and economic programs provided a more uniform and broader range of sanctions that could be applied according to the severity and nature of the violation. Such sanctions could distinguish between "aggravated and willful" and inadvertent violations, provide for fines instead of termination of contracts or debarment for lesser violations, and provide for reinstatement of contract eligibility upon demonstrated compliance.

In the absence of express statutory or Presidential directives, the grounds for debarring contractors have been restricted to criminal acts related to contracting, serious violations of contract provisions, or conditons affecting the responsibility of a contractor to perform.[57]

The nonstatutory grounds for debarment are established by the ASPR and FPR and at present are essentially the same. During our studies it was suggested that the grounds for debarment of contractors should be enlarged to include violations of other Federal laws; for example, violations of the National Labor Relations Act (NLRA). Representatives of organized labor cited one situation where a company violated the NLRA on numerous occasions yet continued to receive Government contracts. The NLRA, of course, proscribes certain actions by both employers and unions and establishes sanctions for violations of the act. Whether those sanctions should include debarment from Government contract work raises questions of overall national labor relations policies. As such we

[51] See Part G for a full discussion of debarment procedures and problems.

[52] Public Law 92-500.

[53] 3 CFR 167 (Supp. 1972).

[54] 42 U.S.C. 1857 (1970).

[55] Public Law 92-574.

[56] The Senate accepted the deletion but its Public Works Committee will review the need for such debarment provisions and if appropriate will recommend their addition at a later time. (*Congressional Record*, Oct. 18, 1972, p. S18645.)

[57] See Part G for a discussion of nonstatutory grounds for debarring of contractors.

CHAPTER 12

Procurement From Small Business

For 30 years, the Federal Government has recognized that small business must play an important role in supplying Government needs. Accordingly, we devoted much effort to studies of the problems small business firms encounter in contracting with the Government and to solutions that will help to strengthen the role of small business in meeting essential national needs.

Historical Development

At the beginning of World War II, the Government recognized the need to increase its reliance on small business. Full mobilization disclosed that the industrial capacity of small business was not being used. Not only were some small industries unable to contribute fully to the war effort, they often could not obtain manpower and raw materials for essential civilian production. Many small firms faced the prospect of going out of business, because Government agencies created to administer war production favored large corporations that had proven management and technical capability and the capacity for mass production. This situation was corrected by the small business programs of the War Production Board (WPB)[1] and the Smaller War Plant Corporation (SWPC).[2]

After the war the Government took steps to strengthen small business participation in the Federal marketplace. One of these steps, the Armed Services Procurement Act of 1947, states that:

> It is the policy of Congress that a fair proportion of the purchases and contracts . . . be placed with small business concerns.[3]

A similar statement appears in the Federal Property and Administrative Services Act of 1949.[4]

The Defense Production Act of 1950[5] provides that small business concerns should "be encouraged to make the greatest possible contribution toward achieving the objectives of the Act," one of which is to maintain an industrial mobilization base. A 1951 amendment[6] to the Defense Production Act established the Small Defense Plants Administration (SDPA); then, in 1953, the Small Business Administration (SBA) was created by the Small Business Act which states that:

> The essence of the American economic system of private enterprise is free competition . . . The preservation and expansion of such competition is basic not only to the economic well-being, but to the security of this Nation. Such security and well-being cannot be realized unless the actual and potential capacity of small business is encouraged and developed.[7]

SBA originally had a temporary existence of two years,[8] but its franchise was extended periodically until 1958,[9] when it became a permanent agency.

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[1] Executive Order 9024, Jan. 16, 1942.
[2] Public Law 77-603, ch. 404, sec. 4; 56 Stat. 353.
[3] 10 U.S.C. 2301 (1970); the "fair proportion" concept is discussed later in this chapter.
[4] 41 U.S.C. 252(b) (1970).
[5] Public Law 81-774, ch. 932; 64 Stat. 815.
[6] Public Law 82-96, ch. 275, sec. 110(a); 65 Stat. 139.
[7] Public Law 83-163, title II, ch. 282; 67 Stat. 232.
[8] Public Law 83-163, ch. 282, sec. 221(a); 67 Stat. 240.
[9] Public Law 85-536, as amended; 72 Stat. 384; 15 U.S.C. 631-647 (1970).

> It should be lowered in any case where the SBA determines that a few concerns . . . have . . . gained undue competitive strength. . . .
>
> . . . concerns which . . . have grown to a size which exceeds the applicable small business size standard should compete for Government contracts not reserved for small business concerns or should seek commercial markets in the same or related fields. Under such circumstances small business concerns should not rely on continuing assistance under the Small Business Act from the cradle to the grave, but should plan for the day on which they become other than small business and should be able to compete without assistance.[14]

Issuance of this policy did not enable SBA to resolve the problem. On September 21, 1971, the SBA Administrator stated, "What is a small business? I can't exactly say . . . Nobody can." [15]

CONCLUSIONS

The definition of small business has changed and should continue to change to accommodate programs established by Congress and SBA. Procurement agencies should use definitions and standards provided by SBA. SBA, rather than the procuring agencies, is and should continue to be responsible for establishing the definition.

Fair Proportion

Each year the legislative and executive branches spend much time, energy, and money to assure that small businesses receive adequate consideration when the Government buys goods and services. This activity centers around the concept of "fair proportion" as defined in the Small Business Act:

> It is the declared policy of the Congress that the Government should aid, counsel, assist and protect insofar as possible the interests of small business in order to ensure that a fair proportion of the total purchases and contracts or subcontracts be placed with small business enterprises.[16]

PROBLEMS

In evaluating small business assistance programs it has been a common practice to use the ratio of contract awards to small business as derived from procurement statistics, even though there have been no studies to indicate that such data provide a valid and reliable measure of fair proportion. Moreover, it has been common to compare the fair proportion statistics of one year with those of preceding years without compensating for the procurement mix, the capability of small business to supply what the Government bought, how the Government made its purchases, which agencies made the purchases, and other factors that influenced contract awards.

A comparison of DOD military procurement data for fiscal years 1965 and 1966 illustrates the danger of relying solely on statistics. In fiscal 1965, the small business share of DOD contracts increased to 19.6 percent from 17.2 percent in fiscal 1964. It increased to 21.4 percent in fiscal 1966.[17] In 1965 and 1966, DOD increased its purchases of items normally produced by small business. However, these statistics do not show whether the percentage rise from one year to the next indicates a "fairer" proportion or a "less fair" proportion for small business.

CONCLUSIONS

Fair proportion can be a rigidly defined or a fluid concept. A rigid definition, such as awarding a fixed percentage of Government procurement to small business, would not be in the Government's interest, even though the percentage might be adjusted from year to year. We believe fair proportion should be recognized as a working concept that expands or contracts from year to year with the types of

[14] U.S. Congress, Senate, Select Committee on Small Business, *Review of Small Business Administration's Programs and Policies—1971*, 92d Cong., 1st sess., Oct. 5, 1971, pp. 26–27.

[15] U.S. Congress, House, Select Committee on Small Business, *Organization and Operation of Small Business Administration*, hearings, 92d Cong., 1st sess., Sept. 21–22, 1971, p. 53.

[16] Public Law 85–536, sec. 2(a); 15 U.S.C. 631(a) (1970).

[17] U.S. Department of Defense, Office of the Secretary, *Military Prime Contract Awards and Subcontract Payments or Commitments, July 1970–June 1971*, p. 25.

a portion further restricted for small business firms in "labor surplus areas." [22]

PROBLEMS

Set-asides affect a relatively small portion of DOD military procurements, but they are important to the small business community because they account for a large part of DOD awards to small firms.[23] DOD awarded small business about $5.8 billion in military prime contracts in fiscal 1972.[24] Of this amount, $1.6 billion resulted from set-asides. These set-asides represented more than one-fourth of the small business awards, but only 4.5 percent of the total DOD prime contract awards (excluding intragovernmental procurement).[25]

Set-asides pose a dilemma for Government procurement officials. The Government is expected to maximize competition and obtain the lowest reasonable price (other factors considered). Because competition for products and services in the set-aside program is restricted to small business, prices to the Government may be higher than those prevailing in a fully competitive market. Moreover, some program officials complain that set-asides delay the procurement process.[26]

SBA, small business associations, and individual small business firms continually call for more set-asides. Congress responds by urging the procuring agencies to increase their awards to small business. These pressures often cause short-term agency response but do little to enhance the long-range goal of maintaining a viable and competitive small business community.

Many procurement officials contend that the set-aside program has become a "numbers game" in which improving the competitive position of small business is secondary to the statistical record.[27] This is particularly true when it appears that procuring offices "satisfy" the directed or implied quota that constitutes a "fair proportion" by setting aside procurements that under ordinary circumstances would be won by small business in open competition.

CONCLUSIONS

Set-asides allow small businesses to compete in segments of the Federal marketplace. However, the set-aside program would be more effective if procuring agencies would establish set-asides in procurement areas where small businesses have been unable to compete successfully for Government contracts. This would permit procurement officials to concentrate on areas offering "real" rather than "paper" accomplishments. Small business firms would benefit by obtaining set-aside contracts in areas where they had not previously been competitive. Such action would counter overemphasis on statistics and would support the long-range goal of a viable and competitive small business industrial base.

Certificate of Competency

If a procuring agency rules that a small business firm lacks capacity or credit to perform a contract, the agency must submit the case to SBA. SBA determines the firm's competency [28] as to capacity and credit. A favorable ruling by SBA is commonly termed a Certificate of Competency (COC).

Under the Small Business Act,[29] Government procurement officers:

> . . . are directed to accept such certification [from SBA] and are authorized to let such Government contracts to such concern or group of concerns without requiring it to meet any other requirement with respect to capacity and credit.

PROBLEMS

SBA representatives report that since 1954 the COC program has resulted in more than

[22] Defense Procurement Circular 102, July 31, 1972.
[23] U.S. Department of Defense, Office of the Secretary, *Military Prime Contract Awards and Subcontract Payments or Commitments, July 1971–June 1972*, p. 48.
[24] *Ibid.*, p. 47.
[25] *Ibid.*, p. 48. (Percentage calculated by the Commission.)
[26] Study Group 2, *Final Report*, Nov. 1971, pp. 287–327.
[27] *Ibid.*, p. 312.
[28] Public Law 85–536, sec. 8(b) (7); 72 Stat. 387; 15 U.S.C. 637(b) (7) (1970).
[29] 72 Stat. 391; 15 U.S.C. 5637 (1970).

program.[35] The act provided for cooperation between SBA, DOD, and GSA to develop a small business subcontracting program to ensure that:

- Small business firms are given fair consideration as subcontractors
- SBA will be consulted by procuring agency prime contractors and subcontractors concerning small business subcontracting opportunities.
- SBA will have access to the procuring agency's subcontracting records.

The small business community expected Public Law 87–305 to increase its share of Government subcontracts; however, the results do not indicate that any increase occurred. At the time of enactment, DOD surveyed 378 large contractors and found that small business received about 38 percent of the subcontracts awarded under military prime contracts. Two years later, with 617 large contractors reporting, the small business share of subcontracting showed no appreciable improvement.[36]

In May 1963, to stimulate the Federal small business subcontracting program, SBA formulated a corollary program called the "voluntary subcontracting program." This program was immediately accepted by 29 major prime contractors. As of October 27, 1972, 68 major contractors were participating in the program.[37]

Under the voluntary subcontracting program, SBA representatives periodically review prime contractors' subcontracting programs and operations. To determine areas of possible subcontracting, they analyze detailed statistics on all awards over $10,000. They chart the trend of individual plants on subcontract actions, subcontract awards, percentage of subcontracting opportunities offered to small business, percentage of subcontracts awarded to small business, and the "capture rate" (ratio of awards made to opportunities offered). Instances of "no known small business sources" are cataloged and analyzed on an interregional basis in an effort to bring additional small business sources to the attention of prime contractors.

PROBLEMS

Small businesses annually receive 35 to 43 percent of DOD military subcontract dollars. The percentage is even more significant when subcontracts for which small businesses cannot compete are taken into account, but this percentage has declined over the past few years. In fiscal 1967, the small business subcontracting percentage of military awards peaked at 43.3 percent. As shown in table 2, this percentage has declined in each succeeding year, and by 1971 it was down to 34.8.

When Federal procurement expenditures decline, large contractors become concerned about maintaining their work force and operating their facilities to capacity. As a result, the large prime contractors tend to "make" rather than "buy"; and, when they do buy, first consideration often goes to firms that can offer subcontracts in return.[38] A 1970 survey of 27 large contractors found:

[35] Public Law 87–305; 75 Stat. 667; 15 U.S.C. 637(d) (1970).
[36] Note 17, *supra*, p. 61.
[37] Note 30, *supra*.
[38] Note 26, *supra*, p. 377.

TABLE 2. DOD MILITARY SUBCONTRACTING TOTALS

Fiscal year	*No. large contractors reporting*	*Total amount subcontracted* (billions)*	*Small business percentage of total subcontracting*
1967	816	$15.5	43.3
1968	886	15.2	42.7
1969	946	14.9	40.6
1970	939	11.9	36.7
1971	865	9.5	34.8
1972	766	9.9	34.8

*Rounded by the Commission.
Source: U.S. Department of Defense, Office of the Secretary, *Military Prime Contract Awards and Subcontract Payments or Commitments, July 1971–June 1972*, p. 62.

also promote the interests of their agency. PCRs, on the other hand, are employed by SBA and owe no allegiance to the procuring agency.

Representatives of the House Small Business Committee believe the rise and fall in the volume of small business set-asides can be attributed directly to the "policing" effect of the PCR presence in the procuring agency. They also believe that PCR services are needed to establish set-asides and to increase the small business share of Government procurement.[42]

CONCLUSIONS

Both small business specialists and the PCRs are needed to maintain liaison between small business and the procuring agencies. The relationships among the small business specialist, the PCR, and the procuring agency should not be modified.

BENEFITS TO SMALL BUSINESS FROM COMMISSION RECOMMENDATIONS

Interagency Coordination

Recommendation 49. Initiate within the executive branch a review of procurement programs with guidance from SBA and the Office of Federal Procurement Policy with the objective of making small business participation in Government procurement more effective and assuring that small businesses have a full opportunity to compete for Government contracts.

The ultimate value to be derived by small business from our recommendations depends largely on close liaison between SBA and the Office of Federal Procurement Policy. Such liaison would encourage timely development of innovative techniques to maintain a viable small business base. It would provide a clear Government-wide focus on the role of small business in contracting with the Government and a mechanism for achieving for small business the benefits we foresee from the many recommendations for improving the procurement process presented elsewhere in this report. A discussion of the expected benefits to small business from some of these recommendations follows.

Office of Federal Procurement Policy

Establishment of a central Office of Federal Procurement Policy in the executive branch to provide leadership in procurement policy and related matters [43] will provide an effective high-level forum for small business interests and a focal point to consider the views of the small business community on procurement policy. This office can be of special benefit to small business by unifying the efforts of procurement offices in the promotion of programs of interest to small firms. Also, the promotion of uniformity, consistency, and simplification of procurement policy will be especially helpful to small business.

Modernize Procurement Statutes

Providing a common statutory basis for procurement policies and procedures applicable to all executive agencies by consolidation of the Armed Services Procurement Act (ASPA) and title III of the Federal Property and Administrative Services Act (FPASA)[44] will reduce administrative cost and simplify business dealings with the Government. During our studies many small businessmen stated that the elimination of divergent policies and procedures would encourage them to participate in Government procurement.

System of Coordinated Procurement Regulations

A system of Government-wide coordinated and uniform procurement regulations under a central office should be especially appealing to

[42] U.S. Congress, House, a report of Subcommittee 6 to the Select Committee on Small Business. H. Rept. 91–1608, 91st Cong., 2d sess., 1970, *Small Business in Government Procurement—Before and After Defense Cutbacks*, p. 9.

[43] Part A, Chapter 2, Recommendation 1.

[44] Part A, Chapter 3, Recommendation 2.

Government property resulting from any defect in items supplied by a contractor and finally accepted by the Government; that this policy apply to subcontractors on the same basis as to prime contractors; and, where items delivered by a contractor to the Government are resold by the Government to a third party, that the latter be granted no greater rights against the contractor or its subcontractors than the Government would have if it had retained the property.[51] Adoption of this recommendation would relieve small business of the purchase of costly insurance against potentially disasterous losses.

Unsolicited Proposals

Elimination of restraints which discourage the acceptance of unsolicited proposals [52] will encourage small research and development firms to submit innovative ideas to the Government and afford them increased opportunities to obtain contracts. Proposals for research are normally requested only when an agency identifies a need and then only from known sources, which limits the chances for small innovative firms to acquire Government business. Our recommendation should change this practice.

Total Economic Cost

Providing for consideration of administrative, operational, life-cycle, and other significant costs in the establishment and use of procurement and distribution systems [53] is expected to give independent distributors and retailers the opportunity to obtain more contracts than is now possible. Interagency support policies have tended to limit the use of innovative and efficient local suppliers. Mandatory centralized interagency support may prevent local sources, including small businesses, from providing products and services although they would be competitive if total costs of procurement, distribution, and handling were considered. Application of a total economic cost concept will be particularly beneficial to small vendors in competing for local supply and service contracts.

Government-wide Contract Support

Small business would reap considerable benefits from a Government-wide program for interagency use of field contract administration, contract audit, and inspection services.[54] Such a program would maximize the use of Government and contractor resources and minimize duplicate demands on small business. Some agencies perform support functions already available from other agencies thus causing small business to complain that there is much duplication of agency contract support activities at their facilities.

Major Systems Procurements

One of our proposals for improving the acquisition of major systems calls for soliciting small firms which do not own production facilities if they have (1) personnel experienced in the development and production of major systems and (2) contingent plans for later utilization of the required equipment and facilities.[55] Small businesses have traditionally been excluded from competing on major system programs due to a lack of equipment and facilities. Adoption of our recommendation would enable and encourage entry of smaller firms into such competition. While they could not expect to be awarded a production contract requiring complex and costly facilities, small firms could certainly benefit by submitting a winning solution in a major system competition.

[51] Part H, Chapter 2, Recommendation 1.
[52] Part B, Chapter 4, Recommendation 7.
[53] Part D, Chapter 4, Recommendation 6.
[54] Part A, Chapter 10, Recommendation 39.
[55] Part C, Chapter 4, Recommendation 4.

Appendixes

A. Public Laws 91–129 and 92–47

B. Data on Study Groups

C. Commission Support Staff

D. Estimated Government expenditures for procurement and grants

E. Data on the procurement work force

F. Steps in the procurement process

G. Historical development of the procurement process

H. List of recommendations, Parts A–J

I. Acronyms

APPENDIX A

Public Laws 91-129 and 92-47

Public Law 91-129
91st Congress, H. R. 474
November 26, 1969

An Act

To establish a Commission on Government Procurement.

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

Commission on Government Procurement. Establishment.

DECLARATION OF POLICY

SECTION 1. It is hereby declared to be the policy of Congress to promote economy, efficiency, and effectiveness in the procurement of goods, services and facilities by and for the executive branch of the Federal Government by—

(1) establishing policies, procedures, and practices which will require the Government to acquire goods, services, and facilities of the requisite quality and within the time needed at the lowest reasonable cost, utilizing competitive bidding to the maximum extent practicable;

(2) improving the quality, efficiency, economy, and performance of Government procurement organizations and personnel;

(3) avoiding or eliminating unnecessary overlapping or duplication of procurement and related activities;

(4) avoiding or eliminating unnecessary or redundant requirements placed on contractor and Federal procurement officials;

(5) identifying gaps, omissions, or inconsistencies in procurement laws, regulations, and directives and in other laws, regulations, and directives, relating to or affecting procurement;

(6) achieving greater uniformity and simplicity whenever appropriate, in procurement procedures;

(7) coordinating procurement policies and programs of the several departments and agencies;

(8) conforming procurement policies and programs, whenever appropriate, to other established Government policies and programs; 83 STAT. 269

(9) minimizing possible disruptive effects of Government procurement on particular industries, areas, or occupations; 83 STAT. 270

(10) improving understanding of Government procurement laws and policies within the Government and by organizations and individuals doing business with the Government;

(11) promoting fair dealing and equitable relationships among the parties in Government contracting; and

(12) otherwise promoting economy, efficiency, and effectiveness in Government procurement organizations and operations.

ESTABLISHMENT OF THE COMMISSION

SEC. 2. To accomplish the policy set forth in section 1 of this Act, there is hereby established a commission to be known as the Commission on Government Procurement (in this Act referred to as the "Commission").

MEMBERSHIP OF THE COMMISSION

SEC. 3. (a) The Commission shall be composed of twelve members, consisting of (1) three members appointed by the President of the Senate, two from the Senate (who shall not be members of the same political party), and one from outside the Federal Government, (2) three members appointed by the Speaker of the House of Representatives, two from the House of Representatives (who shall not be members of the same political party), and one from outside the Federal Government, (3) five members appointed by the President of the

attendance and testimony of such witnesses and the production of such books, records, correspondence, memorandums, papers, and documents as the Commission or such subcommittee or member may deem advisable. Any member of the Commission may administer oaths or affirmations to witnesses appearing before the Commission or before such subcommittee or member. Subpenas may be issued under the signature of the Chairman or Vice Chairman and may be served by any person designated by the Chairman or the Vice Chairman.

Court orders.

(2) In the case of contumacy or refusal to obey a subpena issued under paragraph (1) of this subsection by any person who resides, is found, or transacts business within the jurisdiction of any district court of the United States, such court, upon application made by the Attorney General of the United States, shall have jurisdiction to issue to such person an order requiring such person to appear before the Commission or a subcommittee or member thereof, there to produce evidence if so ordered, or there to give testimony touching the matter under inquiry. Any failure of any such person to obey any such order of the court may be punished by the court as a contempt thereof.

Cooperation of Federal agencies.

(b) The Commission is authorized to acquire directly from the head of any Federal department or agency information deemed useful in the discharge of its duties. All departments and agencies of the Government are hereby authorized and directed to cooperate with the Commission and to furnish all information requested by the Commission to the extent permitted by law. All such requests shall be made by or in the name of the Chairman or Vice Chairman of the Commission.

Compensation of personnel.

83 STAT. 271

83 STAT. 272

80 Stat. 443, 467.

5 USC 5101, 5331, 5332 note.

80 Stat. 416.

(c) The Commission shall have power to appoint and fix the compensation of such personnel as it deems advisable without regard to the provisions of title 5, United States Code, governing appointments in the competitive service, and such personnel may be paid without regard to the provisions of chapter 51 and subchapter III of chapter 53 of such title relating to classification and General Schedule pay rates, but no individual shall receive compensation at a rate in excess of the maximum rate authorized by the General Schedule. In addition, the Commission may procure the services of experts and consultants in accordance with section 3109 of title 5, United States Code, but at rates for individuals not in excess of $100 per diem.

Contract authority.

(d) The Commission is authorized to negotiate and enter into contracts with private organizations and educational institutions to carry out such studies and prepare such reports as the Commission determines are necessary in order to carry out its duties.

GOVERNMENT DEPARTMENTS AND AGENCIES AUTHORIZED TO AID COMMISSION

SEC. 7. Any department or agency of the Government is authorized to provide for the Commission such services as the Commission requests on such basis, reimbursable or otherwise, as may be agreed between the department or agency and the Chairman or Vice Chairman. All such requests shall be made by or in the name of the Chairman or Vice Chairman of the Commission.

Public Law 92-47
92nd Congress, H. R. 4848
July 9, 1971

An Act

85 STAT. 102

To amend the Act of November 26, 1969, to provide for an extension of the date on which the Commission on Government Procurement shall submit its final report.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That subsection (b) of section 4 of the Act of November 26, 1969 (83 Stat. 271; 41 U.S.C. 251, note), is amended to read as follows:

Commission on Government Procurement. Report to Congress, extension.

"(b) The Commission shall make, on or before December 31, 1972, a final report to the Congress of its findings and its recommendations for changes in statutes, regulations, policies, and procedures designed to carry out the policy stated in section 1 of this Act. In the event the Congress is not in session at the time of submission, the final report shall be submitted to the Clerk of the House and the Secretary of the Senate. The Commission may also make such interim reports as it deems advisable."

Approved July 9, 1971.

LEGISLATIVE HISTORY:

HOUSE REPORT No. 92-145 (Comm. on Government Operations).
SENATE REPORT No. 92-231 (Comm. on Government Operations).
CONGRESSIONAL RECORD, Vol. 117 (1971):
May 17, considered and passed House.
June 24, considered and passed Senate.

GPO 48-139

APPENDIX B

Data on Study Groups

FULL-TIME STUDY GROUP PARTICIPANTS LOANED TO THE COMMISSION ON GOVERNMENT PROCUREMENT

STUDY GROUP 1 (UTILIZATION OF RESOURCES)

Evaluated the manner in which the Government uses procurement to acquire, maintain, and utilize resources in the national interest. This included the Government's decision to provide services and products in-house or to purchase them from private industry, mobilization production planning, and maintenance of a technological base.

Chairman

James W. Roach	The Mitre Corporation

Vice Chairmen

Frank A. Robinson, Jr.	American Telephone and Telegraph Company
William D. Russell*	RCA Service Company

Members

Evan D. Anderson	Office of the Assistant Secretary of Defense (Installations and Logistics)
Jerome S. Antel	Department of the Army
Paul Atwood	Department of the Army
Lloyd Dyer, Jr.	International Telephone and Telegraph Corporation
Daniel M. Hamers	Atomic Energy Commission
Thomas P. Rider	General Accounting Office
Earl Ullman	American Telephone and Telegraph Company

* Replaced Frank A. Robinson, Jr.

STUDY GROUP 2 (CONTROLS OVER THE PROCUREMENT PROCESS)

Analyzed the procurement process as an instrument for carrying out such socio-economic objectives as those relating to employment discrimination, unemployment, labor standards, and environmental protection. Also examined the process by which the procurement of goods and services is funded and the role of small business in Federal procurement.

Chairman

Lawrence B. Ocamb	AVCO Corporation

Vice Chairman

Charles W. Neuendorf	Office of the Assistant Secretary of Defense (Comptroller)

Members

Eugene J. Davidson	Small Business Administration
Eugene M. English	General Services Administration
John Garmat	Department of the Treasury
David L. Hirsch	Norris Industries
Alice Hodnett	Atomic Energy Commission
Raymond Kamrath	Department of Labor
Fred T. Plybon	General Accounting Office
Allan G. Vetter	Veterans Administration
Harold M. Zinn	Department of Labor

Vice Chairman

Robert D. Lyons	Office of the Assistant Secretary of Defense (Installations and Logistics)

Members

Thomas Anderson	Defense Contract Administration Services
Arthur E. Epperson	General Accounting Office
Harvey M. Kennedy	National Aeronautics and Space Administration
Charles J. Kenny	U.S. Civil Service Commission
John C. King	Honeywell, Incorporated
Robert A. Nolan	General Services Administration
Frank J. Walcovich	Atomic Energy Commission
Douglas J. Wishart	Martin Marietta Corporation

STUDY GROUP 6 (PRE-CONTRACT PLANNING)

Considered how and where the Government should increase competition for its contracts, including professional services, and how best to fairly and economically select contractors. In addition, evaluated patent policy, contract types and clauses, specifications and standards, technical risk analysis, and planning procedures.

Chairman

Roman C. Braun	Atomic Energy Commission

Vice Chairman

Jarold C. Valentine	Martin Marietta Corporation

Members

Howard D. Clark, Sr.	LTV Electrosystems, Incorporated
Thomas P. Connolly	General Services Administration
James E. Harvey, Jr.	National Security Industrial Association
Franklin L. Hunting	Westinghouse Electric Corporation
Edward H. Koch	Department of the Navy
Joseph W. Lund	General Accounting Office
Richard A. Martin	Texas Instruments, Incorporated
Robert A. McKay	Atomic Energy Commission
Samuel B. Mesnick	Department of the Air Force

STUDY GROUP 7 (COST AND PRICING INFORMATION)

Studied factors that influence the establishment of price, such as the estimating of unknowns and technical uncertainties, risk analysis, inflationary trends, warranty provisions, funding limitations, cost accounting standards, cost allowability principles, and Truth in Negotiations Act.

Chairman

J. Grant Macdonnell	Northrop Corporation

Vice Chairmen

Richard M. Randall	McDonnell Douglas Astronautics Company
Richard P. White	National Aeronautics and Space Administration

Members

E. L. Baker, Jr.	Grumman Aerospace Corporation
Daniel F. Cleary	International Business Machines Corporation
Harold C. Hermann	Office of the Assistant Secretary of Defense (Comptroller)
Edward J. Kirkham	Atomic Energy Commission
Paul R. Kittle, Sr.	Department of the Army
John W. Leinhardt	Defense Contract Audit Agency
Paul McErlean	Defense Supply Agency
Joseph A. Nocera	Defense Contract Audit Agency
Donald W. O'Bryan	General Accounting Office
Robert L. Palmer	Honeywell, Incorporated

STUDY GROUP 11 (RESEARCH AND DEVELOPMENT)

Focus was on the problems involved in Federal contracting for research and technology development. Specific subjects covered were the award of research contracts, independent research and development, and the use of research grants.

Chairman

Dr. William J. Price	Department of the Air Force

Vice Chairman

C. Branson Smith	United Aircraft Corporation

Members

Dr. John N. Adkins	Department of the Navy
Daniel D. Carter	Department of the Air Force
Dr. William H. Goldwater	Department of Health, Education, and Welfare
Harry B. Goodwin	Battelle Memorial Institute
Dr. Harold Hall	Singer-General Precision, Incorporated
Dr. Robert E. Hughes	Cornell University
Dr. Robert D. Newton	National Science Foundation
Leonard A. Redecke	Atomic Energy Commission
George W. Wheeler	Bell Laboratories
Howard P. Wile	National Association of College & University Business Officers
Clotaire Wood	National Aeronautics and Space Administration

STUDY GROUP 12 (MAJOR SYSTEMS ACQUISITION)

Analyzed policy issues affecting the acquisition of major systems, including the structure of this process, initial acquisition planning, source selection procedures, demonstration vs. feasibility studies, systems contracting and related administration, and program management.

Chairman

John Russell Clark	LTV Aerospace Corporation

Vice Chairmen

Francis B. Smith	National Aeronautics and Space Administration
Rodney D. Stewart *	National Aeronautics and Space Administration

Members

G. A. Busch	Lockheed Aircraft Corporation
B. P. DuMars	North American Rockwell Corporation
Orville E. Enders	General Electric Company
Harvey R. Jensen	General Accounting Office
John H. Kunsemiller	Department of the Air Force
Col. George Lockhart, USAF	Department of the Air Force
Warner M. Mackay	Western Electric Company
Ed L. Murdock	Office of Management and Budget
John A. O'Hara	The Boeing Company
Richard A. Orr	Aerojet General Corporation
William Sampson	Aerospace Corporation
H. E. Shipley	Aerospace Industries Association
Marie Urban	Department of Health, Education, and Welfare
Clifford W. Vogel	Department of Transportation
George C. Wells	Shipbuilders Council of America

* Replaced Francis B. Smith

SOURCE OF STUDY GROUP PARTICIPANTS LOANED TO THE COMMISSION ON GOVERNMENT PROCUREMENT

	Full time			Part time				
Study Group	*Govt.*	*Industry*	*Other* [a]	*Govt.*	*Industry*	*Consultants*	*Other* [a]	*Total*
1. Utilization of resources	5	5	0	1	5	6	0	22
2. Controls over the procurement process	9	2	0	0	3	1	2	17
3. Regulations	6	4	0	4	0	0	0	14
4. Legal remedies	7	3	5	6	1	0	4	26
5. Organization and personnel	7	3	0	22	4	4	6	46
6. Pre-contract planning	6	4	1	20	13	5	5	54
7. Cost and pricing information	8	5	0	3	10	0	1	27
8. Negotiations and subcontracting	5	3	0	4	14	5	3	34
9. Reports and management controls	5	4	0	4	5	0	0	18
10. Contract audit and administration	7	4	0	1	5	1	0	18
11. Research and development	7	3	3	1	3	12	3	32
12. Major systems acquisition	8	8	2	34	34	16	2	104
13. Commercial products, architect-engineer services, and construction	1	1	0	0	0	0	0	2
13A. Commercial products	7	4	0	0	6	0	1	18
13B. Architect-engineer services	4	3	0	4	6	0	0	17
13C. Construction	4	2	0	5	0	0	0	11
—— Statutes [b]	0	0	0	0	0	2	0	2
Total	96	58	11	109	109	52	27	462 [c]

[a] Includes participants from universities, foundations, and industry, professional, and trade associations.
[b] Major effort was performed by the staff of the Commission.
[c] There were also approximately 270 attorneys in the Commission's Volunteer Legal Network, many of whom provided legal research papers or assisted the Study Groups.

DISCIPLINES REPRESENTED ON STUDY GROUPS

Disciplines	*Full-time participants*
Academic	6
Administration/management	22
Audit/accounting	15
Engineering	32
Finance	8
Legal	16
Procurement	66
Total	165

SUMMARY OF PUBLIC MEETINGS HELD BY STUDY GROUPS

Thirty-six public meetings were convened in 18 cities.	
Number of Study Groups that held public meetings	6
Total attendance	1,035
Total number of speakers	142

SUMMARY OF STUDY GROUP VISITS

	Number of locations visited	*Total number of visits*
Government:		
Civil agencies	270	712
Department of Defense	236	625
Financial, industrial, and other profitmaking organizations	341	471
Industry, professional, and trade associations	77	109
Colleges and universities	34	49
Federally funded research and development centers	14	35
Miscellaneous	26	46
Total	998	2,047

Study Groups visited installations located in 255 cities in 40 states and the District of Columbia.
Approximately 12,000 people participated in the interviews conducted by the study groups.

APPENDIX C

Commission Support Staff*

Gearline C. Adams
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Geraldine B. Clifton
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Jane I. DeNeale
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Sue H. Dye
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Joyce R. Edwards
Jane M. Ellett
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Michael E. Evans
Martha A. Fairhead
Michael R. Flowers
Donald P. Frazee
Barbara P. Friend
Gloria M. Goodwin
Mary M. Gray
Richard C. Guay
Rebecca A. Gute
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Belita K. Hardesty
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Richard D. Heironimus
Nancy A. Hiner
Louis O. Hinton
Lucy J. Itterly
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Cloria Jackson
Katherine G. Jahnel
Cynthia D. Johnson
Helen B. Johnson
Shirley S. Johnson
Juanita S. Jones
Kathleen Kelly
Randolph W. King
Marykathryn Kubat
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John E. Levan
Carolyn A. Levere
James L. Lyles
Bonnie Lucas
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Alice H. Mason
Jean R. Mathis
Benjamin O. May
Margaret A. Molesworth
Nancy C. Morrison
Patricia A. Newton
Mary A. Nikolic
Ella F. Owens
Betty J. Pass
Margaret L. Pavell
Diane R. Perkins
Carolyn L. Petty
Joyce M. Pool
Steven L. Preister
Bernadette W. Price
Virginia Puffenbarger
Frances K. Raftery
Barbara A. Rauth
Juanita A. Richards
Vivian D. Richardson
Gwendolyn D. Rivers
Sandra J. Robertson
Gene L. Romesburg
Margaret M. Schuler
Natalie H. Schuman
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Mildred D. Sher
Janey L. Shine
Catherine A. Smith
O. Diane Southard
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Raymond C. Stevenson
Constance B. Stewart
Laura C. Swartz
Joyce F. Tanner
Vernetta Tanner
Virginia L. Thaxton
Betty M. Thompson
Carol L. Thompson
Lucy E. Toland
Jean A. Tressler
Vivian E. Tyler
Arleen W. Vandemark
Bernadette M. Washington
Muriel J. White
Katherine S. Wilson
Mignon J. Wilson
Marian R. Winkler
Jean A. Wood
Jeannie C. Yeats
Mazie O. Young
Sophie M. Zawistoski

*Numbers of personnel and periods of service varied to meet demands of Study Groups.

Estimated Government Expenditures For Procurement and Grants

Total Estimated Government Procurement by Executive Agencies
Fiscal 1972
(Billions of dollars)

Agency		*Total*
Department of Defense [a]		39.35
Civilian executive agencies [b]		
Atomic Energy Commission	2.88	
Department of Agriculture	2.62	
National Aeronautics and Space Administration	2.48	
General Services Administration	1.31	
Veterans Administration	0.74	
Department of Health, Education, and Welfare	0.72	
Department of Transportation	0.70	
Department of the Interior	0.65	
Department of Labor	0.38	
Department of Housing and Urban Development	0.25	
Tennessee Valley Authority	0.23	
Department of State	0.20	
Department of Commerce	0.17	
Department of the Treasury	0.16	
Other agencies	1.00	14.49
Other expenditures which should be classified as procurement		
Executive printing by GPO [c]	0.18	
Blind-made products [c]	0.02	
Government bills of lading [d]	1.05	
Government transportation requests [d]	0.38	
Commercial utilities and communications [e]	1.50	
Rents paid by GSA [e]	0.51	3.64
Total estimated Government procurement [f]		57.48

[a] U.S. Department of Defense, Office of the Secretary of Defense, *Military Prime Contract Awards and Subcontract Payments and Commitments, July 1971–June 1972;* and Commission Studies Program.

[b] U.S. General Services Administration, Office of Finance, *Procurement by Civilian Executive Agencies, Period July 1, 1971–June 30, 1972;* and Commission Studies Program.

[c] Estimated by the Commission.

[d] Information furnished by GAO and Commission Studies Program.

[e] Information furnished by GSA and Commission Studies Program.

[f] Does not include salaries of personnel engaged in procurement activities.

Federal Aid Expenditures for Grants and Shared Revenues [a]
(Billions of dollars)

Fiscal 1971 (actual)	*Fiscal 1972 (est.)*	*Fiscal 1973 (est.)*
29.8	39.1	43.5

[a] U.S. Office of Management and Budget, *Special Analyses of the United States Government, Fiscal Year 1973,* table P–9, Federal Aid to State and Local Governments, p. 254.

COMPOSITION OF THE FEDERAL GOVERNMENT PROCUREMENT WORK FORCE, BY HIGHEST LEVEL OF EDUCATION

Level of education	*Civilian*	*Percent*	*Military*	*Percent*	*Total*	*Percent*
Less than high school	2,073	3.9	38	0.9	2,111	3.7
High school	20,864	38.9	891	22.0	21,755	37.8
Post high school	1,513	2.8	16	0.4	1,529	2.6
At least 30 semester hours of college credit	4,228	7.9	211	5.2	4,439	7.7
At least 60 semester hours of college credit and/or a junior college certificate (AA) (AS)	3,812	7.1	154	3.8	3,966	6.9
At least 90 to 120 semester hours of college credit	2,787	5.2	108	2.7	2,895	5.0
Bachelor's degree	14,529	27.1	1,572	38.8	16,101	27.9
Law degree (LLB, JD, etc.)	1,104	2.1	82	2.0	1,186	2.1
Master's degree	2,183	4.1	923	22.8	3,106	5.4
Doctor's degree	475	0.9	58	1.4	533	0.9
Total	53,568	100.0	4,053	100.0	57,621	100.0

Source: Commission Studies Program (based on responses to Commission questionnaires).

COMPOSITION OF THE FEDERAL GOVERNMENT PROCUREMENT WORK FORCE, BY YEARS OF GOVERNMENT PROCUREMENT EXPERIENCE

			Number of persons			
Government procurement experience	*Civilian* [1]	*Percent*	*Military* [2]	*Percent*	*Total*	*Percent*
None or less than one year	4,303	8.0	391	9.6	4,694	8.2
1— 5 years	13,809	25.8	2,428	60.0	16,237	28.2
6—10 years	13,078	24.5	659	16.3	13,737	23.8
11—15 years	8,593	16.0	339	8.4	8,932	15.5
16—20 years	7,609	14.2	190	4.7	7,799	13.5
21—25 years	3,739	7.0	34	0.8	3,773	6.5
26—30 years	2,041	3.8	9	0.2	2,050	3.6
31 years and over	396	0.7	3	—	399	0.7
Total	53,568	100.0	4,053	100.0	57,621	100.0

[1] Government procurement experience in a civilian capacity.

[2] Government procurement experience in a military capacity.

Source: Commission Studies Program (based on responses to Commission questionnaires).

APPENDIX F

Steps in the Procurement Process

There is no simple uniform set of detailed actions for each step in the procurement process (as depicted in figure 1). The process differs according to the agency conducting the procurement; the goods or services required; the size, type, and complexity of the procurement; the economic interests and concerns of the public in a given transaction; and the laws and procedures that apply in each case. Part A covers some general considerations in the procurement process; Parts B through J cover issues relating to specific types of procurement and detailed legal considerations.

Policy Development

Policy development and implementation are eventually expressed through a legal and administrative structure which provides the foundation for procurement activities. Statutes and regulations dealing with national policy objectives, such as social goals, also are implemented through the procurement process and form a part of this foundation.

Work Force

The key to successful conduct of procurement within an agency is the procurement work force. The agency's contracting officers and other professional specialists are members of the procurement team. If a need is special or complex, the team may include project managers, scientists, engineers, lawyers, accountants, price analysts, and other specialists whose services may be required at one or more steps of the procurement (for example, identifying the need; planning; contractor solicitation and selection; contract negotiation; and contract administration).

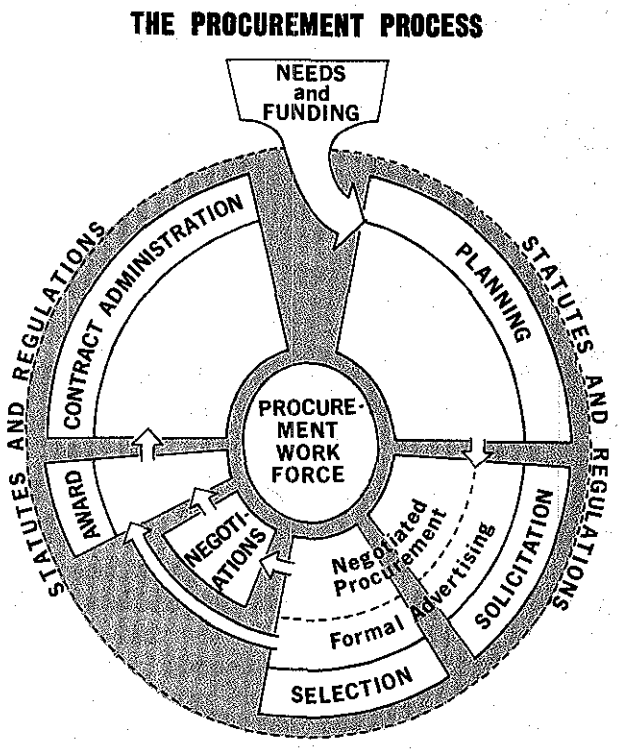


Figure 1

Needs

A need for a simple commercial item may result from the normal depletion of stock. The mechanics for satisfying such a requirement may be routine to the extent that computers are used to determine desired quantities and delivery schedules and to initiate purchase requests. Satisfaction of a need for a yet-to-be-developed major system (involving research, development, testing, production, construction, installation, training, operation, and maintenance) requires complex planning and procurement considerations. All decisions to contract for needs must be supported by congressional appropriations.

decision as to the disposition of any late bids or modifications received.

All bids are reviewed for possible mistakes, exceptions, and missing information. A formal determination must be made of the responsiveness of all bidders to the requirements of the IFB and the low-responsive bidder identified. A positive determination then must be made of the low-responsive bidder's capability to perform on the contract. Following these determinations, the contract can be awarded.

NEGOTIATED PROCUREMENT

Responses to competitive requests for proposals (RFPs) are received at a specified time, but there is no public opening or abstracting. However, procedures do call for an elaborate review of proposals received. Initially it must be determined that offerors have complied fully with the requirements of the RFP. A business evaluation is made of prospective suppliers by the contracting officer and the specialists supporting the contracting officer in determining the offeror or offerors with whom to negotiate.

Negotiations with the selected offeror or offerors may include details regarding the work to be accomplished, terms and conditions of the contract, and its price. Cost and profit considerations are primary factors in the process by which the prices of negotiated contracts, or modifications thereto, are established. The Government's requirement for cost and pricing information includes a determination of whether the prices are reasonable and well-defined. Other factors that must be considered are: contract type; nature of the work (research, development, production, services); technical uncertainties; risk factors; social and economic considerations; inflationary trends; warranty provisions; funding limitations; and competitive pressures—all of which affect the cost and price of a product or service. Following successful negotiation of these considerations, a contract is awarded to the bidder proposing the most advantageous offer to the Government, price and other factors considered.

Contract Administration

Contract administration involves the actions necessary to assure compliance with the terms and conditions of the contract. Typical activities include: negotiation of overhead rates; determining allowability of costs; review of contractor management systems; pre-award surveys; proposal evaluation; cost/price analysis; production surveillance; inspection and testing, and responsibility for Government-furnished property and facilities. A significant amount of resources are devoted to the quality assurance function which consists of the actions taken to ensure that goods and services meet specified technical requirements.

Another important aspect of contract administration is contract audit which provides accounting and financial advisory service in connection with the negotiation, administration, and settlement of contracts and subcontracts. Examples of significant contract audit functions are audits required by the Truth in Negotiations Act, analysis of contractor vouchers, and prenegotiation reviews of contractor cost proposals.

APPENDIX G

Historical Development of the Procurement Process

RECURRING ISSUES IN PROCUREMENT HISTORY

Many problems relating to the Federal Government's procurement of goods and services have been with us since the beginning of the Nation. The evolution of the procurement process has been strongly influenced by several recurring issues: Who will be in charge? What methods will best encourage competition? How can excessive profits be prevented and reasonable prices be ensured? How can accountability to the public be attained? What is the role of the public vs. the private sector in supplying Federal needs? Can socio-economic goals be attained by means of the procurement process?

MILITARY ACTIVITY AS NATURAL TURNING POINTS

The most significant developments in procurement procedures and policies have occurred during and soon after periods of large-scale military activity.

The Revolutionary War Period

During the Revolutionary War, purchasing activity was characterized by sharp and primitive practices, untrained purchasing officials, profiteering, poor supplies, and deficient management.

The Second Continental Congress took control of the Army in June 1775 and appointed a commissary-general to purchase provisions. Colonists rarely accepted Continental currency, thus creating the greatest business difficulty at that time.

One of the earliest problems in selecting between public and private sources for meeting Government needs occurred in 1776. Because of a lack of interest by private enterprise, General Washington asserted that he would manufacture needed supplies himself and, on January 16, 1777, he ordered the erection of facilities for casting cannon at Yorktown, Pennsylvania.

In July 1777, General Washington wrote of the scarcity of food, soap, and other necessities, and Congress directed the Board of War to contract for these items. On March 2, 1778, Congress approved the permanent appointment of a Quartermaster General. Purchasing commissaries were paid 2 percent of the money disbursed by them.

To discourage embezzlement and to stabilize the purchasing service, Congress provided, in 1778, that purchasing commissaries be salaried at $100 per month and six daily rations. Thomas Jefferson successfully sponsored legislation for the bonding of incumbents. Not until 1808 was an "officials not to benefit" law passed.

Inflation and scarcities persisted in 1779, and Congress, in despair, threw the burden of feeding and clothing the Army on the States. This plan proved a fiasco and was abolished. By the summer of 1781, conditions began to improve as executive power became more centralized.

Financier Robert Morris arranged for feeding the Army by letting contracts for delivery of rations. Disputes were to be referred to arbitrators. Deficient rations could be replaced by Congress at contractors' expense.

Washington, aware of the value of harmonious Government-contractor relationships, wrote to Robert Morris on January 8, 1783, "I have no doubt of a perfect agreement between the Army and the present contractors; nor of the advantages which will flow from the consequent harmony."

cies. Based on the commission recommendation, Section 3709 of the Revised Statutes was amended in 1894 to provide for review of all agency purchase proposals by a newly created Board of Awards with representatives of the Department of the Treasury, Interior, and Post Office. The board was advisory only, however, and largely powerless to deal with unstable prices, nonstandard specifications, and duplication of functions.

The Keep Commission

President Theodore Roosevelt, on June 2, 1905, appointed the Keep Commission (named for its chairman, an Assistant Secretary of the Treasury), which conducted a year-long study pointing out deficiencies such as lack of standardization and widely differing prices for similar articles. The Keep Commission recommended the establishment of a General Supply Committee to assure coordination and standardization of supplies.

Thereafter, the Board of Awards, in 1908, appointed a committee for the creation of a "General Schedule of Supplies," consisting of 23 members from the executive agencies.

This period also is noted for the first uses of the procurement process for socioeconomic reform; for example, restrictions on use of Federal convict labor by Congress in 1887 and by Executive Order in 1905; restricted hours of work (8-hour laws) in 1892 and 1912. One of the early statutory price restrictions, enacted in 1897, limited the per ton price of armor plate to $300, a restriction which proved unworkable and was repealed in 1900.

A Statutory General Supply Committee Established

By Executive Order 1071 in 1909, President Taft directed that all supplies contained in the General Schedule would be purchased by Federal agencies under contract made by the General Supply Committee.

In 1910, Congress created a statute-based General Supply Committee as a substitute for the earlier one appointed by the Board of Awards. For Federal establishments in Washington, the law required advertised procurements by the Secretary of the Treasury. Internal and external developments in 1914, however, tended to relegate the General Supply Committee to the background when the ramifications of World War I had engulfed the United States.

WORLD WAR I

The War Industries Board

The War and Navy Departments handled vast amounts of military and civilian goods. Throughout World War I, the General Supply Committee, under the Treasury Department, continued to issue its General Schedule of Supplies—indefinite-quantity term contracts.

On July 28, 1917, the War Industries Board was established and, by Executive Order 2868, May 28, 1918, was made a separate agency under President Wilson. The board was given control over war materials, finished products, priorities, labor, and prices. Many procedures were eliminated or relaxed. At war's end, however, the War Industries Board was dissolved.

Problems and Procedures

Contracting procedure in World War I leaned heavily to cost-type contracts, including cost-plus-a-percentage-of-cost contracts, later outlawed. "Profiteering" and "influence peddling" were highly publicized at this time. Congress enacted excess-profits taxes in 1917, although "profiteering" was practiced and strongly condemned in Washington's time. To curb influence peddling, President Wilson directed the use of the "covenant against contingent fees," which is now required by statute and regulations. The war was over before some of the wartime procurement problems were solved.

the months which followed, the Procurement Division did gradually assume purchasing responsibilities for some Federal agencies.

Special Procurement Programs

Various special programs were also added to the centralized procurement system: the Red Cross purchasing program for refugee relief abroad; the Stockpiling Act for purchasing strategic materials; consolidated procurement of defense housing equipment; lend-lease purchasing; and other special programs.

Socioeconomic Uses of Procurement During the Depression

The depression years saw the first concerted Federal attempts to promote socioeconomic goals through procurement. Efforts to promote some of these goals through the power of Congress over taxes and over interstate commerce had failed in the Courts. Congress thereupon passed laws to support wages and improve employment conditions on Federal contracts. These included the Davis-Bacon Act, setting minimum wages on construction; the Walsh-Healey Act, upgrading wages and conditions of employment on supply contracts and prohibiting the use of convict labor; the Miller Act, requiring payment bonds to protect subcontractors and material men on construction jobs; and the Copeland Act, preventing pay kickbacks on construction work.

Federal procurement of products made by workshops for the blind was ordered by Congress in 1938 (expanded in 1971 to products made by other handicapped persons).

The depression years also saw Congress enacting profit limitations on the aircraft and shipbuilding industries (Vinson-Trammel Act of 1934), and promoting employment by giving preference to domestic sources for Federal purchases under the Buy American Act.

DEVELOPMENTS IN THE 1920's RELEVANT TO THE LATER DEVELOPMENT OF AERONAUTICS, RESEARCH AND DEVELOPMENT, AND SYSTEMS PROCUREMENT

Some of the problems in the 1950's, 1960's, and 1970's relating to use of private versus Federal sources for research and development, methods of assuring effective competition, and overlapping designs are traceable to the growth of the aviation industry in the post-World War I period.

Though World War I demonstrated the importance of the airplane in the postwar years, the aviation industry declined at such a rate that in 1923 an investigative committee predicted its disappearance if remedial actions were not taken.[2] The decline was caused by the small market for aircraft and the lack of a comprehensive Federal policy to stimulate the industry's growth. The Air Corps Act of 1926 initiated a flexible five-year program of Federal purchasing.

The Postwar Aviation Industry: Factual Background

An historical perspective on the aviation industry shows the critical importance of the Air Corps Act of 1926. In the eight years prior to 1916, the Government purchased only 59 airplanes.[3] American entry into World War I initiated a crash program of production. During the 21-month American participation in the war, aircraft production swelled to 9,742 airplanes and 14,765 engines.[4] However, the armistice reduced the aviation industry to chaos. Within months, more than a hundred million dollars worth of contracts was cancelled.[5] Ninety percent of the industry underwent liquidation.[6]

During the early 1920's, the commercial

[2] This report of the Lassiter Board was referred to by the Hon. Fred. M. Vinson in the *Congressional Record*, June 29, 1926, p. 12319.

[3] See note 2, *supra*, p. 12320.

[4] Mingos, *The Birth of an Industry*, in G. R. Simonson, ed., *The History of the American Aircraft Industry*, p. 44.

[5] See note 4, *supra*, p. 45.

[6] See note 2, *supra*, p. 12321.

craft design and construction. It substantially revised a prior procedure that had proven itself too inflexible. It was tailored to encourage expansion of the aircraft industry, to provide incentive and protection for creative design work, and to allow the Government to secure quality aircraft at a reasonable cost.

A Flexible Procurement Policy

World War I had induced the Government to depart from its tradition of procurement by formal advertisement on a fixed-price basis. The postwar years witnessed a return to this method of procurement.[19] However, the aircraft industry had not yet achieved such a level of standardization [20, 21] that it could follow the same procedure that governed the procurement of other supplies.

The Air Corps Act introduced a new flexibility into the procurement process. The military departments were authorized to make use of a design competition in contracting for aircraft, parts, or accessories.[22] The act required the advertisement of such a competition and the publication of detailed specifications of the kind and quantity of aircraft desired. A formal merit system, expressed in percentage points, was to be applied to the designs submitted.

The Secretary of War or the Secretary of the Navy enjoyed discretion to award a contract "on such terms and conditions he may deem most advantageous to the Government." [23] Performance rather than price was to be the controlling factor.[24] However, if the designer was unable to deliver the finished product, the Secretary was authorized to purchase the design, if reasonable terms were agreed upon. Where a price was in dispute, the Secretary could retain the design, advertise for bids, and contract for construction in accordance with the design. Appropriate measures provided compensation for the designer.

Under the act, new authority was conferred on the military departments to purchase experimental designs either in the United States or abroad,[25] with or without competition. Contracts for the construction of such aircraft were to be let competitively only to manufacturers located within the Continental United States.[26]

In addition, the act conferred new authority to contract for production in quantity where a design had reached the working model stage.[27] Under prior law, the Secretary of War or the Secretary of the Navy was unable to contract with the manufacturer who had developed the model. He was required to write up the specifications of the model and advertise to the entire industry for construction bids. Since developmental costs were included in any bid, the original manufacturer would often lose the contract for construction.

Protection of Design Rights

Prior to the Air Corps Act, the Secretary of War could not compensate designers whose ideas the government appropriated in the interests of national defense.[28, 29] This act established two channels through which a designer might obtain compensation. The designer was given a statutory right to initiate a cause of action in the Court of Claims.[30] Since such litigation might prove unduly burdensome, a board of patents and designs was established for the military departments with authority to pay up to $75,000 for any design in which the Government claimed ownership or nonexclusive right of use.[31]

Protection of the Government's Interest

The Air Corps Act also prescribed certain control devices to insure that the Government would receive safe and efficient equipment at

[19] vom Baur, "Fifty Years of Government Contract Law," *Federal Bar Journal*, 29:318 (1970).
[20] See note 2, *supra*, p. 12320.
[21] *Ibid.*, p. 12321.
[22] 44 Stat. 785, ch. 721, sec. 10.
[23] 44 Stat. 786, ch. 721, sec. 10(g).
[24] See note 2, *supra*, p. 12321.
[25] 44 Stat. 787, ch. 721, sec. 10(k).
[26] 44 Stat. 787, ch. 721, sec. 10(j).
[27] 44 Stat. 788, ch. 721, sec. 10(g).
[28] See note 2, *supra*, p. 12322.
[29] H. Rept. 1395, 69th Cong., 1st sess., 1926, p. 2.
[30] 44 Stat. 786–7, ch. 721, sec. 10(i).
[31] 44 Stat. 788, ch. 721, sec. 10(r).

Excessive Profits

As the war progressed, various congressional committees, particularly the House Naval Affairs Committee and the Senate "Truman" Committee, uncovered instances of unreasonable profits. The earlier 1934 Vinson-Trammel Act profit limitations on aircraft and naval vessels had been suspended in 1940 with the reintroduction of the World War I-originated excess profits tax. In a related matter, the Supreme Court handed down a 1942 decision in the Bethlehem Shipbuilding case upholding the validity of a World War I contract providing for unusually high profits. These events led to the passage, in 1942, of the Renegotiation Law [35] authorizing renegotiation of particular contracts to eliminate excessive profits. The Revenue Act of 1942 [36] extended individual renegotiation to renegotiation of all contracts, allowed income and excess-profit taxes to be credited in renegotiation, and authorized exemptions for specific categories of contracts and subcontracts. The Revenue Act of 1943 [37] improved the criteria for determining excessive profits and set up a War Contracts Price Adjustment Board to replace individual department boards. It is interesting to note that industry dissatisfaction with criteria for determining excessive profits has continued and was one of the major problems identified for this Commission's consideration.

Small Manufacturing Concerns

To achieve effective and fair use of all resources, the Office of Small Business Affairs was set up in November 1940 under the National Defense Advisory Commission, later to become part of the Office of Production Management. Its task was to subdivide defense contracts, preferably among smaller business enterprises.

On June 11, 1942, the Smaller War Plants Corporation was created, with capital stock, to assist in mobilizing the productive capacity of small concerns. This corporation was authorized to subcontract Federal prime contracts to small manufacturers. The same authority was given to the Small Defense Plants Administration under the Korean Conflict Defense Production Act of 1950 (1951 Amendments).

World War II Procurement Policies and Procedures

Besides the use of negotiation (and the WPB prohibition on formal advertising of March 3, 1942) and advance payments, other major aspects of World War II procurement included a broad use of cost and pricing analyses and an extensive use of price-revision clauses and other pricing devices, such as voluntary price reductions and company pricing agreements. When necessary, of course, cost-type contracts were used.

On major items, letter orders and letters-of-intent were used to cope with the problem of inadequate leadtime for detailed negotiations. Mandatory orders were available, but rarely used. Priorities in military and civilian use of materials were under the strict control of WPB and other agencies. Some property was seized under WPB's requisitioning procedures, with later agreements on price in the Court of Claims determining just compensation. Other major achievements were the expedited procedure under the Contract Settlement Act of 1944 and the Wartime Army-Navy Joint Termination Regulations and related surplus property-disposal regulations. Nondiscrimination-in-employment provisions were first used in Federal contracts in World War II on the orders of the President (Executive Order 8802, June 24, 1941) as essential to full manpower mobilization. This policy has been reaffirmed by every President since that time.

POST-WORLD WAR II: THE COLD WAR

The Armed Services Procurement Act of 1947

As the end of the war approached and the

[35] 56 Stat. 245, Sixth Supplemental National Defense Appropriation Act, Apr. 28, 1942, sec. 403.
[36] 56 Stat. 982, Oct. 21, 1942.
[37] 58 Stat. 78, Feb. 25, 1944.

FIRST AND SECOND HOOVER COMMISSIONS

First Hoover Commission 1947–1949

The Commission on Reorganization of the Executive Branch, the First Hoover Commission, made many recommendations for improving the structure of the executive branch. One recommendation was for the establishment of a strong central organization to provide Federal services such as supply and procurement, records management, and building management. Congress thereupon enacted the Federal Property and Administrative Services Act of 1949, creating the General Services Administration (GSA). Control of procurement policy and, to a limited extent, certain procurement operations was conferred upon GSA, along with a rather complex set of exemptions for certain agencies and activities. The Bureau of Federal Supply of the Department of the Treasury was abolished.

The commission also recommended extending the negotiation provisions of the Armed Services Procurement Act of 1947 to all agencies. In effect, this was accomplished by title III of the Federal Property and Administrative Services Procurement Act of 1947, except for two categories of exceptions contained only in the latter act, that is, the need for a facility for mobilization and requirements involving substantial investment or long leadtime. Title III negotiating authority was granted to GSA with the right to redelegate to other agencies. The law was later amended to extend title III directly to all executive agencies.

The commission also recommended that supply activities of the military and civil agencies be coordinated through a Supply Policy Committee. This was substantially effected by GSA and DOD. The Hoover Commission Supply Task Force recommended participation of the Office of the President in this coordination process. The Hoover Commission also recommended centralization of purchases and stores distribution to eliminate the many duplications of facilities and promote savings. This recommendation was effected to a considerable extent through the establishment of the GSA–DOD National Supply System, described elsewhere in this report, and the Federal Supply Service, working cooperatively with other agencies.

The recommendation for the development of standard forms of contracts and bid documents was also substantially effected through the establishment of the Federal Procurement Regulation (FPR) and various forms occasionally issued for Government-wide use. DOD has similarly standardized many military forms.

Second Hoover Commission 1953–1955

The Second Hoover Commission recommended regrouping certain DOD functions including logistics and research and development, under Assistant Secretaries. This was effected in the DOD Reorganization Act of 1958.

The commission also recommended the establishment of a separate civilian agency reporting to the Secretary of Defense to administer common supplies and services, including commercial items. While this recommendation was not fully carried out, the Defense Supply Agency (DSA) and component organizations, like the Defense Contract Administration Services (DCAS), were established under the control, direct or indirect, of the Secretary of Defense and, with GSA, carry out many of the Hoover Commission's recommendations under the National Supply System.

The commission's Task Force on Procurement recommended that the Secretary of Defense create a civilian position in his office for planning and review of military procurement requirements. The establishment of the Office of the Assistant Secretary for Installations and Logistics and the Office of Director of Defense Research and Engineering were partially in response to this. Other joint review mechanisms have since been established.

In coordination with other executive agencies and the Comptroller General, the commission also recommended steps to remove needless legal and administrative procedures in awarding military contracts. The Armed Services Procurement Regulation Committee, in coordination with GSA and GAO, have attempted to meet this goal with varying degrees of success.

ment Procurement Policies and Procedures to increase small business participation. Some simplifications of procurement procedures occurred; for example, Public Law 85–800, raising the Armed Forces Procurement Act's and the Federal Property and Administration Services Act's open-market, simplified-purchase level from $1,000 to $2,500, and allowing progress payments limited to small concerns in advertised contracts. Efforts to raise the threshold for application of the Davis-Bacon Act to $10,000 were unsuccessful, although Congress did substitute a certification for the more cumbersome sworn-affidavit requirement for payrolls.

In 1959, also as a result of the task force studies, GSA established the Federal Procurement Regulations (FPR), "developed cooperatively" with the Department of Defense, exempting DOD from mandatory compliance except for standard forms, clauses, and specifications and regulations which might originate from higher authority. These Government-wide regulations concern policies, procedures, standard forms, and clauses of general applicability, although the title II issuing authority is subject to the partial exemptions largely found in Section 602(d) of the amended Federal Property and Administrative Services Act of 1949. The FPR also established an "FPR system" in which all agency procurement regulations were to be published, with uniform format and numbering, in a single title (41) of the Code of Federal Regulations. This system is partially operative today, with most agencies publishing a version of their regulations in title 41. DOD ASPR regulations and military department regulations for implementing procurement, although still published separately from other regulations in title 32 of the U.S. Code, are similar in format and numbering to the FPR.

Specialized negotiated procurements and policies governing them, such as for research and development and major systems, for the most part remain under the control of separate agencies. GSA's authority in such areas is unclear.

Because of the size, dollar volume, and diversity of types of procurement, DOD has taken the lead in policy initiation and revision during the 1950's and 1960's. For the most part, its policies continue to be substantially adopted by other regulatory agencies. Most Government-industry dialogue, as a practical matter, is carried on through the ASPR process for developing regulations. Most of the FPR is thus adopted or adapted from the ASPR.

During this period the FPR expanded into areas which lent themselves to Government-wide regulatory coverage. Most civil agencies followed or incorporated the FPR. However, because of limitations on GSA authority and other constraining factors, the FPR was limited in coverage. Civil agencies augmented the FPR with their own special regulations, not always fully consistent with GSA. NASA developed, with GSA's consent, an independent set of procurement regulations based primarily on the ASPR, but with special emphasis on research and development and related operational missions.

The Departments of Health, Education, and Welfare; Interior; Commerce; Agriculture; Transportation; Housing and Urban Development; and the Veterans Administration are some of the civilian agencies that follow the FPR and augment it as needed. Some of these agencies, such as the Department of Transportation, have developed extensive procurement regulations, due in part to the absence of coverage in the FPR. Much of the supplementary material is taken verbatim or adapted from the ASPR.

National Supply System

In conventional purchasing and distribution during the 1960's, GSA, DOD, and especially DSA worked closely together to further develop a "national supply system" and to promote more centralized purchasing.

GSA, DSA, and other defense agencies thus began additional centralized buying of certain commodities for defense agencies and for the entire Government. Procurement of certain common-use items for the military departments, like paint and handtools, was transferred to GSA. Purchases of other commodities, like electronics, fuels, and lubricants, were controlled by DOD. Some of these actions were spurred on by the continuing interest of

by the technical bureaus in Washington. This centralized purchasing continued after the war, although additional authority was delegated to Navy field-purchasing offices.

In May 1966, Navy Systems Commands were formed, replacing the technical bureaus. The Office of Naval Material, formerly a staff organization, became the Naval Material Command (NMC) with subordinate commands responsible directly to it. NMC in turn reported to the Chief of Naval Operations. The subordinate Navy Systems Commands are Ships, Air, Ordnance, Electronics, Supply, and Facilities Engineering. NMC is currently charged with setting procurement policy for the various commands and the Navy generally.

Air Force Procurement Organization

Upon separation of the Air Force from the Army in 1947, the Air Materiel Command (AMC) was at Wright-Patterson Air Force Base, and a Procurement and Production Directorate was formed at Headquarters, U.S. Air Force, to establish policy and supervise AMC's procurement operations.

Early in the 1950's, when selected classes of procurement were assigned to the geographically-aligned Air Materiel Areas, decentralization of procurement operations began.

In 1961, AMC and the previously established Air Research and Development Command were reorganized and redesignated the Air Force Logistics Command and the Air Force Systems Command. The Logistics Command has responsibility for logistical support of operational systems, and the Systems Command has responsibility for research and development and systems acquisition.

A major realignment of procurement occurred in the Air Force July 1, 1969 when several Air Force commands, in addition to AFLC and AFSC, were designated procuring activities and all Air Force commands and separate agencies were given unlimited procurement authority.

PROCUREMENT IN THE 1950's AND THE 1960's

The Impact of the Technological Age: The Advent of Major Systems Procurement

A major era in Federal procurement began in the 1950's and 1960's. Technology in general, and rocketry, solid-state electronics, and aerospace and military technology in particular, experienced a quantum jump in sophistication and complexity, creating a new set of needs and goals. Aeronautics, electronics, and atomic energy in World War II, and even aeronautical developments of World War I, could be said to represent major technological advances, just as did the naval ironclads of the Civil War. However, with the exception of the development of the atom bomb, earlier technological developments had much less influence on international politics, the national economy, and society in general.

It was this period that saw the birth of a new social consciousness, the spawning of a wide spectrum of socioeconomic programs, and efforts to apply the new techniques of engineering and systems analysis and development to such programs.

While the Government's needs for commercial products grew apace with its size, it was the development of procurement programs for military and aerospace systems which required new techniques and complex contractual and organizational arrangements on an unprecedented scale. Skills were blended in combinations which created new and perhaps unorthodox relationships between the Government and private enterprise. The new organizational patterns were strange to many who were more comfortable with the earlier and clearer lines of demarcation.

Undoubtedly, these novel relationships influenced the growth of regulations and the demand for controls—management, fiscal, organizational, conflicts-of-interest, and others—in response to the huge potential for waste, mismanagement, and inefficiency. The cost and possible self-defeating character of these pyramiding controls attracted only secondary interest at the time of their evolution.

This period witnessed a great outpouring of economic, political, and philosophical commen-

ble. This was accompanied by a policy of increased compensation through weighted profit guidelines. A major shift to the use of fixed-price contracts and formal advertising led, in the 1960's and 1970's, to an unparalleled number of claims. In response to this, anticlaims clauses have been developed.

Pricing

A principal activity in the 1960's was the effort to improve pricing. The 1962 Truth in Negotiations Amendment to the Armed Services Procurement Act, Public Law 87–653, focused attention on this area. Many "defective pricing data" cases were disclosed by GAO. These led to increasingly detailed implementing regulations.

Apart from attempts to avoid submitting costs which were not "current, accurate, and complete," enormous effort went into improving pricing and negotiation techniques and their related training programs. Often, pricing problems resulted from short leadtime.

The relative roles of pricing personnel and "advisory" auditor reports came under continuing consideration as a conceptual and organization problem.

Profit

During the late 1960's, there were many congressional hearings and other expressions of concern directed at profits considered excessive by some and inadequate by others. The various methods of measuring profits came under review, including reexamination of the return-on-investment basis as possibly being entitled to more weight in calculating profit objectives.

Concerns over profiteering are not new, of course. World War I profits were still scandalous as the country prepared for World War II. Profiteering was rampant in the Revolutionary and Civil Wars.

Senate hearings of 1961 and 1962 dealt with the pyramiding of profits in the early missile programs. More recent GAO studies conducted during the period of this Commission's study (for a relatively small proportion of contracts) disclosed rather high profits measured by return on capital invested. Of course, contractor performance, risks assumed, amount of research and development involved, and return on sales are also factors to consider. From a historical standpoint, however, the role of profit measured by return on invested capital has become increasingly significant in policy development. Studies prior to and during this Commission's study disclosed that "extracontractual motivations" (long-term standings, social approval, rewarding social relationships, and other factors) may be more important than short-term profits. All this bears on prior assumptions about the extent to which the profit factor could successfully motivate improved performance or greater cost efficiency under incentive contracts.

Cost Accounting Standards

Divergent practices in accounting for costs between direct and indirect procurement, Federal and non-Federal business, and estimates and cost performances all led to demands for greater uniformity. The Uniform Cost Accounting Standards Amendment to the Defense Production Act set up a Cost Accounting Standards Board under the Comptroller General of the United States.

Growth of Social and Economic Uses of the Procurement Process

The 1950's and 1960's were characterized by intensified use of procurement for social and economic ends, a use which, as described earlier, had its impetus in the depression of the 1930's. During World War II, the equal employment opportunity program was intensified, and enforcement techniques became more effective.

Similarly, small business and surplus labor area assistance and preference programs were intensified. Congress enacted the Small Busi-

should be done in-house? This question faced our Government as far back as the Continental Congress and has remained an issue throughout our history. It may be noted that although both public and private sources were employed to produce military hardware in the Revolutionary War, the fledgling Government provided for its own needs only when there was a lack of interest on the part of private enterprise.

On the other hand, agencies created early in our history tended to rely on in-house facilities (for example, Postal Service, Department of the Treasury, Department of Justice), whereas more recent agencies tend toward contracting (for example, AEC, NASA, Housing and Urban Development, Environmental Protection Agency). Prior to World War II, the military departments relied heavily on in-house sources, such as arsenals and naval shipyards, but expansion and growing complexities brought increased reliance on the private sector.

For some 40 years, special and standing congressional committees and groups such as the Second Hoover Commission conducted extensive studies of the proper extent of Federal involvement in business activities. Congressional studies during the depression years spotlighted the World War I carryover business operations of the Government. More recently, the Appropriations Committees, Armed Services Committees, Government Operation Committees, and Small Business Committees studied and conducted hearings on the subject throughout the 1950's. The Second Hoover Commission report in May 1955 recommended that the Government's direct business operations be narrowed. The Senate Government Operations Committee sponsored legislation to that end in 1955, but was forestalled by executive branch policy directives, particularly those of the Bureau of the Budget (BOB Bulletin 55–4 of January 15, 1955, and 57–7 of February 5, 1957).

In the 1963–68 period, the Government Operations Committees and the House Committee on Post Office and Civil Service conducted hearings on the use of Federal and contract manpower, the effects of Civil Service ceilings, the use of military personnel to perform civilian work, and the use of contractor personnel to work alongside Federal personnel, particularly in skilled or technical services. DOD and NASA implementations of BOB Circular 60–2 of September 21, 1959, and A–76 of August 3, 1966, and August 30, 1967, were studied. The later hearings were also correlated with various opinions and rulings by the Civil Service Commission and the Comptroller General concerning the propriety of contracting for personnel to supplement Civil Service work and the related questions of the necessary degree of supervision of contract personnel and the comparative costs of Federal and contract personnel.

In general, industry has been critical of the Government's moving certain operations in-house. On the other hand, Federal Employee Union representatives have criticized the contracting out of functions which, but for Civil Service personnel ceilings, presumably would be performed by Federal personnel.

Neither industry nor Federal employee groups have been content with the distribution of assignments between the private and public sectors. Many, but not all, of the differences revolve around the proper implementation of BOB Circular A–76 of 1966 and 1967, which sets forth the criteria under which the Government fills its needs through its own resources or through private industry.

Advent of Federally-initiated, Privately-operated Organizations

During the 1950's and 1960's, certain problems suggested that neither the Government nor private industry was best suited to perform certain functions. For example, inflexibilities in the Civil Service system constrained Federal agencies from obtaining needed scientific and technical skills. Organizational conflicts of interest developed when contractors were used to write specifications for systems for which they would compete.[41] These problems led Federal agencies to sponsor the creation and financial support of various types

[41] The growth of research and development programs and the technical and evaluative assistance needed by Federal procurement activities in the development of major systems led to concern over conflicts of interest by organizations and individuals used to assist in design development and evaluation work.

concern even though they do not bring about actual inefficiency. A system can be efficiently produced, meet performance requirements, be on schedule, and yet register major cost overruns if underestimates are the basis of comparison.

Strengths and Weaknesses in Systems Procurement in the 1950's and 1960's

While the technical success of weapons systems in the 1950's was noteworthy—closing the "missile gap"—the management of weapons systems procurement during this period was less successful. Some of the deficiencies were related to inadequate purchasing methods, information systems, and cost controls, particularly on overhead and manpower costs. Cost estimating came under criticism because of severe underestimates. Whether the result of underestimates or of overexpenditures, increases in cost-over-original estimates involved huge sums of money.

The 1960's were characterized by efforts to centralize decision making and solve management problems. One approach to improve motivation was to adopt policies which increase the contractor's risk and provide commensurate rewards through profit guidelines.

Incentive and fixed-price contracts were used to accomplish this. Because of the size and technical uncertainties in the new systems, the general consequence of this approach was substantial disillusionment, particularly with the concept of tying research and development to production and pricing them together ("total package procurement").

In the early 1970's, the pendulum had started to swing back to more Federal risk assumption through cost-type contracting for development until prototypes and other proofs show the feasibility of committing for production. Under more recent DOD directives, concurrent development and production is to be avoided in favor of more "proving-out" time and contracts which postpone substantial production risks until technical and financial uncertainties are better resolved.

CONTROL OF GOVERNMENT PROCUREMENT AT THE START OF THE 1970's

The First Hoover Commission envisioned a strong central organization to provide control over procurement, supply, public buildings, public records, and property use and disposal. Despite the many compromises inherent in the law, there is no doubt that in enacting the Federal Property and Administrative Services Act of 1949, which set up GSA, Congress expected to carry out these recommendations.

In the areas of public building, public records, and property disposal, observers would largely agree that the objectives had been met.

More than 20 years later, however, it would appear that control over the procurement process, its organizations, its personnel, and its policy has fallen short of expectations. Perhaps an independent, non-cabinet-level establishment in the Executive Branch could achieve no more. Some uniformity has been achieved. In the area of computers and general-purpose automatic data processing equipment, Congress, by Public Law 89–306 (1965) (the "Brooks Bill"), gave GSA total control over procurement and use of this equipment; yet funding and staffing problems have not permitted full use of the available authority, and affected agencies have found problems in the manner of its implementation. Thus, the diffusion of authority is not the sole limiting factor.

It has been stated in this study that no organization is fully in charge of this activity that involves so much money and so many people, and has such important economic implications. This in no way detracts from the efforts of the people who labored to make this system work. The FPR staff and the ASPR Committee staff did, in fact, cooperate within the confines of their respective organizational structures. But the fuller results envisioned by the Hoover Commission and Congress were not achieved. Alternatives for a simplified regulatory system were examined. Nevertheless, like Topsy, the regulations "just grew," relatively free from top-level review. The sheer volume of regulatory material and the frequency of changes had become impossible to comprehend or coordinate.

APPENDIX H

List of Recommendations—Parts A–J

PART A

GENERAL PROCUREMENT CONSIDERATIONS

Chapter 2

Policy Development and Implementation

1. Establish by law a central Office of Federal Procurement Policy in the Executive Office of the President, preferably in the Office of Management and Budget, with specialized competence to take the leadership in procurement policy and related matters. If not organizationally placed in OMB, the office should be established in a manner to enable it to testify before committees of Congress. It should develop and persistently endeavor to improve ways and means through which executive agencies can cooperate with and be responsive to Congress.

Chapter 3

The Statutory Framework

2. Enact legislation to eliminate inconsistencies in the two primary procurement statutes by consolidating the two statutes and thus provide a common statutory basis for procurement policies and procedures applicable to all executive agencies. Retain in the statutory base those provisions necessary to establish fundamental procurement policies and procedures. Provide in the statutory base for an Office of Federal Procurement Policy in the executive branch to implement basic procurement policies.

3. (a) Require the use of formal advertising when the number of sources, existence of adequate specifications, and other conditions justify its use.

(b) Authorize the use of competitive negotiation methods of contracting as an acceptable and efficient alternative to formal advertising.

(c) Require that the procurement file disclose the reasons for using competitive methods other than formal advertising in procurements over $10,000, or such other figure as may be established for small purchase procedures.

(d) Repeal statutory provisions inconsistent with the above.

4. Adjust the statutory provision on solicitations and discussions in competitive procurements other than formal advertising in the following manner:

(a) Extend the provision to all agencies.

(b) Provide for soliciting a competitive rather than a "maximum" number of sources, for the public announcement of procurements, and for honoring the reasonable requests of other sources to compete.

(c) Promulgate Government-wide regulations to facilitate the use of discussions in fixed-price competitions when necessary for a common understanding of the product specifications.

(d) Require that evaluation criteria, including judgment factors to be weighed by the head of an agency when he is responsible for contractor selection, and their relative importance, be set forth in competitive solicitations involving contracts which are not expected to be awarded primarily on the basis of the lowest cost.

5. When competitive procedures that do not involve formal advertising are utilized, establish that agencies shall, upon request of an

18. Establish grade levels together with job prerequisites to reflect the authority and responsibility vested in procurement personnel.

19. Establish a rotation program to provide selected future procurement management personnel with a variety of related job experiences and individual assignments throughout the Government and in various locations.

20. Structure career development, promotion, and reduction-in-force programs to reflect a longer-range viewpoint of what is best for the overall needs of the agency and of the Government.

21. Establish a Federal Procurement Institute which would include undergraduate and graduate curricula, procurement research programs, executive seminar programs, and other academic programs.

Chapter 6

The Government Make-or-Buy Decision

22. Provide through legislation that it is national policy to rely on private enterprise for needed goods and services, to the maximum extent feasible, within the framework of procurement at reasonable prices.

23. Revise BOB Circular A–76 to provide that Federal agencies should rely on commercial sources for goods and services expected to cost less than $100,000 per year, without making cost comparisons, provided that adequate competition and reasonable prices can be obtained.

24. Base cost comparisons on:

(a) Fully-allocated costs if the work concerned represents a significant element in the total workload of the activity in question or if discontinuance of an ongoing operation will result in a significant decrease in indirect costs.

(b) An incremental basis if the work is not a significant portion of the total workload of an organization or if it is a significant portion in which the Government has already provided a substantial investment.

25. Increase the BOB Circular A–76 threshold for new starts to $100,000 for either new capital investment or annual operating cost.

26. Increase the minimum cost differential for new starts to justify performing work in-house from the 10 percent presently prescribed to a maximum of 25 percent. (Of this figure, 10 percent would be a fixed margin in support of the general policy of reliance on private enterprise. A flexible margin of up to 15 percent would be added to cover a judgment as to the possibilities of obsolescence of new or additional capital investment; uncertainties regarding maintenance and production cost, prices, and future Government requirements; and the amount of State and local taxes foregone.) New starts which require little or no capital investment would possibly justify only a 5-percent flexible margin while new starts which require a substantial capital investment would justify a 15-percent flexible margin, especially if the new starts were high-risk ventures.

Dissenting Position

Dissenting Recommendation 1. Designate a senior member of the Executive Office of the President to devote his full time to the implementation of the policy of reliance on the private sector. He should be assisted by an interagency task force whose members also would be full time for a period of one to two years or until the program is thoroughly implemented. This task force would:

(a) Work with each principal agency to:

(1) Lay out a definitive time schedule covering the completion of the agency's inventory of commercial or industrial activities being performed in-house.

(2) Outline in order of priority the analyses to be conducted.

(b) Maintain a review of the actions of each agency on the program and examine the studies made by the agency of its major activities in order to offer assistance and advice.

Dissenting Recommendation 2. Require Federal agencies to rely on the private sector except for those cases where:

(a) Such reliance would truly disrupt or significantly delay an agency program.

(b) In-house performance is essential for the national defense.

their investment in facilities specially acquired for Government production programs.

36. Enact legislation to authorize negotiated sale of surplus elephantine tools (such as heavy machine tools) and of equipment which is "excess to Government ownership but not to Government requirements," with adequate protection to the Government for its future needs when competition is not feasible. While the lack of such authority now appears to be a problem only for the Department of Defense, to provide for future contingencies the legislation should cover all agencies.

37. Establish a Government-wide policy for the review and approval of cost-type prime contractor procurement systems and transactions.

Chapter 9

Procurement of Professional Services

38. The procurement of professional services should be accomplished, so far as practicable, by using competitive proposal and negotiation procedures which take into account the technical competence of the proposers, the proposed concept of the end product, and the estimated cost of the project, including fee. The primary factors in the selection process should be the professional competence of those who will do the work, and the relative merits of proposals for the end product, including cost, sought by the Government. The fee to be charged should not be the dominant factor in contracting for professional services.

Chapter 10

Field Contract Support

39. Establish a program to coordinate and promote interagency use of contract administration and contract audit services; and use, to the fullest extent possible, for comparable contract support requirements, the services of those Federal agencies charged with performing designated support services for the general public at contractors' facilities.

40. Transfer all plant cognizance now assigned to the military departments to the Defense Contract Administration Services with the exception of those plants exempted by the Secretary of Defense (for example, GOCO plants and Navy SUPSHIPS).

41. Remove the Defense Contract Administration Services organization from the Defense Supply Agency and establish it as a separate agency reporting directly to the Secretary of Defense.

42. Consolidate the Defense Contract Administration Services and Defense Contract Audit activities into a single agency reporting directly to the Secretary of Defense. [Four Commissioners dissent.]

Chapter 11

National Policies Implemented Through the Procurement Process

43. Establish a comprehensive program for legislative and executive branch reexamination of the full range of social and economic programs applied to the procurement process and the administrative practices followed in their application.

44. Raise to $10,000 the minimum level at which social and economic programs are applied to the procurement process.

45. Consider means to make the costs of implementing social and economic goals through the procurement process more visible.

46. Revise current debarment policies to provide for uniform treatment for comparable violations of the various social and economic requirements and to establish a broader range of sanctions for such violations.

Chapter 12

Procurement from Small Business

47. Establish new standards for annually measuring the performance of procuring agencies and their prime contractors in using small business. Standards for measuring performance, including the sound use of set-aside techniques, should assess progress made in assisting small businesses to obtain a fair

10. Recognize in cost allowability principles that independent research and development (IR&D) and bid and proposal (B&P) expenditures are in the Nation's best interests to promote competition (both domestically and internationally), to advance technology, and to foster economic growth. Establish a policy recognizing IR&D and B&P efforts as necessary costs of doing business and provide that:

(a) IR&D and B&P should receive uniform treatment, Government-wide, with exceptions treated by the Office of Federal Procurement Policy.

(b) Contractor cost centers with 50 percent or more fixed-price Government contracts and sales of commercial products and services should have IR&D and B&P accepted as an overhead item without question as to amount. Reasonableness of costs for other contractors should be determined by the present DOD formula with individual ceilings for IR&D and B&P negotiated and trade-offs between the two accounts permitted.

(c) Contractor cost centers with more than 50 percent cost-type contracts should be subject to a relevancy requirement of a potential relationship to the agency function or operation in the opinion of the head of the agency. No relevancy restriction should be applied to the other contractors.

Dissenting Position 1

Dissenting Recommendation 10. Recognize in cost allowability principles that IR&D and Bid and Proposal expenditures are in the Nation's best interests to promote competition (both domestically and internationally), to advance technology, and to foster economic growth. Establish a policy recognizing IR&D and B&P efforts as necessary costs of doing business and provide that:

(a) IR&D and B&P should receive uniform treatment, Government-wide, with exceptions treated by the Office of Federal Procurement Policy.

(b) Allowable projects should have a potential relationship to an agency function or operation in the opinion of the agency head. (These will be determined in the negotiation of advance agreements with contractors who received more than $2 million in IR&D and B&P payments during their preceding fiscal year.)

(c) Agency procurement authorization and appropriation requests should be accompanied by an explanation as to criteria established by the agency head for such allowances as well as the amount of allowances for the past year.

(d) A provision should be established whereby the Government would have sufficient access to the contractor's records for its commercial business to enable a determination that IR&D and B&P costs are allowable.

(e) In all other cases, the present DOD procedure of a historical formula for reasonableness should be continued.

(f) Nothing in these provisions shall preclude a direct contract arrangement for specific R&D projects proposed by a contractor.

Dissenting Position 2

[One Commissioner believes that in addition to the prime and dissenting recommendations advanced above, additional mechanisms exist which if explored adequately may offer reasonably acceptable solutions to the IR&D dilemma. [See Chapter 4 for full text of his views.]

Chapter 5

Procurement Procedures

11. Encourage the use of master agreements of the grant and contract types, which when executed should be used on a work order basis by all agencies and for all types of performers.

12. When a potential organizational conflict of interest exists and use of a hardware exclusion clause is proposed, require a senior official of the procurement agency to examine the circumstances for benefits and detriments to both the Government and potential contractors, and reach and justify his decision to contract with either no restraint, partial restraint, or strict hardware exclusion provisions.

(b) Assigning agency representatives with relevant operational experience to advise competing contractors as necessary in developing performance and other requirements for each candidate system as tests and tradeoffs are made.

(c) Concentrating activities of agency development organizations, Government laboratories, and technical management staffs during the private sector competition on monitoring and evaluating contractor development efforts, and participating in those tests critical to determining whether the system candidate should be continued.

Chapter 5

Choosing a Preferred System

7. Limit premature system commitments and retain the benefit of system-level competition with an agency head decision to conduct competitive demonstration of candidate systems by:

(a) Choosing contractors for system demonstration depending on their relative technical progress, remaining uncertainties, and economic constraints. The overriding objective should be to have competition at least through the initial critical development stages and to permit use of firm commitments for final development and initial production.

(b) Providing selected contractors with the operational test conditions, mission performance criteria, and lifetime ownership cost factors that will be used in the final system evaluation and selection.

(c) Proceeding with final development and initial production and with commitments to a firm date for operational use after the agency needs and goals are reaffirmed and competitive demonstration results prove that the chosen technical approach is sound and definition of a system procurement program is practical.

(d) Strengthening each agency's cost estimating capability for:

(1) Developing lifetime ownership costs for use in choosing preferred major systems

(2) Developing total cost projections for the number and kind of systems to be bought for operational use

(3) Preparing budget requests for final development and procurement.

8. Obtain agency head approval if an agency component determines that it should concentrate development resources on a single system without funding exploration of competitive system candidates. Related actions should:

(a) Establish a strong centralized program office within an agency component to take direct technical and management control of the program.

(b) Integrate selected technical and management contributions from in-house groups and contractors.

(c) Select contractors with proven management, financial, and technical capabilities as related to the problems at hand. Use cost-reimbursement contracts for high technical risk portions of the program.

(d) Estimate program cost within a probable range until the system reaches the final development phase.

Chapter 6

System Implementation

9. Withhold agency head approval and congressional commitments for full production and use of new systems until the need has been reconfirmed and the system performance has been tested and evaluated in an environment that closely approximates the expected operational conditions.

(a) Establish in each agency component an operational test and evaluation activity separate from the developer and user organizations.

(b) Continue efforts to strengthen test and evaluation capabilities in the military services with emphasis on:

(1) Tactically oriented test designers

(2) Test personnel with operational and scientific background

(3) Tactical and environmental realism

(4) Setting critical test objectives, evaluation, and reporting.

(c) Establish an agencywide definition of the scope of operational test and evaluation to include:

(1) Assessment of critical performance

Chapter 4

Acquisition

5. Encourage agencies to use headquarters procurement staff personnel in the conduct of on-the-job training of field procurement personnel to (a) implement techniques adapted to specific field activity needs and (b) identify possibilities for procurement innovation and transfusion.

6. Provide statutory authority and assign to the Office of Federal Procurement Policy responsibility for policies to achieve greater economy in the procurement, storage, and distribution of commercial products used by Federal agencies. Until statutory authority is provided and until such responsibility is assigned to the Office of Federal Procurement Policy, the following actions should be taken:

(a) Establish reasonable standards to permit local using installations to buy directly from commercial sources if lower total economic costs to the Government can be achieved. However, decentralization of items for local purchase should not be permitted to affect adversely centralized procurement and distribution management required for purposes such as mobilization planning, military readiness, and product quality assurance.

(b) Develop and implement on an orderly basis industrial funding of activities engaged in interagency supply support of commercial products and services, to the fullest practical extent, so that (1) determination and recoupment of the true costs for providing such products and services will be facilitated, and (2) efficiency in the use of resources will be fostered.

(c) Evaluate continuously the efficiency, economy, and appropriateness of the procurement and distribution systems on a total economic cost basis at all levels, without prejudice to mobilization reserve and other national requirements.

7. Require that consideration be given to the direct procurement of products made in the United States from sources available to overseas activities when such sources are cost-effective.

8. Authorize primary grantees use of Federal sources of supply and services when:

(a) The purpose is to support a specific grant program for which Federal financing exceeds 60 percent,

(b) The use is optional on the grantee, the Government source, and, in the case of Federal schedules or other indefinite delivery contracts, on the supplying contractor, and

(c) The Government is reimbursed all costs.

9. Require that grantor agencies establish regulatory procedures for assuring appropriate use of the products or services and computation of total costs for Government reimbursement.

10. Assign responsibility for monitoring implementation of this program and its socio-economic effects to the Office of Federal Procurement Policy.

[One Commissioner abstained from voting on recommendations 8, 9, and 10.]

Dissenting Position

Dissenting Recommendation 1. Prohibit the use of Federal supply sources by grantees, except where unusual circumstances dictate and under express statutory authorization.

Dissenting Recommendation 2. Charge grantees on the basis of total economic cost to the Government for Federal supplies and services made available to them.

[Offered in lieu of Commission recommendations 8, 9, and 10.]

Chapter 5

Special Products and Services

11. Reevaluate GSA and agency ADPE acquisition procedures from identification of requirements to delivery of an operational system, for consideration of all appropriate elements on the basis of total economic cost.

12. Require that GSA establish ADPE procurement delegation policy that would promote (a) effective preplanning of requirements by agencies and (b) optimum use of manpower.

13. Revise funding policies regarding multi-year leasing contracts, in addition to use of the ADPE Fund, to permit Government agencies to procure ADPE on a cost-effective basis.

PART F

FEDERAL GRANT-TYPE ASSISTANCE PROGRAMS

Chapter 3

Proposed Changes

1. Enact legislation to (a) distinguish assistance relationships as a class from procurement relationships by restricting the term "contract" to procurement relationships and the terms "grant," "grant-in-aid," and "cooperative agreement" to assistance relationships, and (b) authorize the general use of instruments reflecting the foregoing types of relationships.

2. Urge the Office of Federal Procurement Policy to undertake or sponsor a study of the feasibility of developing a system of guidance for Federal assistance programs and periodically inform Congress of the progress of this study.

PART G

LEGAL AND ADMINISTRATIVE REMEDIES

Chapter 2

Disputes Arising in Connection With Contract Performance

1. Make clear to the contractor the identity and authority of the contracting officer, and other designated officials, to act in connection with each contract.

2. Provide for an informal conference to review contracting officer decisions adverse to the contractor.

3. Retain multiple agency boards; establish minimum standards for personnel and caseload; and grant the boards subpoena and discovery powers.

4. Establish a regional small claims boards system to resolve disputes involving $25,000 or less.

5. Empower contracting agencies to settle and pay, and administrative forums to decide, all claims or disputes arising under or growing out of or in connection with the administration or performance of contracts entered into by the United States.

6. Allow contractors direct access to the Court of Claims and district courts.

7. Grant both the Government and contractors judicial review of adverse agency boards of contract appeals decisions. [Five Commissioners dissent.]

8. Establish uniform and relatively short time periods within which parties may seek judicial review of adverse decisions of administrative forums.

9. Modify the present court remand practice to allow the reviewing court to take additional evidence and make a final disposition of the case.

10. Increase the monetary jurisdictional limit of the district courts to $100,000. [One Commissioner dissents.]

11. Pay interest on claims awarded by administrative and judicial forums.

12. Pay all court judgments on contract claims from agency appropriations if feasible.

Chapter 3

Disputes Related to the Award of Contracts

13. Promulgate award protest procedures that adequately inform protestors of the steps that can be taken to seek review of administrative decisions in the contract award process.

14. Continue the General Accounting Office as an award protest-resolving forum. [One Commissioner dissents.]

15. Establish, through executive branch and GAO cooperation, more expeditious and mandatory time requirements for processing protests through GAO.

16. Establish in the executive procurement regulations, in cooperation with the General Accounting Office, a coordinated requirement for high-level management review of any de-

patent infringement be provided by specific contractual language and not by implication.

6. Authorize all agencies to settle patent infringement claims out of available appropriations prior to the filing of suit.

7. Grant all agencies express statutory authority to acquire patents, applications for patents, and licenses or other interests thereunder.

8. Give the United States District Courts concurrent jurisdiction with the Court of Claims for suits brought pursuant to 28 U.S.C. 1498 subject to the jurisdictional amount under the Tucker Act.

Chapter 3

Technical Data

9. Amend or repeal statutes limiting agency flexibility concerning rights in technical data.

10. Undertake, through the Federal Council for Science and Technology in coordination with the Office of Federal Procurement Policy, to develop and evaluate the implementation of a statement of Government policy on rights in technical data supplied under Government contracts. Give specific consideration to the relationships between prime contractors and subcontractors.

11. Authorize agencies to acquire information and data.

12. Undertake, through the Federal Council for Science and Technology, in coordination with the Office of Federal Procurement Policy, to develop and evaluate the implementation of a statement of Government policy on the treatment of data submitted with proposals or other related communications.

13. Establish a remedy for the misuse of information supplied to the Government in confidence.

Chapter 4

Copyrights

14. Amend or repeal statutes limiting agency flexibility in dealing with the publication of works developed under Government contracts.

15. Enact legislation giving all agencies authority to acquire private copyrights or interests therein.

16. Establish an interagency task force under the lead of the Office of Federal Procurement Policy to develop and evaluate the implementation of a statement of Government copyright policy.

PART J

OTHER STATUTORY CONSIDERATIONS

Chapter 2

Codification—A Consolidated Procurement Title in the United States Code

1. Establish a program for developing the technical and formal changes needed to organize and consolidate the procurement statutes to the extent appropriate in Title 41, Public Contracts, of the United States Code.

Chapter 4

Statutes of Limited Application

2. Extend the Truth in Negotiations Act to all Government procurement agencies and develop coordinated regulations for interpretation and application of its provisions.

3. Extend the Renegotiation Act for periods of five years.

4. Extend the Renegotiation Act to contracts of all Government agencies.

5. Raise the jurisdictional amount under the Renegotiation Act from one million to two million dollars for sales to the Government; and from twenty-five thousand to fifty thousand dollars for brokers' fees. [Two Commissioners dissent].

6. Expand and clarify the criteria used by the Renegotiation Board.

Dissenting Position

Dissenting Recommendation 6. Expand and clarify the criteria utilized by the Renegotiation Board in determining excess profits and include therein a limitation of renegotiation to cost-type contracts.

Total recommendations Parts A–J: 149

GS	General Schedule
HEW	Department of Health, Education, and Welfare
H.R.	House of Representatives
IFB	Invitation for Bid
IOI	Internal Operating Instruction
IPE	Industrial Plant Equipment
IR&D	Independent Research and Development
LMI	Logistics Management Institute
MK	Mark
NASA	National Aeronautics and Space Administration
NASA PR	National Aeronautics and Space Administration Procurement Regulations
NLRA	National Labor Relations Act
NLRB	National Labor Relations Board
OFCC	Office of Federal Contract Compliance
OMB	Office of Management and Budget
ONR	Office of Naval Research
PCR	Procurement Center Representative
R&D	Research and Development
RFP	Request for Proposal
RIF	Reduction in Force
ROI	Return on Investment
SBA	Small Business Administration
SDPA	Small Defense Plants Administration
SPO	System Project Officer
SUPSHIPS	Supervisor of Shipbuilding (Navy)
SWPC	Small War Plant Corporation
TVA	Tennessee Valley Authority
U.S.C.	United States Code
USDA	United States Department of Agriculture
VA	Veterans Administration
WPB	War Production Board

APPENDIX I

Acronyms

ACO	Administrative Contracting Officer
ADPE	Automatic Data Processing Equipment
A-E	Architect-Engineer
AEC	Atomic Energy Commission
AEC PR	Atomic Energy Commission Procurement Regulations
AEDC	Arnold Engineering Development Center
AFIT	Air Force Institute of Technology
ALMC	Army Logistics Management Center
AMETA	Army Management Education Training Agency
AMSL	Acquisition Management Systems List
APA	Administrative Procedure Act
ASPA	Armed Services Procurement Act
ASPR	Armed Services Procurement Regulation
BOB	Bureau of the Budget
B&P	Bid and Proposal
BPA	Bonneville Power Administration
CFR	Code of Federal Regulations
CIA	Central Intelligence Agency
COC	Certificate of Competency
CPFF	Cost-Plus-A-Fixed-Fee
CPIF	Cost-Plus-Incentive-Fee
CPSR	Contractor Procurement System Review
CSCSC	Cost Schedule Control Systems Criteria
CWAS	Contractors Weighted Average Share in Cost Risk
DCAA	Defense Contract Audit Agency
DCAS	Defense Contract Administration Services
DOD	Department of Defense
DPC	Defense Procurement Circular
DSA	Defense Supply Agency
DSMS	Defense Systems Management School
ECOM	Electronics Command
EPA	Environmental Protection Agency
FDA	Food and Drug Administration
FPASA	Federal Property and Administrative Services Act
FPR	Federal Procurement Regulations
FY	Fiscal Year
GAO	General Accounting Office
GSA	General Services Administration
GOCO	Government-Owned, Contractor-Operated

cision to award a contract while a protest is pending with GAO.

17. GAO should continue to recommend termination for convenience of the Government of improperly awarded contracts in appropriate instances.

18. Improve contracting agency debriefing procedures.

19. Establish a pre-award protest procedure in all contracting agencies.

20. Conduct periodic reviews by GAO of agency award protest procedures and practices.

Chapter 4

Equitable and Special Management Powers Under Public Law 85–804

21. Make authority presently conferred by Public Law 85–804 permanent authority.

22. Authorize use of Public Law 85–804 by all contracting agencies under regulations prescribed by the President.

23. Incorporate Public Law 85–804 into the primary procurement statute.

[One Commissioner dissents to recommendations 21–23.]

24. Revise existing requirements in Public Law 85–804 on reporting to Congress.

PART H

SELECTED ISSUES OF LIABILITY: GOVERNMENT PROPERTY AND CATASTROPHIC ACCIDENTS

Chapter 2

Self-Insurance of Government Property

1. That the Government, with appropriate exceptions, generally act as a self-insurer for the loss of or damage to Government property resulting from any defect in items supplied by a contractor and finally accepted by the Government.

2. Apply the Government policy of self-insurance to subcontractors on the same basis as to prime contractors.

3. Ensure that, where items delivered by a contractor to the Government are transferred by the Government to a third party, the third party has no greater rights against the contractor or its subcontractors than the Government would have if it retained the item.

Chapter 3

Catastrophic Accidents

4. Enact legislation to assure prompt and adequate compensation for victims of catastrophic accidents occurring in connection with Government programs.

5. Enact legislation to provide Government indemnification, above the limit of available insurance, of contractors for liability for damage arising from a catastrophic accident occurring in connection with a Government program.

PART I

PATENTS, TECHNICAL DATA, AND COPYRIGHTS

Chapter 2

Patents

1. Implement the revised Presidential Statement of Government Patent Policy promptly and uniformly.

2. Enact legislation to make clear the authority of all agencies to issue exclusive licenses under patents held by them.

3. Supplement the Presidential policy by the adoption of uniform procedures for application of the rights reserved to the Government under the policy.

4. Amend 28 U.S.C. 1498 to make authorization and consent automatic in all cases except where an agency expressly withholds its authorization and consent as to a specific patent.

5. Amend agency regulations and clauses to provide that all contractual warranties against

14. Develop and issue a set of standard programs to be used as benchmarks for evaluating vendor ADPE proposals.

15. Change the late proposal clause regarding ADPE to conform to other Government procurement practices.

16. Assign responsibility for consistent and equitable implementation of legislative policy concerning food acquisition to the Office of Federal Procurement Policy or to an agency designated by the President.

17. Establish by legislation a central coordinator to identify and assign individual agency responsibilities for management of the Federal food quality assurance program.

18. Encourage procuring activities, when it is deemed in the best interests of the Government, to purchase supplies or services from public utilities by accepting the commercial forms and provisions that are used in the utilities' sales to industry and the general public, provided the service contract provisions are not in violation of public law.

19. Review transportation procurement techniques to determine whether more innovative procurement methods are warranted when alternative sources and modes are available.

PART E

ACQUISITION OF CONSTRUCTION AND ARCHITECT-ENGINEER SERVICES

Chapter 2

Architect-Engineer Services

1. Base procurement of architect-engineer services, so far as practicable, on competitive negotiations, taking into account the technical competence of the proposers, the proposed concept of the end product, and the estimated cost of the project, including fee. The Commission's support of competitive negotiations is based on the premise that the fee to be charged will not be the dominant factor in contracting for professional services. The primary factor should be the relative merits of proposals for the end product, including cost, sought by the Government, with fee becoming important only when technical proposals are equal. The practice of initially selecting one firm for negotiation should be discouraged, except in those rare instances when a single firm is uniquely qualified to fill an unusual need for professional services.

2. Provide policy guidance, through the Office of Federal Procurement Policy, specifying that on projects with estimated costs in excess of $500,000 proposals for A-E contracts should include estimates of the total economic (life-cycle) cost of the project to the Government where it appears that realistic estimates are feasible. Exceptions to this policy should be provided by the agency head or his designee.

Dissenting Position

Dissenting Recommendation 1. The procurement of A-E services should continue to be based on a competitive selection process as outlined in Public Law 92–582, which focuses on the technical competence of interested prospects. Solicitations of a price proposal and negotiations as to price should be undertaken only when the best qualified firm has been ascertained; if mutual agreement cannot be reached, the next best qualified firm should be asked for a price proposal, followed by negotiation; and if necessary, the process should be repeated until a satisfactory contract has been negotiated. [Offered in lieu of Commission recommendations 1 and 2.]

3. Consider reimbursing A-Es for the costs incurred in submitting proposals in those instances where unusual design and engineering problems are involved and substantial work effort is necessary for A-Es to submit proposals.

4. Repeal the statutory six-percent limitation on A-E fees. Authorize the Office of Federal Procurement Policy to provide appropriate policy guidelines to ensure consistency of action and protection of the Government's interest.

characteristics of an emerging system to determine usefulness to ultimate users

(2) Joint testing of systems whose missions cross service lines

(3) Two-sided adversary-type testing when needed to provide operational realism

(4) Operational test and evaluation during the system life cycle as changes occur in need assessment, mission goals, and as a result of technical modifications to the system.

10. Use contracting as an important tool of system acquisition, not as a substitute for management of acquisition programs. In so doing:

(a) Set policy guidelines within which experienced personnel may exercise judgment in selectively applying detailed contracting regulations.

(b) Develop simplified contractual arrangements and clauses for use in awarding final development and production contracts for demonstrated systems tested under competitive conditions.

(c) Allow contracting officials to use priced production options if critical test milestones have reduced risk to the point that the remaining development work is relatively straightforward.

11. Unify policymaking and monitoring responsibilities for major system aquisitions within each agency and agency component. Responsibilities and authority of unified offices should be to:

(a) Set system acquisition policy.

(b) Monitor results of acquisition policy.

(c) Integrate technical and business management policy for major systems.

(d) Act for the secretary in agency head decision points for each system acquisition program.

(e) Establish a policy for assigning program managers when acquisition programs are initiated.

(f) Insure that key personnel have long-term experience in a variety of Government/industry system acquisition activities and institute a career program to enlarge on that experience.

(g) Minimize management layering, staff reviews, coordinating points, unnecessary procedures, reporting, and paper work on both the agency and industry side of major system acquisitions.

12. Delegate authority for all technical and program decisions to the operating agency components except for the key agency head decisions of:

(a) Defining and updating the mission need and the goals that an acquisition effort is to achieve.

(b) Approving alternative systems to be committed to system fabrication and demonstration.

(c) Approving the preferred system chosen for final development and limited production.

(d) Approving full production release.

PART D

ACQUISITION OF COMMERCIAL PRODUCTS

Chapter 2

The Marketplace

1. Improve the system for collection and dissemination of statistics on procurement by commodity and agency to meet congressional, executive branch, and industry needs.

Chapter 3

Requirements

2. Provide a positive means for users to communicate satisfaction with their support system as a method of evaluating its effectiveness and ensuring user confidence.

3. Require that development of new Federal specifications for commercial-type products be limited to those that can be specifically justified, including the use of total cost-benefit criteria. All commercial product-type specifications should be reevaluated every five years. Purchase descriptions should be used when Federal specifications are not available.

4. Assign responsibility for policy regarding the development and coordination of Federal specifications to the Office of Federal Procurement Policy.

PART C

ACQUISITION OF MAJOR SYSTEMS

Chapter 3

Needs and Goals for New Acquisition Programs

1. Start new system acquisition programs with agency head statements of needs and goals that have been reconciled with overall agency capabilities and resources.

(a) State program needs and goals independent of any system product. Use long-term projections of mission capabilities and deficiencies prepared and coordinated by agency component(s) to set program goals that specify:

(1) Total mission costs within which new systems should be bought and used

(2) The level of mission capability to be achieved above that of projected inventories and existing systems

(3) The time period in which the new capability is to be achieved.

(b) Assign responsibility for responding to statements of needs and goals to agency components in such a way that either:

(1) A single agency component is responsible for developing system alternatives when the mission need is clearly the responsibility of one component; or

(2) Competition between agency components is formally recognized with each offering alternative system solutions when the mission responsibilities overlap.

2. Begin congressional budget proceedings with an annual review by the appropriate committees of agency missions, capabilities, deficiencies, and the needs and goals for new acquisition programs as a basis for reviewing agency budgets.

Chapter 4

Exploring Alternative Systems

3. Support the general fields of knowledge that are related to an agency's assigned responsibilities by funding private sector sources and Government in-house technical centers to do:

(a) Basic and applied research

(b) Proof of concept work

(c) Exploratory subsystem development.

Restrict subsystem development to less than fully designed hardware until identified as part of a system candidate to meet a specific operational need.

4. Create alternative system candidates by:

(a) Soliciting industry proposals for new systems with a statement of the need (mission deficiency); time, cost, and capability goals; and operating constraints of the responsible agency and component(s), with each contractor free to propose system technical approach, subsystems, and main design features.

(b) Soliciting system proposals from smaller firms that do not own production facilities if they have:

(1) Personnel experienced in major development and production activities.

(2) Contingent plans for later use of required equipment and facilities.

(c) Sponsoring, for agency funding, the most promising system candidates selected by agency component heads from a review of those proposed, using a team of experts from inside and outside the agency component development organization.

5. Finance the exploration of alternative systems by:

(a) Proposing agency development budgets according to mission need to support the exploration of alternative system candidates.

(b) Authorizing and appropriating funds by agency mission area in accordance with review of agency mission needs and goals for new acquisition programs.

(c) Allocating agency development funds to components by mission need to support the most promising system candidates. Monitor components' exploration of alternatives at the agency head level through annual budget and approval reviews using updated mission needs and goals.

6. Maintain competition between contractors exploring alternative systems by:

(a) Limiting commitments to each contractor to annual fixed-level awards, subject to annual review of their technical progress by the sponsoring agency component.

proportion of awards—not just statistical percentages.

48. Test mandatory small business subcontracting on a selected basis to determine its feasibility.

49. Initiate within the executive branch a review of procurement programs with guidance from SBA and the Office of Federal Procurement Policy with the objective of making small business participation in Government procurement more effective and assuring that small businesses have a full opportunity to compete for Government contracts.

PART B

ACQUISITION OF RESEARCH AND DEVELOPMENT

Chapter 2

Federal Objectives and Organizations

1. Conduct R&D procurement primarily to meet agency missions, but whenever possible be responsive to the needs of other Federal agencies and activities.

2. Allocate a limited amount of funds to each Federal laboratory to be used at the discretion of the laboratory director to initiate R&D projects in support of any national objective. Some of these projects might lie outside the normal mission of the laboratory.

3. Encourage, through the Office of Science and Technology, every Federal agency that has an R&D program in direct support of its missions and objectives to generate an associated program in long-range basic research and advanced studies and to support it at a level appropriate to the agency's needs.

Chapter 3

Performers of Research and Development

4. Strengthen in-house capabilities to support technology advancement in the private sector, and specifically the procurement-related technical and management capabilities in laboratories by:

(a) Clarifying the assigned roles of the laboratories;

(b) Providing training and temporary assignment of technical manpower to intra-agency and interagency program management offices and regulatory bodies;

(c) Undertaking test and evaluation (T&E) of conceptual design, hardware, and systems that are proposed, designed, and built by private sources; and

(d) Maintaining technical competence by continuing to conduct basic and applied research and development projects.

5. Continue the option to organize and use FFRDCs to satisfy needs that cannot be satisfied effectively by other organizational resources. Any proposal for a new FFRDC should be reviewed and approved by the agency head and special attention should be given to the method of termination, including ownership of assets, when the need for the FFRDC no longer exists. Existing FFRDCs should be evaluated by the agency head periodically (perhaps every three years) for continued need.

6. Monitor the progress of the NSF/NBS experimental R&D incentives program and actively translate the results of this learning into practical agency application.

Chapter 4

Procurement Policy

7. Eliminate restraints which discourage the generation and acceptance of innovative ideas through unsolicited proposals.

8. Eliminate cost sharing on R&D projects, except in cases where the performer of the project would clearly benefit, e.g., through economic benefits on commercial sales. Decisions with respect to the placement of R&D contracts or grants should not be influenced by potential involvement in cost sharing.

9. Eliminate recovery of R&D costs from Government contractors and grantees except under unusual circumstances approved by the agency head.

(c) The product or service is not and cannot be made available in the private sector and is available from a Federal source.

Take all practical steps to encourage and develop additional private sources in the unlikely event that sufficient competitive sources are not available in the private sector. Only as a last resort consider in-house performance in comparison to the private sector. (Offered in lieu of Commission recommendations 23, 24, 25, and 26.)

Dissenting Recommendation 3. Establish a 15-percent cost differential favoring the private sector over ongoing activities. Of this figure, ten percent would be in support of the general policy of reliance on the private sector.

Chapter 7

Timely Financing of Procurement

27. Initiate effective measures to make procurement funds available to the procuring activities in a timely manner.

(a) The executive branch should eliminate delays in the submission of authorization and appropriation requests.

(b) Congress should eliminate delays in its consideration of requests. Among the techniques which hold promise of providing substantial improvement, we believe each of the following deserves serious consideration by the Congress:

(1) Making greater use of authorization statutes covering periods of two years or more.

(2) Making greater use of authorizing legislation covering program objectives rather than annual segments of work.

(3) Making greater use of appropriations for a period longer than one fiscal year.

(4) Changing the fiscal year from July 1–June 30 to October 1–September 30. [One Commissioner dissents.]

(c) The executive branch and its agencies should assure that apportionment, allocation, and allotment of appropriated funds are promptly made available to the procuring activities.

Chapter 8

Selected Areas in the Acquisition Process

28. Establish Government-wide principles on allowability of costs.

29. Establish procedures for a single, final overhead settlement binding on all Federal contracts at a given contractor location.

30. Develop uniform Government-wide guidelines for determining equitable profit objectives in negotiated contracts. The Office of Federal Procurement Policy should take the lead in this interagency activity. The guidelines should emphasize consideration of the total amount of capital required, risk assumed, complexity of work, and management performance.

31. Evaluate procurement negotiation procedures on a continuing basis to compare results obtained in completed contracts with original objectives. This evaluation should take place Government-wide.

32. Establish contract payment offices to make payments for all Federal agencies in each of the ten Federal regional areas. This could be accomplished by a lead agency designated to formulate standard procedures to implement this recommendation.

33. Establish standards and criteria for estimating costs and benefits of product data requirements. The need for product data should be determined on the basis of cost-benefit analyses. Selective after-the-fact reviews should be used as a basis for eliminating unnecessary requirements.

34. Establish Government-wide criteria for management systems which are prescribed for use by contractors, including standards for determining mission-essential management data requirements.

35. Provide new incentives to stimulate contractor acquisition and ownership of production facilities, such as giving contractors additional profit in consideration of contractor-owned facilities and, in special cases, by guaranteeing contractors full or substantial amortization of

unsuccessful proposer, effectively communicate the reasons for selecting a proposal other than his own.

6. Authorize sole-source procurements in those situations where formal advertising or other competitive procedures cannot be utilized, subject to appropriate documentation; and, in such classes of procurements as determined by the Office of Federal Procurement Policy, subject to the determination being approved at such level above the head of the procuring activity as is specified in agency regulations.

7. Increase the statutory ceiling on procurements for which simplified procedures are authorized to $10,000. Authorize the Office of Federal Procurement Policy to review the ceiling at least every three years and change it where an appropriate formula indicates the costs of labor and materials have changed by 10 percent or more.

8. Authorize all executive agencies to enter into multi-year contracts with annual appropriations. Such contracts shall be based on clearly specified firm requirements and shall not exceed a five-year duration unless authorized by another statute.

9. Repeal the current statutory requirement that the contractor provide the procuring agency with advance notification of cost-plus-a-fixed-fee subcontracts and subcontracts over $25,000 or five percent of the prime contract cost.

Chapter 4

The Regulatory Framework

10. Establish a system of Government-wide coordinated, and to the extent feasible, uniform procurement regulations under the direction of the Office of Federal Procurement Policy, which will have the overall responsibility for development, coordination, and control of procurement regulations.

11. Establish criteria and procedures for an effective method of soliciting the viewpoints of interested parties in the development of procurement regulations.

Chapter 5

The Procurement Work Force

12. Reevaluate the place of procurement in each agency whose program goals require substantial reliance on procurement. Under the general oversight of the Office of Federal Procurement Policy, each agency should ensure that the business aspects of procurement and the multiple national objectives to be incorporated in procurement actions receive appropriate consideration at all levels in the organization.

13. Clarify the role of the contracting officer as the focal point for making or obtaining a final decision on a procurement. Allow the contracting officer wide latitude for the exercise of business judgment in representing the Government's interest.

14. Clarify the methods by which authority to make contracts and commit the Government is delegated to assure that such authority is exercised by qualified individuals and is clearly understood by those within the agencies and by the agencies' suppliers of goods and services.

15. Assign to the Office of Federal Procurement Policy responsibility for:
(a) Developing and monitoring, in cooperation with the procuring agencies and the Civil Service Commission, personnel management programs that will assure a competent work force.
(b) Defining agency responsibilities and establishing standards for effective work force management and for development of a Government-wide personnel improvement program.
(c) Developing and monitoring a uniform data information system for procurement personnel.

16. Establish a recruiting and trainee program to assure development of candidates for procurement positions in all agencies, at all levels, and in all required disciplines. Special attention should be given to college recruitment to obtain young workers capable of being trained through experience and additional formal education to provide the managerial staff required a decade from now.

17. Establish a better balance between employee tenure and promotion rights and long-range needs of the agencies.

ESTABLISHMENT OF THE COMMISSION ON GOVERNMENT PROCUREMENT

Originally proposed in 1966, preliminary hearings were held by the 89th and 90th Congress on the need for a comprehensive study of Federal procurement. H.R. 474, the bill that eventually led to Public Law 91–129 establishing this Commission, was introduced in the 91st Congress by Congressman Chet Holifield on January 3, 1969. Testimony from more than 100 witnesses filled 10 volumes of hearings on H.R. 474 and the companion bill, S. 1707, introduced by Senator Henry M. Jackson.

Alternative studies by the Executive Branch or congressional committees were considered, but a legislatively-created commission with a bipartisan, 12-member body from the Legislative Branch, the Executive Branch, and the public was the mechanism finally adopted. The Comptroller General of the United States was made a statutory member.

Creation of the Commission was generally favored, although some in Government and industry were concerned with the magnitude and complexity of the study and the sensitivity with which the Commission would have to approach many problems. Nevertheless, opposition faded away and both the public and private sectors made noteworthy investments of talent and know-how in the study effort.

In any event, the foregoing represents some of the historical events, circumstances, trends, and concerns confronting the Commission as it undertook its study of the procurement process.

of nonprofit organizations, neither purely Federal nor purely private. Included were Federally-owned or financed, privately-operated centers for scientific or operations research; for strategic analysis; for systems analysis; for systems engineering evaluation, development, or integration; and for "think tank" studies of various types. The "Bell Report," referred to earlier, concluded that while Government should continue to rely heavily on private contracts, both public (in-house) and private research programs had their place, and their use should be based on relative efficiency, with management of research retained in Federal hands.

Characteristically, these hybrid organizations are privately operated, sometimes university-affiliated. They operate under agency-approved, flexible controls. Reconsideration of their proper role has been underway for some time by various agencies and congressional committees.

Adoption of Statutes and Rules on Conflicts of Interest

A number of laws dealing with conflicts of interest have been enacted through the years and made a part of the Criminal Code. For example, the "official not to benefit" law (18 U.S.C. 431), barring members of Congress from sharing in Federal contracts, was originally enacted in 1809. Other Federal and former Federal employees are similarly restricted from submitting claims, receiving dual compensation, or influencing or benefitting from Federal contracts (18 U.S.C. 201–219 and 437–422, and Executive Order 11222 of May 8, 1965, and implementing Civil Service and agency regulations).

In the 1950's and 1960's, the complexity of major systems procurements required the assistance of profit and nonprofit organizations in developing and evaluating systems specifications and performance. The high-level interagency committee appointed by President Kennedy in 1961, which issued the "Bell Report," recommended agency codes of conduct to prevent conflicts of interest by non-Federal organizations engaged in research and development and systems evaluation work. Current complaints relate either to over-application or purposelessness of the restrictions or, in some cases, to the continued potential for conflict.

"Cost Overruns" and "Buy-Ins"

Cost overruns are not new, but in the 1960's and 1970's, they attracted public awareness to an extent uncharacteristic of previous times. For example, the cost increases in the C–5A transport probably have no historical equal. Yet overruns have been characteristic of most new technological efforts, public or private. World War I cost increases in armaments and naval vessels, for example, were notorious in their time. The NC4 airplane of 1919, important in early aviation history, had a 40 percent cost increase over Curtiss and Navy estimates and design problems as well.

A 1970 GAO study of 57 major systems revealed 38 systems with an estimate of a 30 percent increase from the point of contract award (50 percent from planning estimates)—$62.8 billion versus the original $49 billion. While the percentage of increase may not be new or may be even less than in earlier times, the staggering dollar amount has become even more unacceptable.

Cost increases have been ascribed, among other things, to planning deficiencies and organizational rivalries, abnormal inflation, changes in design, underestimates to "buy-in," overoptimism by program advocates, and premature commitment to production with insufficient technical validation. In March 1971, DOD-selected procurement reports for 45 systems amounting to $110 billion accounted for "cost growth" in the following categories: technical changes, 20 percent; delivery schedule extensions, 17 percent; abnormal economic fluctuations, 18 percent; incorrect estimates, 29 percent; and other causes, 16 percent. Thus, some patterns of cost growth causes have been emerging.

Performance deficiencies and schedule slippages may often be expressed in terms of "dollars to correct," and both will likely contribute to cost overruns. Contractor buy-ins and Federal program optimism lead to underestimates and have been the subject of public

ness Act of 1953, creating the Small Business Administration, and made it a permanent agency in 1958. The labor standards laws of the 1930's for construction (Davis-Bacon Act) and supply contracts (Walsh-Healey Act) were extended to employees of service contractors with regard to wages, hours, and safety and health conditions (Service Contract Act). Safety and health standards were also extended to construction workers (Contract Work Hours Standards Act), and Davis-Bacon Act wage coverage for construction workers was broadened to include fringe benefits.

The Federal contract appeared increasingly attractive as a device for implementing socio-economic programs, particularly as an executive branch alternative to lengthy legislation. Thus, Federal procurement was enlisted in programs relating to discrimination against women and the aged, humane animal slaughter, safety and health regulations, hard-core unemployment, the disadvantaged and minority enterprises, geographic distribution of Federal work, gold-flow controls, wage and price controls, and environmental pollution (Clean Air Act and President Nixon's Executive Order 11602).

While the cost of administering and carrying out these programs is, for the most part, not directly appropriated by Congress, implied sanction comes through the regular appropriations process which funds all contractual costs, from planning through end product, and through administrative funding of the costs of procurement and management. Direct sanctions are present, of course, for those programs specifically mandated by Congress.

Developments in the Procurement of Major Weapons and Other Systems

In the 1950's and 1960's, major emphasis was given by Congress and the Executive Branch to the problems of procuring weapons, aerospace, and other major systems.

The technological crisis came to the fore in the 1950's. Reductions in defense research and development dating from the end of World War II came to a stop, and funds were poured into the development of missiles, high-performance aircraft, nuclear weapons, and the space program. Cold war crisis attitudes, heightened by the Korean conflict and continued international uncertainties, led to a recognition of the need for a permanently high level of military readiness and a broader technological base.

The "Permanent" Defense Industry

Thus, the United States began to develop, for the first time in its history, a "permanent" defense industry. The "arsenal system," which had developed when private enterprise turned away from military production, was no longer adequate; the free enterprise system was considered more efficient. The trend toward a permanent defense industry attracted a significant number of industries producing primarily for national defense. Some broad-based, commercially-oriented concerns created separate defense divisions.

In this environment the traditional free market system in which sellers could come and go was drastically changed. Because of the size of investments and the great technical and financial uncertainties, new marketing procedures were needed. Special Federal investments in plants and equipment, and funding techniques such as progress payments under risk-limiting, cost-type contract reimbursement procedures, altered the earlier relationships of Government and private enterprise.

Along with these developments came increasing Federal involvement in the performance of the work and in the review of the management systems used by contractors.

The principle which developed was that if the Government must provide primary sources of operating capital and the physical plant, and must underwrite the risk, then it should have a substantial voice in the procedures used by defense contractors.

Government Engagement in Business Activities vs. Reliance on Private Enterprise: New Emphasis in the 1950's and 1960's

Which Federal needs should be met by contracting with private enterprise and which

tary on the weaknesses of the procurement process and the programs to which it was being applied. In many cases, complaints about the system itself were closely tied to differences over the wisdom of the programs being supported.

Increased Use of Negotiation and of Cost-type Contracts: Need for Motivation

The 1950's were characterized by a trend towards increased use of negotiated and cost-reimbursement contracts, particularly for research and development work and for work involving the acquisition of major weapons and aerospace systems. Certain congressional studies and the 1962 "Bell Report" (named for BOB director David Bell, chairman of the Interagency Study Group designated by President Kennedy) dealt particularly with research and development, the use of cost-type contracts, and the relative roles of public and private research laboratories, including nonprofit organizations. All these studies led to the conclusion, among others, that cost-type contracting lacked necessary controls and motivation to keep costs down.

These studies, particularly the Bell Report, emphasized the need for "incentive-type"—cost-reimbursement and fixed-price—contracts. Cost-reimbursement incentive contracts provided for reimbursement of costs and for adjustment of fees up or down based on the contractor's achievements in cost, performance, and schedule. Fixed-price incentive contracts permitted contractors to earn increased or decreased fees within a ceiling price, based on accomplishments; an actual loss could result if costs exceeded the ceiling.

In major systems acquisition, the 1960's saw the development of systems evolution in sequential steps during which the system was increasingly defined and limited efforts were made to have competition maintained. A technique adopted during this period was the "total package procurement," which sought to join development and initial production work under a single contract to reduce the likelihood of competing contractors underestimating costs and attempting to "buy in" to a major program during the development phase.

Movement to Increase Competition

Because of the concern over the increasing dollar value of "negotiated" as distinguished from "advertised" procurement under the Armed Services Procurement Act,[40] pressure was growing to increase competition. Two-step formal advertising was developed and other methods were used, such as the use of component breakout procedures, improved source-selection procedures, and adoption of contractor performance-evaluation programs.

Hearings on military procurement were held in 1959 by the Senate Armed Services Committee on a group of bills, S. 500, S. 1383, and S. 1875, with emphasis on the "Saltonstal Bill," S. 500. Much testimony was heard, but no action taken. The bill would have given competitive negotiation equal status with formal advertising and removed statutory inhibitions on use of incentive-type contracts.

In 1962, Public Law 87–653 was enacted amending the Armed Services Procurement Act to require "oral or written discussions" with all firms "within a competitive range" and also requiring, in negotiated contracts exceeding $100,000, the use of a contract clause providing for price reductions for defective pricing data and full disclosure of all "current, complete, and accurate" cost and pricing data. This latter provision has become known as the Truth in Negotiations law. The same law also tightened the requirements for justifying the use of "negotiation exceptions" in lieu of the preferred formal advertising.

Shift of Risk: Profit Guidelines

Because of the pressure to increase competition, DOD issued instructions which were designed to shift the risk of bearing unexpected costs to contractors to the fullest extent possi-

[40] See, for example, Economic Aspects of Military Procurement and Supply, Joint Economic Committee Print, Oct. 1960, p. 24, "Exception Becomes the Rule." Also, see Armed Services Committee Report 1900, 86th Cong., "Report on Procurement," Aug. 23, 1960.

congressional committees, especially the Government Operations Committees and the Joint Economic Committee, as illustrated by the latter's 1960 hearings on "Economic Aspects of Military Procurement and Supply." The committee dealt with lagging implementation of Hoover Commission recommendations and the economic objectives of the Federal Property and Administrative Services Act of 1949. More recently, complaints by Federal agencies which use the commodities and by local business organizations have led the commission to examine the extent to which the Government's centralized supply and distribution system partially duplicates more economical commercial systems. Another area of commission study is the effect of the extension of the Federal purchasing and distribution system for use by grantees under multibillion dollar grant programs. The complaint was that this is an unwarranted intrusion of the Federal Government into the private sector.

Department of Defense: Organization for Procurement Policy and Operations

The Department of Defense was established as an executive department by the National Security Act Amendments of 1949 to succeed the "National Military Establishment" created by the National Security Act of 1947. Creation of the new department was, of course, a major step in the unification of the Armed Forces, following the creation of the Air Force as a separate service 2 years earlier.

The goals of procurement unification in the new department were not immediately realized, and the need for centralized policy control led finally to the enactment of Section 638 of the Defense Appropriation Act of 1953.[39] Under that law, officers and agencies of DOD were prohibited from using funds "for procuring, producing, warehousing or distributing supplies, or for related functions . . ." except under regulations issued by the Secretary of Defense.

The reorganized Office of Assistant Secretary of Defense for Supply and Logistics (later Installations and Logistics) assumed broad authority over procurement policy. The Office of Director of Defense Research and Engineering was established to manage research, development, testing, and evaluation of weapons, designs, and engineering.

Defense agencies have assumed procurement duties previously performed by the military departments (for example, the Defense Contract Audit Agency, the Defense Supply Agency, and, within it, the Defense Contract Administration Services). There is now one Armed Services Procurement Regulation, in place of separate regulations for each service; a unified Armed Services Board of Contract Appeals; and a central directive system for treating issues in procurement policy.

Army Procurement Organization

During World War II, Army procurement was managed by the "technical services," including the Chemical Corps, the Signal Corps, the Transportation Corps, the Ordnance Corps, the Quartermaster Corps, the Corps of Engineers, and the Medical Corps. Between World War II and 1962, the trend was toward regionally dispersed centralized procurement and procurement management.

In a major reorganization in the summer of 1962, the Army Materiel Command (AMC) was created. The procurement functions of the technical services were transferred to AMC (except for construction, which remained with the Corps of Engineers, and common-use, commercial items of the Quartermaster Corps, which, for the most part, went to the new Defense Supply Agency).

Weapons and related military material are currently procured by AMC through the seven "commodity commands": Aviation Materiel, Electronics, Munitions, Missile, Weapons, Tank-Automotive, and Mobility Equipment. Another major command is Test and Evaluation.

Navy Procurement Organization

At the end of World War II, the bulk of the Navy's procurement dollars were being spent

[39] 10 U.S.C. 2202 (1970).

Effective contract-pricing policy for DOD was recommended. This was undertaken in revisions of the Armed Services Procurement Regulation (ASPR), especially through the issuance of the DOD Pricing Manual, the conduct of periodic DOD Pricing Conferences, and other methods.

Streamlining the contract administration system was recommended by the commission. This was partially accomplished by "Project 60," establishing DCAS as a component agency of DSA. The military departments, however, still retain some contract administration functions, and retain plant cognizance of prime contractors for certain major systems.

Other recommendations included evaluation of existing coordinated purchasing assignments, additional purchase coordination efforts, and consideration of the mobilization aspect of coordinated purchasing. Some changes in assignments have resulted in more centralized procurement by DSA and GSA and in reorganization of military procurement organizations.

The Second Hoover Commission also recommended policies to strengthen the contracting officer's effectiveness. Later changes in the regulations sought to do this by assigning career personnel to key positions. DOD took certain steps to promote career development. Also recommended was the establishment of a procurement policy council with the Assistant Secretary of Defense, Supply and Logistics, assuming a greater degree of authority over military procurement. The Office of the Assistant Secretary of Defense "for Installations and Logistics" was reorganized adding a Deputy Assistant Secretary for Procurement. The Office of the Director of Defense, Research and Engineering, was established under the Secretary of Defense to coordinate research and development activities.

In its report on business enterprise, the Second Hoover Commission endorsed the policy of eliminating Government-operated services and functions that compete with private enterprise. This was in accordance with earlier executive branch policies, congressional committee conclusions, and the commission's own charter.

Since the Second Hoover Commission's recommendations on procurement, there have been many directives issued, organizational arrangements revised, and changes in procedures made. At the start of this study, however, many of the problems identified by the Second Hoover Commission were still persisting in varying degrees.

CONTROL OF GOVERNMENT PROCUREMENT

Government-wide GSA Procurement Policy Role: Dominant Role of DOD

In title II of the Federal Property and Administrative Services Act of 1949, GSA was given authority over procurement policies and methods of all executive agencies. It also received authority to perform general procurements, coordinated with affected agencies. Appeals from GSA decisions in this field were to be referred to the President. Exceptions to this authority were given primarily under Section 602(d) of this act to certain agencies and programs, including DOD, Atomic Energy Commission (AEC), National Aeronautics and Space Administration (NASA), Central Intelligence Agency (CIA), Tennessee Valley Authority (TVA), and others. The language of the exceptions tended to be limiting, but the technique of strengthening central control through statement of intent in the legislative history had only limited success. Initially, DOD was directed by President Truman not to except itself from GSA policy direction, but this was revoked by President Eisenhower, who proposed arrangements for voluntary cooperation in this area. Neither Presidential instruction had a significant effect on the relative roles of DOD and GSA.

Interagency Task Force to Simplify Procurement Procedures

At President Eisenhower's direction in 1956, following the suggestions of the President's Cabinet Committee on Small Business, GSA Administrator Franklin Floete established the Interagency Task Force for Review of Govern-

First War Powers Act was due to expire, WPB, with representatives from various Federal agencies, studied desirable peacetime procurement methods. The conclusion was reached that, as in the war period, legislation was needed to authorize negotiated procurement and pricing and special contract types. Legislation was drafted to reintroduce prewar formal advertising, but to allow negotiation where advertising would be unrealistic.

Congress did recognize the need for more flexible peacetime procedures. As enacted, the Armed Services Procurement Act of 1947 stated that contracts were to be formally advertised, but that agencies were authorized to negotiate under 17 justifiable exceptions. Many of these represented modifications of prior interpretations of the earlier law or, in some cases, clarifications or expansions of previously interpreted authority. This latter category included public exigency; purchases within the open-market limitation of $1,000; personal or professional services; items procured for use outside the United States; medical supplies; resale supplies; perishable or nonperishable subsistence; experimental, developmental, or research work; classified projects; and items for which it is "impracticable to obtain competition."

Additional exceptions included negotiation during a national emergency, national defense priorities in the event of national emergency or in the interest of rapid mobilization, required standardization and interchangeability of parts, cases requiring a substantial initial investment or extended period of preparation for manufacture, services by educational institutions, cases where bid prices after advertising are unreasonable, or contracts otherwise authorized by law.

The act continued the First War Powers Act prohibition against cost-plus-a-percentage-of-cost contracts and required economic justification for contracts other than fixed-price contracts. The law also required use of the "covenant against contingent fees," a rule against paying employees on a contingent-fee basis for obtaining Federal contracts, except for bona fide employees with commercial selling agencies. The Armed Services Procurement Act (as did the later Government-wide title III of the Federal Property and Administrative Services Act of 1949) continued the policy of using Federal procurement to award small businesses a "fair share" of contracts.

Certain First War Powers Act Provisions Extended and Made Permanent

After enactment of the Armed Services Procurement Act, there was some uncertainty about the continued application of title II of the First War Powers Act. Following the outbreak of hostilities in Korea in 1951, Congress extended and subsequently reextended the act until 1958. At that time, the provisions of the act were continued or merged into Public Law 85–804, thus making that authority a semipermanent measure effective during periods of national emergency [38] for specified agencies and authorizing, among other things, amendments without consideration.

Extension of Profit Limitations: The Renegotiation Act of 1951

The profit limitations on military aircraft and naval vessels in the Vinson-Trammel Act of 1934 had given way to excess-profits taxes in 1940 and early forms of renegotiation from 1942 through 1948. The cold war, with its high military expenditures, led to further extensions of renegotiation, including the Renegotiation Act of 1951, which has been extended every two years since, including its latest two-year extension through June 30, 1973, as provided by Public Law 92–41. The law also substituted the Court of Claims for the Tax Court as the forum for appeals from the Renegotiation Board's excess-profits determinations.

[38] The "national emergency" declared by President Truman on Dec. 16, 1950, is still in effect. Executive Order 10789, Nov. 15, 1958, prescribes regulations under the act and designates the agencies authorized to use this authority. Executive Order 11610, July 22, 1971, amended the earlier order to broaden contractor indemnification for certain risks.

reasonable cost. The Government reserved the right to inspect the plant and audit the books of any contractor furnishing or constructing aircraft.[32] The Secretary of the appropriate department was required to report to Congress all operations under the act,[33] including the names and addresses of all persons awarded contracts and the prices of the contracts. Penal sanctions were also incorporated into the act to prevent any collusion which would deprive the Government of the benefit of full and free competition.[34]

WORLD WAR II: PROCUREMENT ORGANIZATION AND CONTROL OF POLICY

As the world prepared for war, officials recognized that peacetime practices would not suffice and that the Federal structure for mobilizing and using resources would require drastic changes. In 1940, President Roosevelt declared a "threatened national emergency" and established the Office for Emergency Management in the Executive Office of the President. One of its functions was the clearing of Army and Navy contracts.

After several earlier actions relating to coordination and clearance of Army and Navy contracts, President Roosevelt created the Office of Production Management, and Federal purchasing was placed under central control in its Purchase Division. With the advent of war, however, these functions were shifted to the new War Production Board (WPB), with its extraordinary powers over production and procurement.

Executive Order 9024 of January 14, 1942, gave full responsibility to the Chairman of the War Production Board to direct war procurement and production; determine policies, plans, and procedures of agencies engaged in procurement, production, construction and conversion, requisitioning, plant expansion, and financing; and allocate supply priorities. The Army and Navy Munitions Board reported to the President through the chairman, and the chairman's decisions were to be final.

One of the first WPB directives established policies for war procurement, including a requirement for negotiated contracts. Contracting by formal advertising was prohibited unless specially authorized, and there is no record of any such authorizations. WPB dealt with allowable costs; financing of facilities, contract forms, and clauses (including a uniform termination clause); and use of price-revision clauses.

In practice, however, the development of most of the specific policies, clauses, and procedures devolved on the War and Navy Departments, which issued extensive regulations, implemented by the "Technical Service" and "Bureau" procedures. The Munitions Board and, at the top of the structure, WPB were coordinating offices.

Some of the principal organizations conducting and controlling war purchasing were: Army—Quartermaster Corps, Ordnance Corps, Signal Corps, Medical Corps, Chemical Corps, Engineers Corps, and Air Corps; Navy—Bureau of Ships, Bureau of Ordnance, Bureau of Yards and Docks, and Bureau of Supplies and Accounts. Other major purchasing activities were carried out by the Department of the Treasury, the Department of Agriculture, and the Maritime Commission.

Title II of the First War Powers Act: Negotiation of Contracts

Legislation in 1939 and 1940 authorized limited negotiation. However, on December 18, 1941, Congress enacted the First War Powers Act, which, in title II, as implemented by Executive Order 9001, authorized contracting without regard to laws relating to the making, performance, amendment, or modification of contracts. Negotiation was thus authorized. Prohibited were use of cost-plus-a-percentage-of-cost contracting or contracts in violation of profit-limitation laws.

This broad negotiating authority and ability to disregard other legal restrictions invalidated prior authority. Yet competition was actively sought and wartime experience demonstrated the wisdom of informal procedures.

[32] 44 Stat. 787, ch. 721, sec. 10(l).
[33] 44 Stat. 787, ch. 721, sec. 10(m).
[34] 44 Stat. 788, ch. 721, sec. 10(p).

aviation market was still in an embryonic state. The first practical demonstration of the commercial potential of aircraft was provided by air mail in 1918.[7] Within a few years, this service covered the continent; however, figures available from 1926 suggest that American industry lagged behind its European counterpart.[8] Only 433,648 pounds of air mail were transported within the United States at a cost of $6.45 per pound, whereas European airlines carried 2,512,460 pounds at a cost of $3.90 per pound. Air cargo freight service within the United States amounted to only 3,555 pounds. Only 5,782 passengers made use of American aircraft, which sharply contrasts with the 150,095 passengers transported throughout Europe. Safety risks, the lack of Federal regulation, and the prohibitive costs of insurance contributed to the low number of passengers. Between the armistice and 1925, more than 300 persons were killed and 500 injured in flying accidents.[9] In 1924 alone, the injury ratio for private commercial flying amounted to one fatality for every 13,500 miles flown.[10]

Federal competition exacerbated the deplorable condition of the aviation industry.[11] In the postwar years, the Government allotted substantial funds for the production and development of aircraft. During the 1920–24 period, total aviation expenditures for the Army and Navy air services amounted to about $424 million,[12] the bulk of which was consumed in operational costs. Of the annual expenditures of approximately $84 million, only 10 percent was devoted to purchasing new airplanes and parts and remodeling older aircraft.[13] During this period, the $30 million devoted to research work maintained a Federal aviation industry larger than the entire civil industry.[14] An excerpt from the Lambert Report of 1925 suggests the effect of Federal programs:

> The Air Services have no standard procurement policy. They have not sufficiently recognized the principle of proprietary rights. They have not spent their money with a view to continuity of production in the industry. They have constantly competed with the industry. They have spent a large part of their appropriations attempting to do the things that ought to be left to private capital, all with the result that the aircraft industry is languishing . . . The decline in industrial aircraft is due not only to a lack of orders but also to a lack of a continuing policy . . .[15]

The net results of the Government-sponsored production program were hardly commensurate with the expenditures. Figures available from 1924 reveal that the Government possessed only 1,592 operational airplanes.[16] This figure is deceptive, since more than 40 percent of these airplanes were so seriously handicapped that they were unsuited for use in a war emergency.

The Air Corps Act of 1926: Remedial Legislation

The Air Corps Act of 1926 was the major congressional attempt to stimulate the aviation industry.[17] The act addressed itself to improving the Army air service, but its ambitious construction program and innovative procurement policy promised to benefit the private aviation industry as well.[18] Under the act, the Government was to begin a five-year program of aircraft procurement (a projected 1,800 airplanes) for the military departments. The act included authorization for the replacement of up to 400 obsolete craft per year. The program would cost $200 million.

Section 10 of the Air Corps Act was the keystone of a new procurement policy for air-

[7] See note 4, *supra*, p. 49.

[8] *Final Report of the War Department Special Committee on the Army Air Corps*, 1934, p. 78.

[9] S. Rept. 2, 69th Cong., 1st sess., 1926, p. 2.

[10] *Ibid.*

[11] H. Rept. 1653 (Lambert Report), 68th Cong., 2d sess., 1925, p. 15.

[12] *Ibid.*, p. 3.

[13] *Ibid.*

[14] *Ibid.*, pp. 3–4.

[15] *Ibid.*, p. 15.

[16] *Ibid.*, p. 22.

[17] Act of July 2, 1926, ch. 721, sec. 9, 44 Stat. 784. The author takes note that in Mar. 1926, Congress enacted into law the Commercial Aviation Act of 1926. Act of Mar. 17, 1926, ch. 344, 44 Stat., 568. This act granted the Secretary of Commerce general powers to foster civil air navigation. It subjected civilian aviation to Federal regulation. The prime objective of the act was to improve the safety record of private aviation. It did not have the immediate impact on the aviation industry that the Air Corps Act had.

[18] This act incorporated the language of two earlier bills (H.R. 12471 and H.R. 12472) which had been introduced into the 69th Congress to encourage the development of aviation.

POST-WORLD WAR I DEVELOPMENTS

Reconversion

Dominating the post-World War I period were the problems of reconversion to peacetime production and the use of enormous amounts of surplus materials through reissue by the General Supply Committee. Military procurements continued to be made by the War and Navy Departments.

Organizational Developments

Both the Bureau of the Budget (BOB) and GAO were created from their Treasury Department predecessors by the Budget and Accounting Act of 1921. Under this law, GAO received its charter to audit expenditures and settle claims against the United States.

On July 27, 1921, the first Director of the Bureau of the Budget, with President Harding's approval, created the Federal Coordinating Service, with a number of "coordinating" boards. Particularly relevant to procurement were the Federal Purchasing Board, the Interdepartmental Board of Contracts and Adjustments, and the Coordinator for Purchase.

Congress strengthened the General Supply Committee in 1929 by conferring on the Secretary of the Treasury authority to procure and distribute supplies for consolidated Federal requirements in Washington, D.C., and optionally for "field services." The law also created the General Supply Fund of the Department of the Treasury, later transferred with broadened authority to GSA for financing purchasing and supply operations. This law laid the groundwork for a centralized purchasing and distribution system and revitalized the General Supply Committee.

Return to Peacetime Procedures

The end of the war brought a return to formal advertising and standard peacetime procurement procedures. The standardization of forms was started in the 1920's under the Interdepartmental Board of Contracts and Adjustments of the Federal Coordinating Service, a function to be later transferred to the Treasury Department by Executive Order 6166 in 1933 and to GSA under the Federal Property and Administrative Services Act of 1949.

THE GREAT DEPRESSION

Establishment of the Procurement Division, Department of the Treasury: Centralization for Economy

The depression that followed the 1929 stock market crash stimulated the establishment of an improved procurement system through cuts in Federal expenditures. Under the Economy Act of June 20, 1932, President Roosevelt issued Executive Order 6166 in 1933, reorganizing certain executive agencies, creating the Procurement Division of the Department of the Treasury, and abolishing the General Supply Committee.

Under the order, the determination of procurement policies and methods and certain related functions were transferred to the Department of the Treasury. The Procurement Division was authorized, upon Department of the Treasury order with approval of the President, to perform any procurement, warehousing, or distribution functions desirable in the interest of economy. The earlier Federal Coordinating Service was abolished and its procurement-related functions, including prescribing of standard forms, transferred to the Procurement Division. The Army Corps of Engineers retained its responsibilities. It is interesting to note that a similar centralization of procurement authority had been contemplated by President Hoover, but under the Department of the Interior.

Not since Alexander Hamilton's era had procurement been so centralized. The work of the Procurement Division was further expanded by the Emergency Relief Program. On June 10, 1939, President Roosevelt approved a Department of the Treasury order stating that the Procurement Division would thereafter undertake all civil procurement for use in Washington, D.C., "or in the field." In

Early Purchasing Under the Constitution

The Constitution contained no specific provisions for contracting but, as the Supreme Court has confirmed (*United States* vs. *Tingey,* 39 U.S. 114 [1831]), the implied power of the executive to enter into contracts is inherent in the concept of sovereignty. However, to withdraw money from the Treasury, under Section 9, Article I, of the Constitution, appropriations must be made by Congress. Through the years, Congress has imposed many requirements or limitations on this implied executive contracting power.

With the ratification of the Constitution, the militia and the standing Army required food and other essentials. The first Congress had set the pattern of procurement, including the establishment of executive departments (Foreign Affairs, War, Treasury, and Post Office) and the making of appropriations for those agencies, including provisions for lighthouses and other facilities.

Alexander Hamilton, as the first Secretary of the Treasury, is generally credited with having given the initial impetus to centralized Federal purchasing. While today there are some 4,000 procurement-related statutes, it was on May 8, 1792, that the Second Congress passed the first law regulating Federal procurement, providing that all purchases for the Army were to be made by the Department of the Treasury. In 1798, Congress required all outstanding contracts to be deposited in the Treasury, a function to be inherited many decades later by the General Accounting Office (GAO).

Centralized purchase by the Department of the Treasury was shortlived, and in 1798 and 1799 some of its duties were transferred to the Navy and War Departments. Hamilton's dream of centralized procurement suffered additional setbacks when, on March 28, 1812, under the stress of war with England, Congress established the Quartermaster General's Office [1] broadening the purchasing authority of the Army.

With progressive expansion of the Government, various agencies gradually introduced the practice of obtaining supplies they needed by funding them through their own budgets.

[1] 2 Stat. 696.

Nineteenth Century: Advertising Established

Between 1829 and the Civil War, no major procurement legislation was introduced. Faults in the system largely persisted until 1860 and 1861, when Congress enacted a law requiring advertising for purchases, except for matters of "public exigency." Earlier versions of this law had been enacted since 1809, although a number of advertising exemption laws were passed between 1809 and 1841. An 1842 law on stationery and printing procurements required advertising, sealed bids, and default security; an 1843 law required an abstract of bids; and an 1852 law provided for advertising 60 days before the opening of public bids.

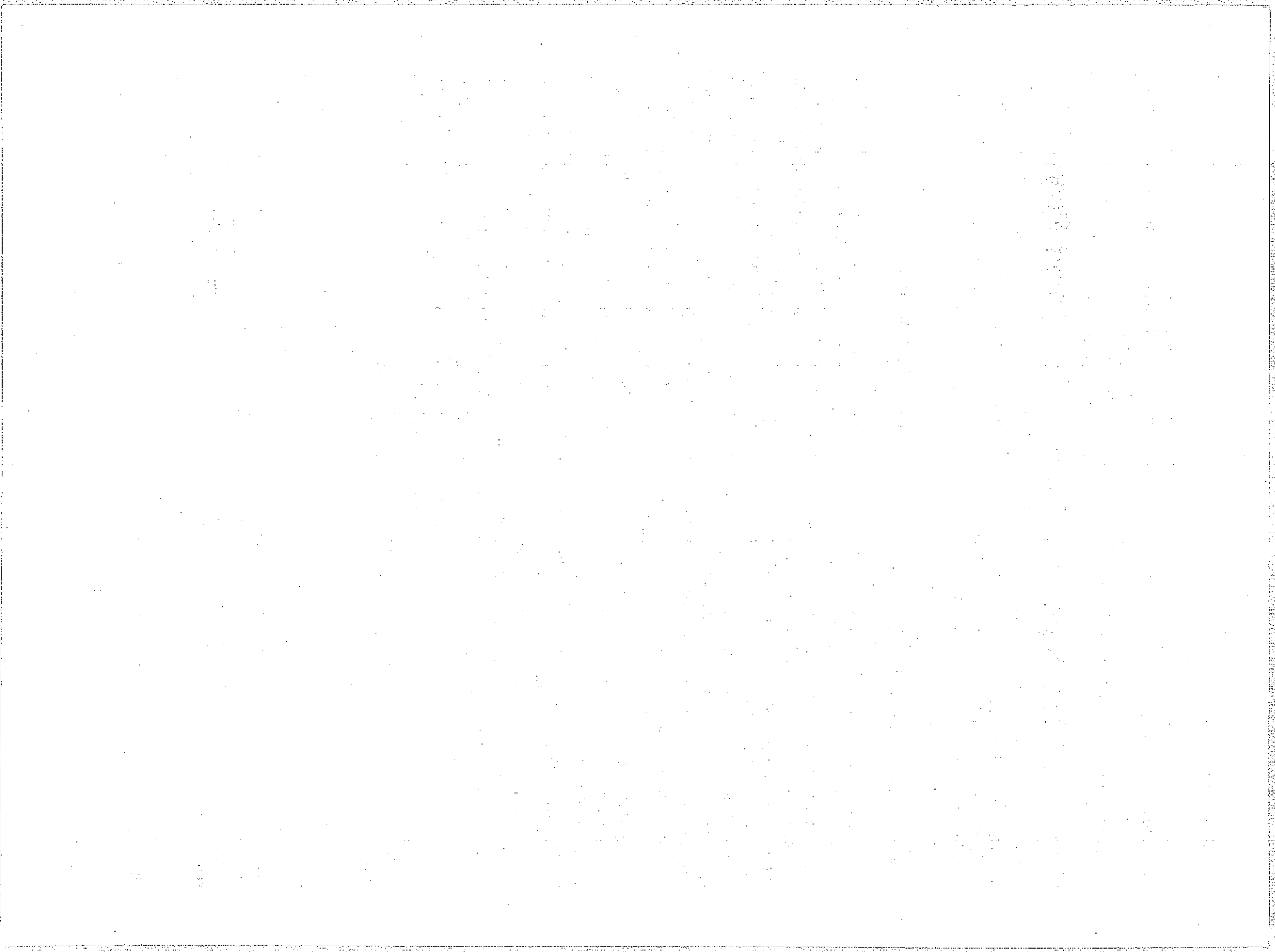
Advertising for competitive bids became generally mandatory during this period, although the Civil War, with its specification difficulties, profiteering, and other problems demonstrated that in some situations negotiation is the most practical method of procurement. The 1860 advertising law, as amended in 1910, became known as "Section 3709 of the Revised Statutes." Except during the Spanish-American War, the Filipino insurgency, and World Wars I and II, this statute applied until 1948 for the military departments, NASA (NACA in the original law), and the Coast Guard; until 1949 for the General Services Administration (GSA) and delegated agencies; and until 1965 for other executive agencies. This law still applies to agencies not in the executive branch.

EARLY TWENTIETH CENTURY REFORMS

The Dockery Commission

In 1893, a joint Senate and House Commission (named for its chairman, Representative Dockery of Missouri) was established to make certain studies, including one of procurement. It was a prototype of the Hoover Commission and the Commission on Government Procurement.

The commission reported that there had been no attempt to standardize specifications or quantities purchased by the various agen-



Some needs can be met through: (a) procurement of commercial items, (b) use of "in-house" or intragovernment resources, or (c) acquisition of special items from private sector suppliers. Under (b) or (c) above, it may be necessary to modify a product, develop a new product, or even develop new technology.

Planning

FORMS OF COMPETITION

The basic forms of procurement include (1) advertising, (2) competitive negotiations, and (3) negotiations with a sole-source. One of the three forms must be decided on prior to contractor solicitation and selection.

TYPE OF CONTRACT

Selection of the type of contract best designed to fulfill a procurement goal is a basic planning factor. Contract types vary according to the degree of risk assumed by the contractor and the amount of profit incentive offered for achieving the Government's objectives. At one end of the spectrum is the firm-fixed-price (FFP) contract in which the contractor agrees to deliver the supplies or services for a specified price which includes profit. At the other end is the cost-plus-a-fixed-fee (CPFF) contract, in which profit is fixed in the form of a specified fee and the contractor is reimbursed for his allowable costs. Selection of contract type is influenced by factors such as the financial liability of the Government, the adequacy of cost information furnished by the contractor, the nature of the work, associated risks, and current market conditions.

COST ESTIMATES

Cost estimates are needed for initial and subsequent planning and frequently must be revised at several stages of a procurement. The quality of an estimate depends on the time available to prepare it, the amount and kind of data available, the precision used in defining the object to be estimated, the extent of technical and economic uncertainties, and the skill of the estimator.

Estimates are used in making cost-benefit analyses; in deciding whether to continue a program; in revising requirements; in evaluating alternative or competitive courses of action; in budgeting to obtain funding; and in apportioning funds. Estimates are also used to prepare independent judgments before solicitation of proposals and to establish negotiating positions and goals after receipt and analysis of proposals.

Solicitation

A solicitation document should reflect all key decisions made in the initial planning. An invitation for bid (IFB) is used to solicit competitive sealed bids. A request for proposal (RFP) is used to solicit competitive and sole-source proposals.

An IFB must be precise because bidders are required to bid on exactly what is set forth. Deviations from the requirements of the IFB usually disqualify the bidder. RFPs permit more flexibility and judgment in making business decisions.

Generally, IFBs are sent to a large number of firms. Any firm that requests an IFB may obtain one. When other competitive procedures are used, agencies generally select the firms to which an RFP will be sent; however, additional firms may request an RFP and submit a proposal.

Selection and Award

FORMAL ADVERTISING

The formal procedures for the public opening and recording of responses to invitations for bids (IFBs) involve: preparation of abstracts of all bids received; public examination of all bids; and, where required, a

APPENDIX E

Data on the Procurement Work Force

THE PROCUREMENT WORK FORCE HIGHLIGHTS, 1971

SIZE

ESTIMATED TOTAL —80,000
POSITIONS REPORTED—61,000
POSITIONS ANALYZED—57,000 (THOSE ANSWERING QUESTIONNAIRES)

DEPARTMENTAL DISTRIBUTION

76%—DEPARTMENT OF DEFENSE
24%—ALL OTHER DEPARTMENTS

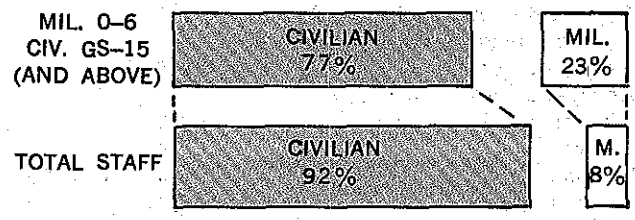
GOVERNMENT PROCUREMENT REFERENCE (CIVILIAN STAFF)

NONE, OR LESS THAN 1 YEAR — 8%
1–5 YEARS —26%
OVER 5 YEARS—66%
} OVER 50% WILL BE ELIGIBLE TO RETIRE BY END OF 1980—OBVIOUSLY FROM THE MOST EXPERIENCED GROUP

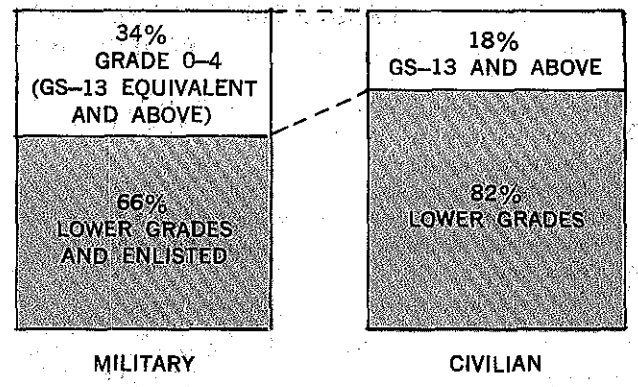
AVERAGE EDUCATION (CIVILIAN STAFF)

HIGH SCHOOL, PLUS 3 MONTHS COLLEGE

MANAGEMENT LEVEL MIX



DISTRIBUTION OF HIGHER LEVEL CIVILIAN AND MILITARY PROCUREMENT POSITIONS



Source: Commission Studies Program (based on responses to Commission questionnaires).

COMPOSITION OF THE FEDERAL GOVERNMENT PROCUREMENT WORK FORCE, BY AGE

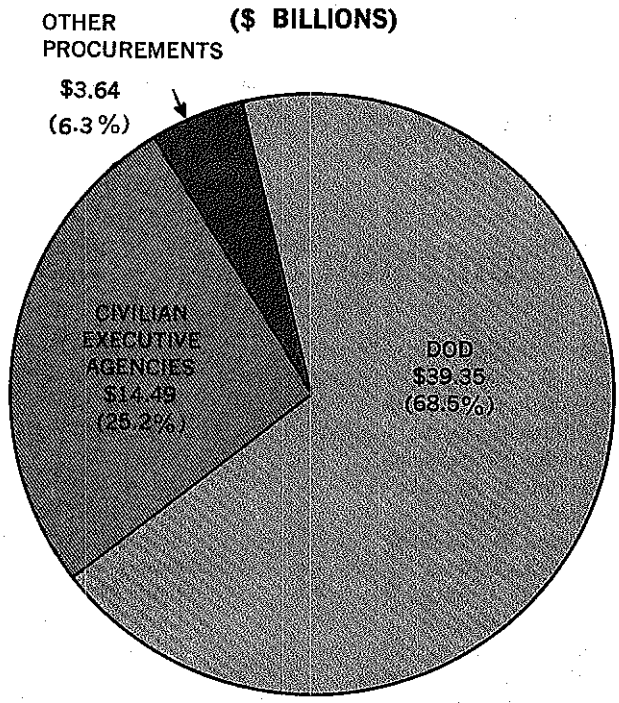
Age	*Civilian*	*Percent*	*Military*	*Percent*	*Total*	*Percent*
20 and under	12	—	61	1.4	73	0.1
21—25	1,206	2.3	749	17.3	1,955	3.4
26—30	3,093	5.8	1,060	24.5	4,153	7.2
31—35	4,324	8.1	721	16.7	5,045	8.7
36—40	5,934	11.1	838	19.4	6,772	11.8
41—45	7,215	13.5	449	10.4	7,664	13.3
46—50	11,235	21.1	279	6.4	11,514	20.0
51—55	10,845	20.4	143	3.3	10,988	19.1
56—60	6,176	11.6	24	0.5	6,200	10.8
61—65	2,674	5.0	4	0.1	2,678	4.6
66—70	579	1.1	—	—	579	1.0
Total	53,293	100.0	4,328	100.0	57,621	100.0

Source: Commission Studies Program (based on responses to Commission questionnaires).

APPENDIX D

ESTIMATED TOTAL GOVERNMENT PROCUREMENT

FISCAL YEAR 1972
($ BILLIONS)



Does not include salaries of personnel engaged in procurement activities.

STUDY GROUP 13 (COMMERCIAL PRODUCTS, ARCHITECT-ENGINEER SERVICES, AND CONSTRUCTION)

Chairman

Robert J. Brown	Atomic Energy Commission

Vice Chairman

William H. Norton	J. T. Baker Chemical Company

STUDY GROUP 13A (COMMERCIAL PRODUCTS)

Studied the procurement of equipment, material, and services generally available through established commercial sources. Emphasis was placed on an evaluation of total costs, including item price, acquisition system costs, and cost of the product in use.

Chairman

Col. George Ostrowski, USAF	Department of the Air Force

Vice Chairman

Francis E. Daigle	General Electric Company

Members

Francis C. Bryan	John Sexton and Company
Roy C. Chisholm	General Services Administration
John W. Egan	A. T. Kearney Company, Incorporated
G. Kent Godwin	Department of Agriculture
Raymond L. Harshman	Small Business Administration
Dr. Claire R. Miller	Honeywell, Incorporated
John J. Mitchell	Department of State
John J. Shea	Veterans Administration
Lt. Col. Walter B. Sloan, USAF	Defense Supply Agency

STUDY GROUP 13B (ARCHITECT-ENGINEER SERVICES)

Examined procedures unique to architect-engineer services and the possibilities for increasing competition in this area of contracting.

Chairman

Leo A. Daly, Jr.	Leo A. Daly Company

Vice Chairman

Thomas L. Peyton, Jr.	General Services Administration

Members

Roger S. Long	Department of the Navy
Robert J. Piper	The Perkins & Will Corporation
Roy L. Poore	Department of the Army
Billy T. Sumner	Barge, Waggoner, Sumner & Cannon
Travis Thompson	Atomic Energy Commission

STUDY GROUP 13C (CONSTRUCTION)

Evaluated the entire construction procurement cycle, from planning to occupancy, including variations between Government and commercial practices.

Chairman

Robert J. Fitz	Department of the Army

Members

H. N. Hockensmith	Brown and Root, Incorporated
Charles F. Palmetier	Department of the Interior
Robert S. Penter	Bechtel Corporation
Comdr. Joseph L. Reese, Jr., USN	Department of the Navy
William P. Snyder	Atomic Energy Commission

STUDY GROUP 8 (NEGOTIATIONS AND SUBCONTRACTING)

Evaluated the conduct of negotiations, including the allocation of risks and benefits. Additionally, problems of the Government contracting authority in the negotiation process, constraints on business judgment, and the degree of latitude granted the Government negotiator were examined.

Chairman

Arthur Linkins	Eastman Kodak Company

Vice Chairmen

John T. Howard	Defense Supply Agency
Robert E. Rodney	Defense Supply Agency

Members

John W. Carley	ITEK Corporation
Carl S. Grossman	Defense Contract Audit Agency
John Hemlick	Department of the Army
Carl J. Mitchell	General Services Administration
Warren D. Orr	Lockheed Missiles and Space Company

STUDY GROUP 9 (REPORTS AND MANAGEMENT CONTROLS)

Studied the authority, generation, and use of procurement reports and management control systems.

Chairman

Rear Adm. Edward F. Metzger, USN	Department of the Navy

Vice Chairman

W. Stewart Hotchkiss	TRW, Incorporated

Members

Marvin D. Coffland	Department of the Air Force
George E. Fleury	General Accounting Office
D. W. Neal	The Boeing Company
Stanley I. Sachs	Westinghouse Electric Corporation
A. Anthony Scarpa	Department of the Army
Comdr. Patrick D. Sullivan, USN	Defense Supply Agency
John F. Wood	International Business Machines Corporation

STUDY GROUP 10 (CONTRACT AUDIT AND ADMINISTRATION)

Addressed such contract administration matters as adherence to contract schedules, quality assurance, control over contractual changes, and timeliness in the closeout of completed contracts. Also evaluated the effectiveness with which specific contractual provisions are administered, i.e., payments, suspension of work, terminations, inspection and testing, and the audit of contractors' records.

Chairman

Robert S. MacClure	Peat, Marwick, Mitchell and Company

Vice Chairman

Robert F. Larkin	Defense Contract Administration Services

Members

Frank B. Colby	United Aircraft Corporation
Gerald A. Couture	Environmental Protection Agency
Herbert C. Duffy	Department of Health, Education, and Welfare
Robert L. Fitzgerald	General Services Administration
Michael J. Francone	Defense Contract Audit Agency
David W. Johnson	Department of the Navy
Robert P. Meahl, Jr.	General Accounting Office
Ronald G. Tormey	Colt Industries
Troy R. Willson	Mason and Hangar-Silas Mason Co., Incorporated

STUDY GROUP 3 (REGULATIONS)

Studied the regulations and the regulatory process governing Federal procurement, with emphasis on the role and structure of regulations as a management mechanism, how they are developed, and whether they are serving their purpose.

Chairman

Wayne M. Wallace	Control Data Corporation

Vice Chairman

Leroy J. Haugh	Office of the Assistant Secretary of Defense (Installations and Logistics)

Members

Robert C. Bryan	Department of Agriculture
Russell Y. Cooke, Jr.	Sperry Rand Corporation
Norman V. Gomes	Jet Propulsion Laboratory
Irving Liberman	Defense Supply Agency
John H. Mitchell	Hercules, Incorporated
John E. Preston	General Accounting Office
Floyd R. Sherman	General Services Administration
William J. Wilken	National Aeronautics and Space Administration

STUDY GROUP 4 (LEGAL REMEDIES)

Analyzed the remedies and disputes-resolving processes which are available to the Government, prime contractors, subcontractors, and prospective contractors.

Chairman

Russell Fairbanks	Rutgers University School of Law

Vice Chairman

Moody R. Tidwell, III	Department of the Interior

Members

Andrew L. Bain	Singer-General Precision, Inc.
Eugene Brownell	Kurz and Root
John A. Erlewine	Atomic Energy Commission
Donald A. Giampaoli	Associated General Contractors of America
Irving Jaffe	Department of Justice
John A. McIntire	Department of the Navy
John A. McWhorter	King and King, Attorneys-at-Law
William Munves	Department of the Air Force
Paul Shnitzer	General Accounting Office
Richard Speidel	University of Virginia
Lawrence P. Stitch	International Business Machines Corporation
John A. Stichnoth	Union Carbide Corporation

STUDY GROUP 5 (ORGANIZATION AND PERSONNEL)

Reviewed the manner in which Federal agencies are organized and staffed to carry out their procurement mission. Also examined the qualifications of procurement personnel and developed ways to increase proficiency and promote career development of the procurment work force.

Chairman

Allen A. Kaufmann	Litton Industries, Incorporated

TERMINATION OF THE COMMISSION

SEC. 8. One hundred and twenty days after the submission of the final report provided for in section 4 of this Act, the Commission shall cease to exist.

Ante, p. 270.

AUTHORIZATION OF APPROPRIATIONS

SEC. 9. There are hereby authorized to be appropriated to the Commission such sums as may be necessary to carry out the provisions of this Act.

Approved November 26, 1969.

LEGISLATIVE HISTORY:

HOUSE REPORTS: No. 91-468 (Comm. on Government Operations) and No. 91-613 (Comm. of Conference).
SENATE REPORT No. 91-427 accompanying S. 1707 (Comm. on Government Operations).
CONGRESSIONAL RECORD, Vol. 115 (1969):
Sept. 23: Considered and passed House.
Sept. 26: Considered and passed Senate, amended, in lieu of S. 1707.
Nov. 12: Senate agreed to conference report.
Nov. 13: House agreed to conference report.

GPO 37-139

Appointment by President.

United States, two from the executive branch of the Government and three from outside the Federal Government, and (4) the Comptroller General of the United States.

(b) The Commission shall select a Chairman and a Vice Chairman from among its members.

Quorum.

(c) Seven members of the Commission shall constitute a quorum.

Vacancies.

(d) Any vacancies in the Commission shall not affect its powers, but shall be filled in the same manner as the original appointment.

DUTIES OF THE COMMISSION

Study of procurement procedures.

SEC. 4. (a) The Commission shall study and investigate the present statutes affecting Government procurement; the procurement policies, rules, regulations, procedures, and practices followed by the departments, bureaus, agencies, boards, commissions, offices, independent establishments, and instrumentalities of the executive branch of the Federal Government; and the organizations by which procurement is accomplished to determine to what extent these facilitate the policy set forth in the first section of this Act.

Report to Congress.

(b) Within two years from the date of enactment of this Act, the Commission shall make a final report to the Congress of its findings and of its recommendations for changes in statutes, regulations, policies, and procedures designed to carry out the policy stated in section 1 of this Act. In the event the Congress is not in session at the end of such two-year period, the final report shall be submitted to the Clerk of the House and the Secretary of the Senate. The Commission may also make such interim reports as it deems advisable.

83 STAT. 270
83 STAT. 271

COMPENSATION OF MEMBERS OF THE COMMISSION

Travel expenses, etc.

SEC. 5. (a) Members of the Commission who are Members of Congress or who are officers or employees of the executive branch of the Federal Government, and the Comptroller General, shall receive no compensation for their services as members of the Commission, but shall be allowed necessary travel expenses (or in the alternative, mileage for use of privately owned vehicles and a per diem in lieu of subsistence not to exceed the rates prescribed in sections 5702 and 5704 of title 5, United States Code), and other necessary expenses incurred by them in the performance of duties vested in the Commission, without regard to the provisions of subchapter I, chapter 57 of title 5, United States Code, the Standardized Government Travel Regulations, or section 5731 of title 5, United States Code.

80 Stat. 498; Ante, p. 190.

5 USC 5701-5708.

Travel expenses, etc.

(b) The members of the Commission appointed from outside the Federal Government shall each receive compensation at the rate of $100 for each day such member is engaged in the actual performance of duties vested in the Commission in addition to reimbursement for travel, subsistence, and other necessary expenses in accordance with the provisions of the foregoing subsection.

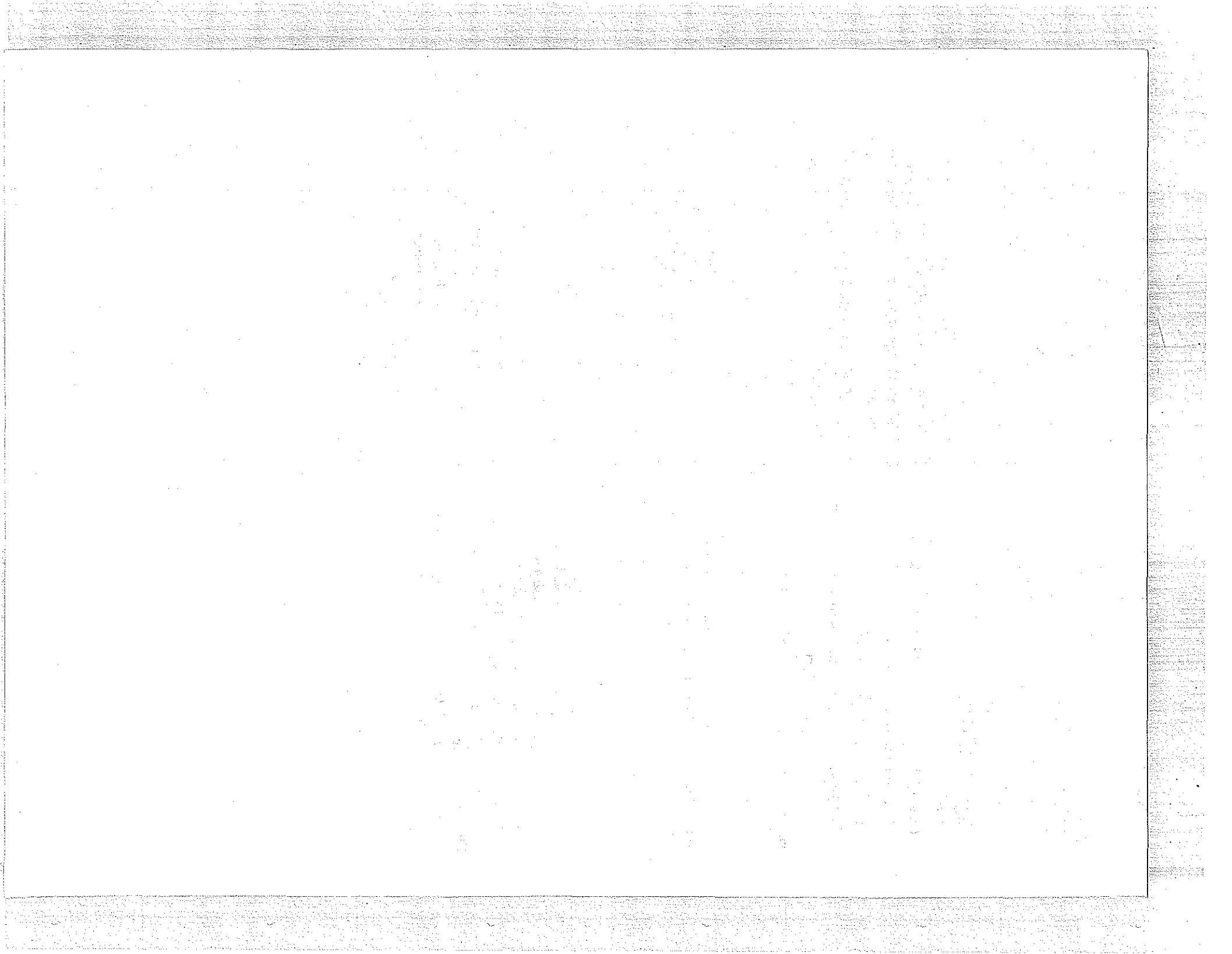
POWERS OF THE COMMISSION

Hearings.

SEC. 6. (a) (1) The Commission, or at its direction any subcommittee or member thereof, may, for the purpose of carrying out the provisions of this Act, hold such hearings, sit and act at such times and

Subpena.

places, administer such oaths, and require by subpena or otherwise the



small business.[45] Giving the small businessman a system of uniform regulations will help to reduce the number of problems arising from differing policy interpretations by different procurement officials. Small businessmen are especially critical of procurement regulations. They find it difficult in dealing with different agencies to adjust their pricing, negotiating, and contracting practices to the variable requirements and regulations of different agencies. Small business usually lacks the legal talent, manpower, and time to interpret and follow the myriad of existing regulations; greater consistency in procurement regulations would relieve much of this burden.

Legal and Administrative Remedies

The recommended changes in the disputes-resolving process will aid small firms by removing some of the rigidity in the process.[46] The proposed system of remedies is more flexible and better suited to the needs of small business than existing procedures. It includes recommendations to establish regional Small Claims Boards of Contract Appeals to resolve claims not exceeding $25,000 quickly, fairly, and economically; to pay interest on successful contract claims; to encourage the negotiated settlement of disputes through the use of an informal agency review conference; to upgrade the agency boards of contract appeals; and to allow claimants the option of direct access to the courts for the resolution of their claims. These changes will be especially helpful to the small firm which lacks the financial and personnel resources required for protracted litigation.

Small Purchase Authority

Increasing the statutory ceiling to $10,000 on procurements for which simplified procedures are authorized [47] will facilitate contracting in the price range where small business is most competitive. Based on DOD experience, about half of the dollars for awards of less than $10,000 go to small business firms.[48] Raising the limit from $2,500 to $10,000 and permitting the use of simplified procurement procedures would have the immediate effect of making small business contracting less burdensome and more attractive to small firms.

Specifications

Our recommendation that development of new Federal specifications for commercial-type products be limited to those that can be specifically justified, including use of total cost-benefit criteria, and be reevaluated every five years [49] will mitigate a problem that burdens small businessmen. It is usually most difficult for a small business to gather all the specifications and standards referred to in an invitation for bid or request for proposal. Many times the specification for a simple item incorporates a seemingly endless number of others by reference. With fewer specifications, more small businessmen will be encouraged to respond to solicitations.

Multi-year Contracts

Authorizing all executive agencies to enter into multi-year contracts with annual appropriations [50] will permit small firms to become more competitive for contracts requiring substantial startup costs and capital outlays. Usually such expenditures are more burdensome to small than to big business. The ability to amortize such costs over longer periods should be helpful to small firms in competing for service and support contracts in the firm's geographic area.

Government Self-insurance

We are recommending that the Government act as a self-insurer for loss of or damage to

[45] Part A, Chapter 4, Recommendation 10.
[46] Part G, Chapters 2 and 3, Recommendations 1–20.
[47] Part A, Chapter 3, Recommendation 7.
[48] Note 23, *supra*, p. 22.
[49] Part D, Chapter 3, Recommendation 3.
[50] Part A, Chapter 3, Recommendation 8.

> . . . a clear trend toward limiting competition . . .
>
> Expense, trust, risk and familiarity . . . emerge as pressures constraining against exclusive reliance on the competitive selection of subcontractors.[39]

The decline of the total value and percentage of small business subcontracting under Government contracts is a potentially serious problem. If the decline continues, the Government will lose indispensable sources of goods and services needed to maintain a broad and viable industrial base.

A mandatory subcontracting program might reverse the decline in small business subcontracting opportunities. The Department of the Navy has successfully tested such a program under a contract for the MK 56 mine. In this test the contractor was required to place first-tier subcontracts equal to 25 percent of the total contract price with small firms; to identify proposed first-tier small business subcontractors; to describe the subcontracted items; and to estimate in dollars the value of the subcontracts. The Navy reported that this subcontracting requirement did not increase prime contract costs, that the prime contractor awarded more than the prescribed 25 percent, and that the mandatory provision did not diminish overall competition.[40]

Limited testing does not prove that the program would be successful on a larger scale, particularly if the mandatory percentage were raised to 34.8 percent or 43.3 percent as was accomplished without mandatory subcontracting (see table 2, column 4).

CONCLUSIONS

Despite the potential drawbacks, the need for greater subcontract awards to small business merits a thorough test of the mandatory subcontracting concept.

[39] Raymond G. Hunt, et al., "Federal Procurement: A Study of Some Pertinent Properties, Policies and Practices of a Group of Business Organizations," *National Contract Management Journal*, fall 1970, pp. 263, 299.

[40] Note 26, *supra*, p. 392.

Counseling

To sell a product or service to the Government, the seller must understand Federal procurement procedures. The Government, recognizing that its procurement organizations and operations are often complicated, offers "counseling" to the businessman. Counseling generally consists of explaining to the businessman what goods and services a specific procurement agency buys, whether or not a specific procurement is related to his product line, which procurement offices might buy his product, and how to be placed on an agency bidders' list.

Counseling is especially important for small business firms; since they usually have limited resources, they are at a disadvantage in pursuing sales opportunities. Congress recognized this in the Small Business Act, which states: "the Government should aid, *counsel* and protect . . . the interests of small business concerns . . ." [41] [Italics supplied.]

The procurement agencies are primarily responsible for counseling small businesses on Government procurement. Any procurement official can provide such counseling, but it is a primary responsibility of a "small business specialist," who works for the agency and is usually located in or near the agency's procurement offices. Small business specialists also are located in the Defense Contract Administration Services regions to provide field assistance to small business contractors located within a particular geographic area.

SBA also provides procurement counseling to small businessmen through its field offices and its Procurement Center Representatives (PCRs) located at major procurement centers.

PROBLEMS

Small business advocates believe that agency small business specialists do not represent them adequately since the specialists are closely aligned with the interests of the agencies that employ them. They believe that only the PCRs actively promote small business interests. Although they are ombudsmen for small business, small business specialists must

[41] Note 16, *supra*.

TABLE 1. SAVINGS RESULTING FROM THE COC PROGRAM

Fiscal year	*Savings (in millions)*	*Fiscal year*	*Savings (in millions)*
1954–1961	$15.7	1967	$3.0
1962	5.3	1968	4.2
1963	2.2	1969	4.0
1964	2.2	1970	4.9
1965	3.9	1971	5.0
1966	3.9	1972	5.6

$60 million in savings to the Government.[30] This figure was arrived at by subtracting the low bid of the small business firm that received the COC from that of the next highest bidder that would have received the award if the COC had not been issued. Individual fiscal year savings are shown in table 1.[31] According to SBA, the total savings are about equal to the amount appropriated for all SBA procurement assistance programs during this period.[32]

Although the COC program has yielded lower contract prices, many agency officials state that the administrative burden it places on the procuring agency offsets much of the savings.[33] They claim that once a COC has been issued, the procuring agency and SBA carefully watch the progress of and often provide substantial assistance to the COC contractor to assure successful completion of the contract.[34]

Procurement officials claim that the SBA bias in favor of small business could result in issuance of a COC that would endanger a vital agency mission. These officials contend their first concern is to award contracts to firms which can clearly meet the agency's needs rather than to assist a small firm whose ability to perform is doubtful.

ALTERNATIVES

Several alternatives have been proposed to the COC program. Defense Supply Agency (DSA) representatives suggested that SBA participate in the procuring agency's preaward surveys. SBA and the small firms with whom this was discussed rejected the idea. They believe it might make SBA a party to the contracting officer's decisions on capacity and credit, thereby largely negating SBA's ability to make an independent COC decision. A second alternative would be to rescind SBA's COC authority on the grounds that an insignificant number of COCs are issued, and a third would be to continue the program in its present form.

CONCLUSIONS

The number of contracts awarded under COCs represents an insignificant share of the total number of Government contracts. However, it is clear that when looking solely at SBA operating costs, there are savings. Neither the number of COC contracts nor the amount of savings is a sound basis for judging the COC program. The question is whether or not the COC program has contributed to the goal of maintaining a viable small business industrial base. Because the COC program has encouraged small businesses to compete for Government contracts, it should be continued in its present form.

Small Business Subcontracting

Recommendation 48. Test mandatory small business subcontracting on a selected basis to determine its feasibility.

In 1961, Public Law 87–305 established the Government's small business subcontracting

[30] Letter from U.S. Small Business Administration to the Commission, Oct. 27, 1972.

[31] *Ibid.* (Data rounded by the Commission.)

[32] *Ibid.* These SBA procurement assistance programs include set-aside contracts, subcontracting, certificates of competency, property sales, and 8(a) contracting.

[33] Study Group 6, *Final Report*, Dec. 1971, p. 195.

[34] Study Group 2, *Final Report*, Nov. 1971, p. 337.

procurement by the Government, state of the economy, and fluctuations of particular industries. It should support and create a small business capability to meet the Government's needs and should express congressional intent to develop small business opportunities in Government procurement.

SMALL BUSINESS ASSISTANCE PROGRAMS

The Government aids small business by providing disaster relief, financial and management assistance, and preferential treatment and counseling in Government contracting. Preferential treatment and counseling programs are implemented through the procurement process by such techniques as the following:

- *Set-asides* restrict all or portions of solicitations for certain goods and services to small businesses.
- *Certificates of Competency* provide a small business firm with a separate evaluation of its capability to perform a contract after the procuring agency determines that it lacks the credit or capacity necessary to fulfill the contract successfully.
- *Small business subcontracting* promotes the use of small business firms as subcontractors to Government prime contractors and major subcontractors.
- *Counseling* acquaints small business with the how, what, and where of dealing with the Government.

Recommendation 47. Establish new standards for annually measuring the performance of procuring agencies and their prime contractors in using small business. Standards for measuring performance, including the sound use of set-aside techniques, should assess progress made in assisting small businesses to obtain a fair proportion of awards—not just statistical percentages.

Unrefined statistics are inadequate standards for measuring the success of Government programs for assisting small business. Such data are not based on thorough, objective analyses of small business awards and what causes awards to fluctuate. For example, the long-standing use of the percentage of total procurement to show the success of the small business program is not an accurate indicator, since it does not consider such variable factors as the change in mix of products and services for which small business can reasonably compete.

Set-asides

The small business set-aside program is designed to strengthen the industrial base by providing competitive opportunities for small business. A set-aside restricts a procurement partially or totally to competition among small business firms.

Set-asides are of two types: (1) "joint determinations" or "joint set-asides" made under the Small Business Act [18] that require the joint decision of SBA and the procuring activity and (2) unilateral set-asides made by the procuring agency alone under its authority to negotiate during periods of national emergency.[19]

A total set-aside restricts the entire procurement to small business.[20] A partial set-aside restricts only part of the procurement to small business. To qualify for partial set-asides, the procurement must be severable into two or more production runs. All bidders compete on the unrestricted portion, and small firms whose bids on this portion are within 130 percent of the highest award price are offered the restricted portion at the highest price paid on the unrestricted portion.[21]

In addition to total or partial set-asides, classes of procurement or portions of selected items or services may be set aside for small business. For example, some procuring agencies set aside for small business all construction contracts of $500,000 or less.

A new DOD combined set-aside procedure takes precedence over all other DOD set-asides. It involves a total small business set-aside with

[18] Public Law 85–536, ch. 15; 72 Stat. 395; 15 U.S.C. 644 (1970).
[19] 10 U.S.C. 2304(a)(1); 70 Stat. 128; Public Law 81–152, ch. 288; 63 Stat. 393; 41 U.S.C. 252(c)(1) (1970).
[20] ASPR 1–707.1(c); SBA Standard Operating Procedure 60–02, p. 13.
[21] ASPR 1–706.6; FPR 1–1.706–6; SBA Standard Operating Procedure 60–02, pp. 13–14.

The Role of Small Business in Government Procurement

Small business participates in Government procurement by:

- Improving and broadening the competitive base
- Providing innovative technology
- Lowering procurement costs
- Performing a vital role in industrial mobilization
- Dispersing procurement funds industrially and geographically.

Small business procurement policy is set forth in broad terms in the Small Business Act and other procurement statutes, but implementation of the general intent of Congress is left to SBA and the procuring agencies. Although SBA and the procuring agencies advocate small business participation in the Federal marketplace, they do not always agree on how much is possible or how to measure performance. Procurement officials, who are required to seek maximum performance at the lowest reasonable price, also are required to give special treatment to small firms. These goals are not always compatible.

DEFINING SMALL BUSINESS AND FAIR PROPORTION

Variations in the definition of "small business" from industry to industry and from year to year persistently have perplexed small businessmen and procurement officials. Moreover, there has been no set definition of "fair proportion" in determining how many Government contracts should be channeled to small business.

Small Business

In 1942, a member of one congressional committee accurately predicted that failure to find a usable definition of small business would lead to difficulty in formulating small business programs.[10] In the 1940's two attempts by Congress to define small business were unsuccessful.[11, 12] In 1953, Congress abandoned its attempt to define small business through legislation. Accordingly, the Small Business Act states:

> It shall be the duty of the Administration . . . to determine within any industry the concerns, firms, persons, corporations, partnerships, cooperatives, or other business enterprises which are to be designated small business concerns for the purpose of effectuating the provisions of this Act.[13]

PROBLEMS

Many definitions of small business have been offered, but none has gained popular acceptance. The variety of definitions has confused and handicapped small firms in obtaining Government contracts. Because definitions vary, the applicability of small business assistance programs has not always been clear.

SBA originally defined a small business as one with less than 500 employees. Many representatives of small business testified at congressional hearings that this criterion did not meet the needs of certain industries. They pressed for industry-by-industry standards, and SBA obliged by making exceptions to the standard. These included an increase in the permissible number of employees and dollar quotas (annual revenues) for service industries.

SBA recently established a new size policy that states:

> . . . there is a segment of each industry wherein concerns by reason of their size are in the competitive disadvantage. Therefore, the definition of small business for each industry should be limited to that segment of the industry struggling to become or remain competitive.
>
> Smaller concerns often are forced to compete with middle-sized as compared with very large concerns. In consideration of this fact, the standard for each industry should be established as low as reasonably possible.

[10] U.S. Congress, House, Committee on Banking and Currency, hearing on S. 2250 and H.R. 6975, 77th Cong., 2d sess., p. 39.

[11] Public Law 78–458, ch. 8, sec. 204(c); 58 Stat. 788.

[12] Public Law 80–759, sec. 18(a); 60 Stat. 625.

[13] Public Law 85–536, sec. 8(b)(6); 15 U.S.C. 632 and 637(b)(6) (1970).

believe they involve matters beyond the mandate given this Commission by Congress. However, Congress, either through its appropriate committees or the proposed Office of Federal Procurement Policy, may wish to determine whether there is a need to strengthen the sanctions imposed under other statutes or to extend the grounds for debarment from Government contract work in order to achieve the objectives of these statutes. Any evaluation of the feasibility of imposing debarment as a sanction for the violation of Federal law generally would have to consider such difficult questions as how apparent violations would be detected and how and by whom determinations of violations would be made. There would also be a need to consider the enormous administrative problems, effort, and cost involved in extending such sanction to the millions of Federal contracts, grants, and grants-in-aid each year.

Other Issues Raised by Organized Labor

During our studies, representatives of organized labor noted that Government procurement from an employer during a strike or representation campaign can adversely affect his employees' assertion of their rights under the NLRA and alleged that there had been cases when Government procurement from a contractor was increased for this purpose. Of course, by withholding contracts during such events the Government would also adversely affect an employer's capacity to exercise his rights under the NLRA.

We strongly believe that contracting agencies should not take sides in the employee-employer relationships of their contractors and should not use the power of procurement either for or against the parties involved in a labor dispute.

rather than increased. Notwithstanding, we believe that the cost and administrative effort required by social and economic programs that are imposed on low-dollar procurements cannot be justified by the results obtained.

Need to Increase Cost Visibility

Recommendation 45. Consider means to make the costs of implementing social and economic goals through the procurement process more visible.

It is basic Government procurement policy to obtain products and services of the needed quality at the lowest reasonable price available. This policy does not always require acceptance of the lowest bid or proposed cost but does emphasize the public policy of minimizing expenditures of tax revenues. The pursuit of social and economic objectives through the procurement process often contradicts this basic policy to minimize cost. The labor standards that impose minimum wage and other working condition requirements on contractors increase the costs of Government purchases by placing a competitive floor under the labor factor in bids and proposals. The Buy American Act and related measures that give procurement preference to domestic producers in many cases exclude lower prices from foreign producers or those possible with foreign-made components which could be incorporated into domestic articles.

Higher costs also stem from implementation and administration of social and economic programs. These costs cannot be measured with any sort of precision unless they are specifically identified, as in the Section 8(a) minority shall business program. The business development expense commitments made by SBA under that program between July 1, 1971, and February 29, 1972, amounted to $2,242,143.21.[48] At present much of the incremental cost of social and economic programs is hidden within the budgets of the procuring agencies that cover both in-house costs of administration and increased contractor performance costs in the form of higher overhead and prices. A recent informal survey of the Office of the Secretary of Defense, Army, Navy, Air Force, and Defense Supply Agency estimated that the equal employment, small business, and Section 8(a) programs alone cost them $396,024,000 per year.[49]

We fully recognize that it is extremely difficult, if not impossible, to measure precisely the value of certain of the social and economic programs in order to compare this value with their cost. How does one place a value on the elimination of inner city riots, the protection of the environment, the prevention of substandard labor conditions, or the retention of an American source for possible strategic materials or products? We do believe, however, that a reasonable assessment can and should be made of the costs these programs impose on the procurement process and of the results of the programs in order to determine if the procurement process is an effective and appropriate vehicle for their implementation.

One possible means that has been suggested for measuring the cost of certain of the social and economic programs is to provide statutory authority, where necessary, for agencies to pay premium prices to contract with firms in order to support social and economic programs. This would exempt the agencies from the requirement to deal with the lowest bidder if necessary to attain social and economic objectives. Such an approach would require modifications to current legislation.[50]

There is a great need to recognize the impact that social and economic programs have on the procurement process, the individual and cumulative cost of such programs, and the effectiveness of the procurement process as a means of promoting such goals.

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[48] U.S. Congress, House, Select Committee on Small Business, hearings on *Government Minority Small Business Programs* before the Subcommittee on Minority Small Business Enterprise, 92d Cong., 2d sess., vol. 2, p. 399 (1972).

[49] Presentation by Captain L. E. Hopkins, SC, USN, Chairman, Armed Services Procurement Regulation Committee, at a Procurement Conference, Sept. 27–29, 1972. In his presentation Captain Hopkins pointed out that the departmental inputs on both the direct cost estimate of $14,799,000 and the indirect cost estimate of $381,225,000 consisted of variable mixes and cost projection. In a recent interview Captain Hopkins emphasized that the cost figures were "guess-estimates" or "ballpark" figures.

[50] For example, the Department of Defense Appropriation Act consistently contains a prohibition against the payment of a price differential on contracts made for the purpose of relieving economic dislocation. A similar prohibition appears in Defense Manpower Policy No. 4, 32A CFR 33 (Supp. 1972).

bor, the procuring agencies, and the General Accounting Office causing cumbersome interplay of reporting procedures and different interpretations of responsibilities.[35]

- Enforcement of the equal employment clause is divided between the Office of Federal Contract Compliance (OFCC) in the Department of Labor and designated compliance agencies which have major procurement responsibilities. Charges of discrimination in employment are often investigated by OFCC, the Equal Employment Opportunity Commission, and State agencies.

The administrative discretion permitted by the Buy American Act has resulted in inconsistent administration among agencies, particularly between the civilian and military agencies. In evaluating foreign bids on supply contracts, civilian agencies add a six-percent evaluation factor to the bid price including duty, except that where the low domestic bidder is a small business or labor surplus area concern a 12-percent evaluation factor is substituted.[36] On the other hand, military agencies normally use an evaluation factor of either 50 percent of the foreign bid price exclusive of duty or six percent of the bid price inclusive of duty, whichever results in the greater evaluated price.[37] Where the low domestic bid is from a small business or labor surplus area concern a 12-percent [38] factor is substituted for the six-percent factor. This disparity in evaluation procedures is confusing and a matter of concern to suppliers who sell to both military and civilian agencies.

A reexamination of the administrative practices followed in the implementation of social and economic programs would reveal whether the implementation of the programs was consistent with the purposes of the programs. For example, under the Service Contract Act prevailing wage determinations have been extended to cover professional employees although the act purports to cover only service employees; wage rates prevailing at the location of the procuring agency have been imposed although the act requires that wage rates prevailing in the area of the work be applied; "median," "slotted," [39] and construction trade rates are sometimes used as prevailing rates although it is possible that no service employees are being paid such rates.[40]

Dollar Threshold for Applying Social and Economic Programs

Recommendation 44. Raise to $10,000 the minimum level at which social and economic programs are applied to the procurement process.

Currently there is considerable variance in the dollar levels at which the various social and economic programs apply to procurements. The Walsh-Healey Act, labor surplus area program, and equal employment opportunity program (Executive Order 11246) all apply above the $10,000 level. The Davis-Bacon Act, Miller Act, and Copeland "Anti-Kickback" Act apply to construction contracts exceeding $2,000. The Service Contract Act applies to service contracts of any dollar amount. The Buy American Act and the Convict Labor Laws apply regardless of the dollar level of the contracts. Many of these thresholds were established more than 30 years ago and inflation and other factors have all but dissipated the exemptions they provided when first enacted. The varying threshold levels require special procedures for Government procurement personnel and for its contractors; this increases administrative costs and the possibility of error in the application of the social and economic clauses.

The Department of the Interior previously proposed legislation which would raise the

[35] See Part E for a discussion of these problems in connection with the Davis-Bacon Act.

[36] FPR 1-6.104-1.

[37] ASPR 6-104.4.

[38] *Ibid.*

[39] Slotting is a practice whereby rates applicable to one classification are applied to another classification having some minor degree of similarity in duties. For example, the electrician wage rates might be applied to a janitor who changes light bulbs.

[40] Other matters considered in connection with the administration of the Service Contract Act which have apparently been resolved by the recent amendments enacted by Public Law 92-473 (Oct. 9, 1972) are the disadvantage to which incumbent service contractors are put when no wage determinations are made in connection with rebidding contracts, and the loss of fringe benefits suffered by employees when service contractors are changed annually. The amendments create other problems, however, in that they apparently now require wage determinations for contracts below $2,500; they have established policies for all service contracts which can have no application to contracts which are not being rebid; and they make a successor contractor responsible to employees for fringe benefits accrued but not used while working for predecessor contractors.

lishes a Government policy of purchasing low-noise-emission products and permitting a price differential to be paid for such products. The Vietnam Veterans Readjustment Assistance Act of 1972 requires Government contracts and subcontracts thereunder to contain provisions requiring that employment preference be given to disabled veterans and to veterans of the Vietnam era.

Thus, conditions attached to Government contracts are designed to carry out a variety of objectives or policies such as:

- Establishing fair wages and working conditions
- Promoting domestic business and the domestic economy
- Eliminating unemployment and providing training and job opportunities
- Establishing fair employment practices
- Promoting minority business concerns
- Rehabilitating prisoners and the handicapped
- Protecting the environment
- Effective use of resources
- Humane treatment of animals.

Reexamination Needed

Recommendation 43. Establish a comprehensive program for legislative and executive branch reexamination of the full range of social and economic programs applied to the procurement process and the administrative practices followed in their application.

Although the objectives of the various social and economic programs implemented through the procurement process are commendable, there is a need to reexamine them as the result of changes in social objectives, current economic requirements, and the passage of new laws. For example, the prohibition against the use of convict labor by Government contractors reflects national policy at the turn of this century.[28] Protecting jobs by flatly prohibiting competition from convict labor, however, tends to be inconsistent with current trends in Federal and State penal systems that emphasize rehabilitation programs such as work-release arrangements. The Davis-Bacon Act, which was enacted to solve a problem during a period of economic depression, recently has been cited as a cause of inflation and allegedly operates as a restraint on meeting the increased demands for skilled labor. The Walsh-Healey Act requirements for the payment of minimum wages determined by the Secretary of Labor have been rendered inoperative by Department of Labor reaction to judicial decisions; and its overtime pay requirements and safety provisions largely have been superseded by other laws. The child labor provisions of the act discriminate against females and have been administratively modified by regulation. The act's requirement that contractors be regular manufacturers or dealers is also an objective of the basic procurement statutes.

Apart from a reexamination for continued relevancy,[29] there also is a need to provide a continuing means for evaluating the impact on the procurement process when new social and economic objectives are established. Over the years the number of such objectives implemented through procurement has increased steadily; nevertheless, there is little evidence that consideration is given to the cumulative effect of existing requirements or that full recognition is given to the possible impact of new ones. This is partly the result of the diverse responsibilities of the congressional committees and the various agencies in the executive branch. There is no central place where each can obtain an overview of the effects its requirements will have on the procurement process.

Conflicts Among Objectives

The existing pattern of social and economic objectives implemented through the procurement process discloses a number of conflicts in priorities. Although some statutes establish clear preferences,[30] many provide no guidance

[28] Note 10, *supra*.

[29] See Part J for a discussion of the consolidation of existing labor laws affecting procurement.

[30] For example, the Wagner-O'Day Act and the act establishing the Federal Prison Industries, Inc., make it mandatory on Federal agencies to purchase products produced by the blind and other severely handicapped, and also those produced by prisoners, in place of those available through commercial sources. The choice between

TABLE 2. SUMMARY OF PROBLEMS ASSOCIATED WITH SOCIAL AND ECONOMIC PROGRAMS

Act	*Original enactment date*	*Agencies sharing responsibility with procuring activity*	*Problems*
Davis-Bacon Act (40 U.S.C. 276a–1 to 276a–5)	1931	Department of Labor; Comptroller General	● Low dollar threshold. ● Ambiguity or lack of definition of important terms, including "site of work," "public work," "construction, alteration, or repair" versus "maintenance." ● Ambiguity of enforcement responsibility. ● Improper determinations of prevailing wage rates. ● Excessive reporting requirements.
Walsh-Healey Public Contracts Act (41 U.S.C. 35–45)	1936	Department of Labor; Comptroller General	● No wage determinations made since 1964. ● Fair Labor Standards Act of 1938 and Occupational Safety and Health Act of 1970 overlap and make much of act unnecessary. ● Inhibition of use of 4-day, 10-hour work week. ● Prohibition of use of convict labor is contrary to current rehabilitation policies.
Copeland "Anti-Kickback" Act (18 U.S.C. 874 and 40 U.S.C. 276c)	1934	Department of Labor	● Reports required cause administrative burdens. Total impact minor.
Miller Act (40 U.S.C. 270a–d)	1935	Comptroller General	● Unrealistically low dollar threshold. ● Technically qualified small contractors, including minority contractors, may have equipment, expertise, and desire to perform but lack credit rating sufficient to be bondable. ● Bonding costs to Government are substantial. ● Nonuniform practices as to (a) whether agencies may waive bonding requirement for cost-type contractors, and (b) requiring bonds from fixed-price subcontractors of cost-type prime contractors.
Buy American Act (41 U.S.C. 10a–d)	1933		● Nonuniform regulations and procedures make administration of act confusing to suppliers. ● Definition of "domestic" allows inclusion of up to 50 percent of foreign components (by cost) in a domestic end product and makes purchase of foreign components (only) as replacement parts difficult. ● Suppliers' certifications of percentage of foreign components in an end product are difficult for procurement personnel to verify. ● Act applies to all contracts regardless of amount.
Convict Labor (Executive Order 325A)	1905		● Changing attitudes in rehabilitation programs cast doubt on currency of law, particularly since

TABLE 1. SOCIAL AND ECONOMIC PROGRAMS

Program	*Authority*	*Purpose*
Buy American Act*	41 U.S.C. 10a–10d	To provide preference for domestic materials over foreign materials
Preference for United States Manufacturers	22 U.S.C. 295a	To provide preference for domestic manufactures in construction of diplomatic and consular establishments
Preference for United States Manufacturers	16 U.S.C. 560a	To restrict U.S. Forest Service from purchasing twine manufactured from materials of foreign origin
Preference for United States Products (Military Assistance Programs)*	22 U.S.C. 2354(a)	To require the purchase of U.S. end products for the military assistance program
Preference for United States Food, Clothing, and Fibers (Berry Amendment)*	Public Law 91–171, sec. 624	To restrict the Department of Defense from purchasing specified classes of commodities of foreign origin
Officials Not to Benefit*	41 U.S.C. 22	To prohibit members of Congress from benefiting from any Government contract
Clean Air Act of 1970	42 U.S.C. 1857h–4	To prohibit contracting with a company convicted of criminal violation of air pollution standards
Equal Employment Opportunity*	Exec. Order 11246, Exec. Order 11375	To prohibit discrimination in Government contracting
Copeland "Anti-Kickback" Act*	18 U.S.C. 874, 40 U.S.C. 276c	To prohibit kickbacks from employees on public works
Walsh-Healey Act*	41 U.S.C. 35–45	To prescribe minimum wage, hours, age, and working conditions for supply contracts
Davis-Bacon Act*	40 U.S.C. 276a–1–5	To prescribe minimum wages, benefits, and work conditions on construction contracts in excess of $2,000
Service Contract Act of 1965*	41 U.S.C. 351–357	To prescribe wages, fringe benefits, and work conditions for service contracts
Contract Work Hours and Safety Standards Act*	40 U.S.C. 328–332	To prescribe eight-hour day, forty-hour week, and health and safety standards for laborers and mechanics on public works
Fair Labor Standards Act of 1938	29 U.S.C. 201–219	To establish minimum wage and maximum hours standards for employees engaged in commerce or the production of goods for commerce
Prohibition of Construction of Naval Vessels in Foreign Shipyards	Public Law 91–171 (DOD Appropriation Act of 1970), title IV	To prohibit use of appropriated funds for the construction of any Navy vessel in foreign shipyards
Acquisition of Foreign Buses	Public Law 90–500, (DOD Appropriation Act of 1969), sec. 404	To restrict use of appropriated funds to purchase, lease, rent, or otherwise acquire foreign-manufactured buses
Release of Product Information to Consumers	Exec. Order 11566	To encourage dissemination of Government documents containing product information of possible use to consumers
Prohibition of Price Differential	Public Law 83–179, sec. 644	To prohibit use of appropriated funds for payment of price differential on contracts made to relieve economic dislocation
Required Source for Jewel Bearings*	ASPR 7–104.37	To preserve a mobilization base for manufacture of jewel bearings

tices [4] or for contract awards to minority enterprises.[5] They can also be identified when, as in the case of the Noise Control Act,[6] specific amounts are authorized for the payment of price differentials in the purchase of low-noise-emission products.[7] In other cases, costs are absorbed within the procurement process itself, without any ready means to identify them.

In a larger sense, it may be cost-effective for the Government and society at large to use the leverage of the procurement process for achieving selected national objectives. It is doubtful that such achievement is cost-effective for the procurement process itself. Herein lies the dilemma. We do not believe this dilemma can be resolved by simply disengaging the procurement process from the whole complex of other objectives attached to it through many decades. However, there are limits to the number of such objectives that the procurement process can support, and both Congress and the Executive should consider the consequences for procurement each time a law is passed or an Executive order is issued which mobilizes the procurement process for some other purpose—regardless of the worthiness of that purpose.

Our mandate is to improve the procurement process, not to assess the value or relative importance of all the nonprocurement objectives associated with that process. However, our statutory charter directs us to consider the problem of conforming Government procurement policies and programs, wherever appropriate, to other established Government policies and programs. Our studies in this area necessarily have been limited because of the wide-ranging impact of procurement on everything else that the Government does or supports.[8] Our recommendations recognize the dilemma mentioned earlier. We do not propose to divorce the procurement process from other national objectives. We do believe, however, that more deliberate attention and analysis should be given to the nonprocurement obligations placed on the procurement process and to the consequences that are adverse to efficient and economic performance.

Nature and Scope

One of the earlier attempts to bring about social change through the procurement process was the enactment of the Eight Hour Laws, a series of statutes setting standards for hours of work.[9] The eight-hour day was first extended to workers employed by contractors and subcontractors engaged in Federal projects in 1892. In 1905 an Executive order by President Theodore Roosevelt prohibited the use of convict labor on Government contracts,[10] thereby implementing through the procurement process an 1887 statute prohibiting the hiring-out of convict labor. A list of several social and economic programs implemented through the procurement process is set forth in table 1. Each of these programs results in the addition of a clause or clauses to Federal contracts or in the requirement for a certification, notification, or some other administrative procedure related to obtaining bids or proposals. Some problems associated with the most significant of these programs are summarized in table 2.

[4] Budget figures for fiscal 1972 indicated that the procurement agencies budgeted approximately $24 million for the enforcement of nondiscrimination in employment. This figure does not reflect the time and effort of procurement personnel, who have implementation responsibilities, or of contractors, whose costs are ultimately borne by the Government.

[5] The fiscal 1972 budget of the Small Business Administration contained $8 million for "business development expense," that is, the price differential paid small business enterprises over what the goods or services could be obtained for elsewhere. (U.S. Congress, House, Select Committee on Small Business, hearings on Government Minority Small Business Programs before the Subcommittee on Minority Small Business Enterprise, 92d Cong., 2d sess., 1972, vol. 2, p. 395.)

[6] Public Law 92–574.

[7] Section 15 of the act provides for the prequalification and certification of low-noise-emission products and also provides that the Government is to acquire certified low-noise-emission products for its use in lieu of other products if the Administrator of General Services determines that the procurement costs of low-noise-emission products are not more than 125 percent of the retail price of the least expensive products for which they are substitutes. It authorizes appropriation of $1 million for fiscal 1973 and $2 million for each of the two succeeding fiscal years for the payment of price differentials and to carry out the purposes of section 15.

[8] Our detailed studies have been limited to statutes, Executive orders, or other pronouncements which are implemented solely or principally through the procurement process. Many other social and economic measures which are of general application also have an impact on the procurement process in that procuring agencies are required to take action to assure that such measures are not violated in connection with their procurements. The current wage and price controls are an example.

[9] These confusing and overlapping work standard statutes were superseded on Aug. 13, 1962, by the Work Hours Act of 1962, 76 Stat. 357.

[10] Executive Order 325A, *An Order Forbidding the Hiring of Prisoners by Contractors to the U.S. Government*, May 18, 1905.

in a diminution of the independence of the auditor. Undoubtedly consolidation would place the DCAA auditor under the supervision and control of DCAS personnel. This could result in restrictions placed on the auditor and decrease the confidence that the public and the Congress have in the contract negotiation and administration process.

There is little evidence of adverse effects on the procurement process that result from DCAA operating as an independent agency or of the savings that would be realized by the proposed consolidation. Further, whether or not DCAA and DCAS should be consolidated has little effect on the procurement process. It is primarily an internal coordination and management problem which should be resolved by the Secretary of Defense.

Commissioner Webb adds the following comments to the dissenting position:

While my dissent from the majority opinion on the consolidation of DCAA with DCAS is primarily based on my view that the independence of both internal and contract audit functions should be clearly preserved, there is another basic reason for my dissent. All through the studies for the Government Procurement Commission we have found a very real need for senior officials of Government agencies to give more attention to ways and means through which they can furnish better leadership to improve procurement activities and to encourage and support procurement personnel in ways that will accomplish a substantial upgrading in both the capability and motivation of the men and women who are assigned responsibility in this area.

In my private business activities and governmental service, I have found that senior officials in a complex organization can build into the structure an important self-policing function through the use of senior officials, reporting at the highest level, to administer an independent audit function. Procurement personnel gain a strong feeling of support and motivation from the assurance that suspected irregularities relating to procurement will be given attention by very senior officials. This is of great importance to the quality of their performance. An added element of effectiveness for the leadership role of senior executives is frequently obtained from utilizing the independent audit capability to emphasize, through the way the audit work is planned and conducted, those basic policies and patterns of work which are considered most important. Senior executives such as the Secretary of Defense and Deputy Secretary simply cannot assume that procurement personnel will maintain the high level of performance which is needed without their direct and visible leadership to this end and the utilization of the most effective forms of organizations to make that leadership effective.

tute (LMI) report [6] evaluating the contract audit-contract administration interface suggested that the existing organizational framework be improved or that DCAA and DCAS be merged into a single organization reporting to the Secretary of Defense. LMI recommended the latter alternative as the one more likely to produce a workable and lasting solution.

Subsequently, the Deputy Secretary of Defense designated a task group composed of top DOD officials to review and evaluate the recommendations of the LMI study. The task group unanimously concluded that DCAA and DCAS should not be merged, but recommended a number of actions designed to achieve closer coordination between the two agencies and to clarify regulations and directives on their respective roles and missions.[7]

In 1970, to implement the task group's suggested improvements, the Deputy Secretary of Defense directed the establishment of a second task group. In July 1971, this group proposed a number of recommendations that were approved by the Deputy Secretary of Defense.[8] These recommendations included changes in regulations, physical collocation of contract administration services and auditing offices, improved procedures for requesting field pricing assistance and resolving differences, and establishment of a working level group to be known as the Contract Administration and Audit Advisory Forum. ASPR Revision 11 of April 28, 1972, partially implemented these changes by directing contracting officers to send all requests for field pricing assistance to the ACO/Plant Representative.

Thus far these attempts to resolve audit-contract administration interface problems within the existing organizations have not been fully effective. Despite the many statements that contract administration and audit are equally important advisory functions, their organizational separation continues to result in overlap, duplication, and friction. We are concerned that these problems still persist despite the vast amounts of energy already devoted to their resolution.

Opponents of a DCAS and DSA merger contend that the auditor traditionally and necessarily must be independent of the operations he is auditing. When placed in the proper context, this is a sound management principle. For example, an agency's *internal audit* organization audits all internal operations, including procurement. To prevent the exertion of undue influence by the several levels of operating management and to lend objectivity, the auditing organization is separate from the operating elements and reports directly to the agency head. Thus, the auditor is "independent" of the operations he is auditing.

Contract audit, however, has a different role. This role was described succinctly by the Director of DCAA during the congressional hearings that led to the establishment of this Commission: [9]

> . . . In order to set the stage, and to be sure that the Agency's place in the general scheme of things is clearly understood, I would like to make the following statements:
>
> First, substantially all of our work is in support of some phase of procurement or contract administration.
>
> Second, *we audit no enterprise or activity except Government contractors; we do not audit or examine any internal Government function or activity.*
>
> Third, *our reports and recommendations are advisory to procurement and contract administration officials.* It is intended, where there is to be a negotiation or a determination of costs, either with respect to costs incurred or prices proposed, that our reports should bring to the attention of the contracting officer or negotiator those costs claimed or proposed which are either:
>
> (i) Unallowable or not allocable under the contract provisions or the contract cost principles, or

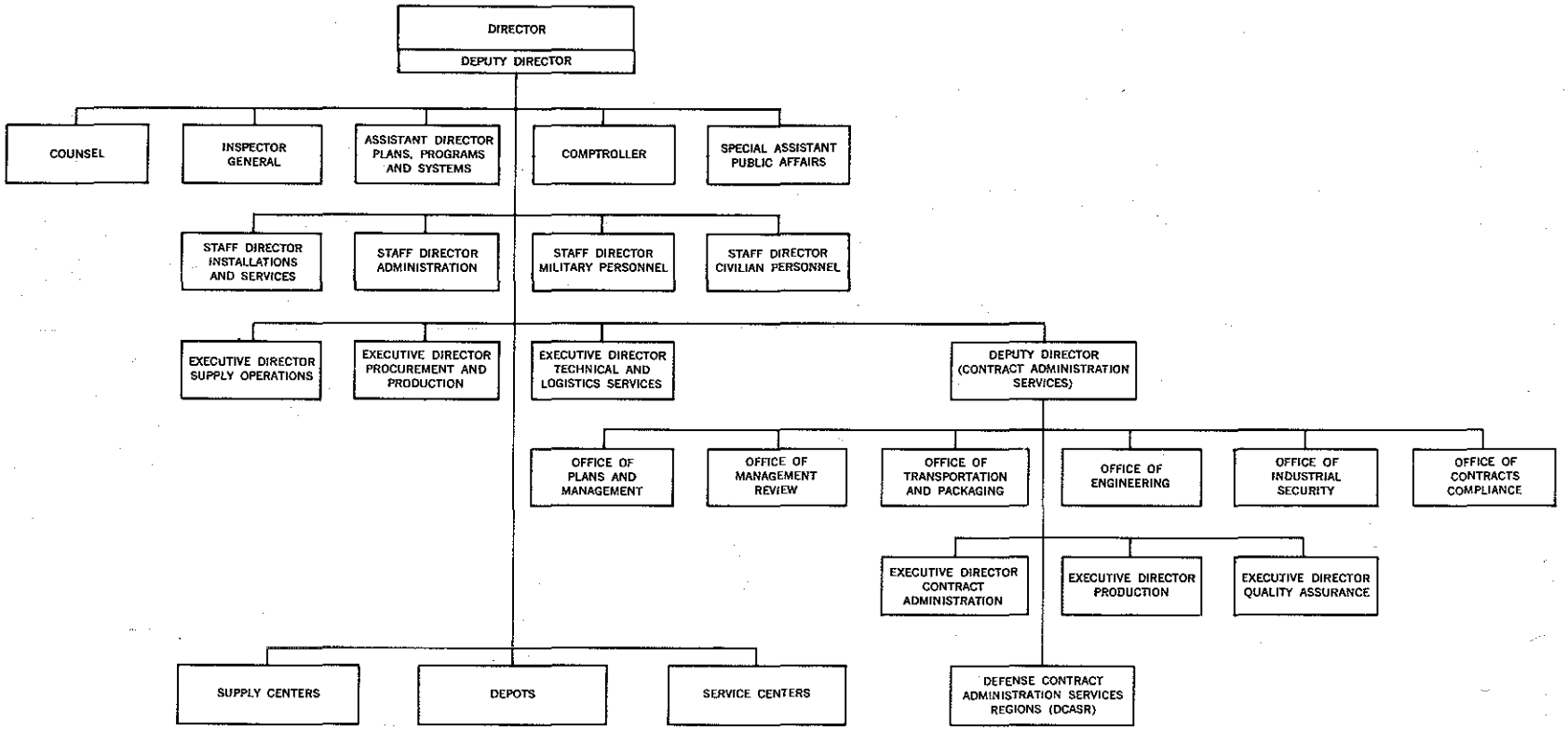
[6] Logistics Management Institute, *Report on the Contract Audit/Contract Administration Interface*, LMI Task 68-17, Mar. 1969.

[7] U.S. Department of Defense, Office of the Assistant Secretary of Defense (Comptroller) Memorandum for Deputy Secretary of Defense, *Logistics Management Institute (LMI) Study Covering "The Contract Audit/Contract Administration Interface"—March 1969*, Jan. 16, 1970.

[8] U.S. Department of Defense, Office of the Deputy Secretary of Defense, Defense Contract Advisory Council Task Group, *Report on DOD Contract Audit/Contract Administration Operating Improvements*, July 12, 1971.

[9] U.S. Congress, House, Committee on Government Operations, *Government Procurement and Contracting*, hearings before a subcommittee of the Committee on Government Operations on H.R. 474 "To Establish a Commission on Government Procurement," 91st Cong., 1st sess., 1969.

DEFENSE SUPPLY AGENCY



Source: Commission Studies Program.

Figure 1

operate under uniform procedures and have strong central direction.

DOD CONTRACT SUPPORT

Transfer all DOD Plant Cognizance to DCAS

Recommendation 40. Transfer all plant cognizance now assigned to the military departments to the Defense Contract Administration Services with the exception of those plants exempted by the Secretary of Defense (for example, GOCO plants and Navy SUPSHIPS).

With the establishment of DCAS in 1965, DOD improved the effectiveness of the field contract support provided to its procuring activities. These internal improvements in DOD operations have had a salutary effect on industry: much of the duplication at contractors' facilities has been minimized or eliminated, thus showing a single DOD "face" to industry. Nevertheless, further economies can be realized. A first step toward these goals involves the transfer of additional plant cognizance responsibilities to DCAS.

The DOD plan [3] for centralized contract management excludes certain types of contracts and organizations from DCAS central management. These exclusions are:

- Basic research contracts to which field personnel could contribute little
- Research contracts with educational institutions under exclusive cognizance of the Office of Naval Research (ONR)
- Government-owned, contractor-operated (GOCO) plants (primarily arsenal operations involving ammunition and chemicals under cognizance of the Army)
- Navy Supervisors of Shipbuilding (SUPSHIPS) whose activities relate exclusively to shipbuilding and fleet operations
- Construction.

DCAS commenced operations with a limited but ambitious charter. The contract management offices taken over by DCAS represented about 50 percent of total DOD contract expenditures and more than 60 percent of the contract administration resources.[4] Minimal progress has been made toward bringing the 51 major plants initially excluded under the cognizance of DCAS. As shown in table 1, 39 plants are still controlled by the military departments.

As originally conceived, the program would assign plant cognizance to the DOD agency with the preponderance of contract activity at a particular plant. In this way, the assigned agency would administer *all* DOD contracts placed in the plant, regardless of their origin. Although the program includes flexibility to reassign plant responsibility among the military services and DCAS, this generally has not been done.

In most cases, when a military service awards a new contract for a major weapon system, the responsibility for contract administration automatically comes under the service currently cognizant in the contractor's plant. This situation appears to prevail regardless of the mix or amount of work being performed by the contractor or for whom it is being performed. Although some plant reassignments have been made, the net result has been perpetuation of the status quo (see table 1). Little progress has been made toward the ultimate goal of transferring all plant cognizance functions to DCAS.

The division of plant cognizance functions between the military services and DCAS perpetuates the problems of nonuniform policies and procedures, duplication, and overlap. The three military services and DCAS each has its own set of policies and procedures covering field contract support. They all stem from the same authority, the Armed Services Procurement Regulation (ASPR), but they are not uniform since agency interpretations and methods of implementation differ. The adverse effects are clear. Industry must cope with four different sets of procedures, all intended to accomplish the same functions, administered by four separate organizations. The problem is acute for a multidivision contractor doing business with more than one DOD organization and is further aggravated if the contrac-

[3] U.S. Department of Defense, Office of the Secretary of Defense, *Project 60 Report on Contract Management*, 1963.

[4] *Ibid.*

- In unusual circumstances, only one firm may have the demonstrated capability to provide the needed services. In such cases, it should be recognized that it is proper for an agency to negotiate with that firm on a sole-source basis.

Failure to Balance Qualitative Factors and Price

We found that agencies need guidance on how to balance the quality of the technical proposal against the price proposal in order to select the firm that presents the optimum balance between quality and price. Placing undue emphasis on initial price tends to degrade the quality of the proposals, encourage buy-ins, and discourage some of the best qualified firms from bidding. This problem is discussed elsewhere in this report and specifically in Part B with respect to the Acquisition of Research and Development. The same considerations are present in the types of specialized services covered in this chapter.

CONCLUSIONS

In order of importance, the factors normally to be considered in contracting for professional services should be: (1) technical competence of the proposers, (2) proposed plan of performance, and (3) estimated cost. The criteria for evaluation should be set forth in the RFP, and the primary basis of rating technical competence should be the qualifications of the key people who will perform the work. Key personnel should be named in the proposal and in the contract. The estimated cost should be only one factor in contracting for specialized services.

Underutilization of Contract Results

During our interviews, both industry and Government officials expressed concern over the failure to implement the results presented in many of the studies performed under professional services contracts. For example, one industry representative noted that a newly-appointed agency official requested proposals to study a problem that had been studied no fewer than 12 times in the past ten years. In each of the prior studies, the same solution had been proposed but not implemented. In another case, an agency's internal review team examined 53 professional service contracts costing more than $10 million. The results from contracts representing two-thirds of this cost were not utilized because of personnel turnover, poorly conceived RFPs, reorganization, poor performance by the contractor, or lack of involvement by persons in decisionmaking positions.

CONCLUSIONS

Guidelines and agency regulations should require assignment of qualified agency personnel to oversee performance of professional service contracts, to be responsible for evaluating results of the services performed, and to take action on resulting findings or recommendations. If action is not taken, the agency records should reflect the reasons therefor.

Inappropriate Use of Professional Service Contractors

Another major problem concerns the use of professional services contracts when they are not really justified or relevant.

An official of the Office of Management and Budget,[3] in assessing the use of management experts within Government, has cited the following "inappropriate situations":

- As a substitute for developing essential in-house competence
- As the fashionable thing to do

[3] Statement of Alan A. Dean, Deputy Assistant Director for Organization and Management Systems, OMB, in a lecture delivered on Dec. 6, 1971, and published as "Improving Management for More Effective Government," *50th Anniversary Lectures, of the United States General Accounting Office 1921–1971.*

The Evaluation Research Industry

One of the newest developments has been the emergence of what is now known as the evaluation research industry. The Bureau of Social Science Research, in May 1972, published a study of *The Competitive Evaluation Research Industry*. This study finds that a specialized industry "of imperfectly known magnitude and boundaries has grown up to serve this demand for social program evaluation research."

The study points out that the percentage of total Federal outlays for human resources programs doubled between 1955 and 1971 and that accompanying this trend has been an increasing acceptance of the principle that these programs should be "subject to explicit, systematic, independent, professional evaluation." The Bureau reports that many statutes specifically allocate funds for program evaluation—and that "one percent of the total budget appears to be a figure popular with the Congress."

An analysis by the General Accounting Office of legislation during 1967–1972 identified 23 acts and five bills that require program evaluation. Examples of these are:

- Each title of the Economic Opportunity Act specifies detailed methods of evaluation, including cost-benefit analysis, use of control groups, and standards for evaluation. It is estimated that in fiscal 1973 the Office of Economic Opportunity will spend more than $8 million on evaluation studies.
- The HEW budget for fiscal 1973 requests approximately $51 million to finance its evaluation activities. This includes $33 million for evaluations of health services, $10 million for education programs, $4 million for social and rehabilitation services, and $3 million for child development. It is reported that about 45 percent of HEW's contract studies are performed by for-profit firms, 50 percent by universities and nonprofit organizations, and the rest by public sector organizations.
- Funding authorizations appear in the Public Health Service Act Amendment of 1968, the Elementary and Secondary Education Amendment of 1967, Head Start Supporting Services, and the Older Americans Act Amendments of 1969.

Evaluation studies are of major importance in agencies which deal with health and safety, education, housing, and economic opportunity programs. Almost all other agencies have some requirement for these or similar services and the problems identified below generally appear throughout the executive branch.

Contracting for Professional Services

Recommendation 38. The procurement of professional services should be accomplished, so far as practicable, by using competitive proposal and negotiation procedures which take into account the technical competence of the proposers, the proposed concept of the end product, and the estimated cost of the project, including fee. The primary factors in the selection process should be the professional competence of those who will do the work, and the relative merits of proposals for the end product, including cost, sought by the Government. The fee to be charged should not be the dominant factor in contracting for professional services.

Professional services rarely can be acquired by formal advertising or the competitive techniques used in buying hardware, since detailed specifications or performance criteria against which to judge competing proposals do not exist. Rather, competitors are compared on the basis of qualitative factors which usually are characterized by the knowledge, skills, and experience of the individuals who propose to perform the services. Hence competitive selection requires evaluation and judgment by agency officials and necessitates the use of competitive negotiation procedures.

Negotiation for these specialized services is authorized by the Armed Services Procurement Act and the Federal Property and Administrative Services Act [2] and would be continued by our recommendations in Chapter 3.

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[2] Personal or professional services: 10 U.S.C. 2304(a)(4); 41 U.S.C. 252(c)(4).

The services of educational institutions: 10 U.S.C. 2304(a)(5); 41 U.S.C. 252(c)(5).

Experimental, developmental, and research work: 10 U.S.C. 2304(a)(11); 41 U.S.C. 252(c)(11). (Continued on next page.)

views on a more selective basis. Most of the GAO recommendations for improving the program have been adopted and others are under consideration.

Overall, the DOD CPSR concept is sound and has benefits both for the Government and its contractors. The concept has a strong potential for improving the efficiency of procurement and for reducing the administrative costs and burdens associated with review and approval of individual transactions. Its utility is greatest in very large contracts, particularly where the contractor is heavily engaged in Government work.

The CPSR concept is not intended to be a complete substitute for the review and approval of all individual transactions. When properly used, it can be equally or more effective than approval of individual transactions where the primary Government interests are the adequacy of competitive methods and equal treatment of prospective subcontractors. Having an approved procurement system before beginning work on a contract contributes to better Government/contractor relationships and helps to minimize work delays caused by the necessity of submitting individual transactions for review and approval by the contracting agency. An approved procurement system also can facilitate review and approval of individual transactions since many of the elements of interest to the Government will have been satisfied by the approved system.

A Government-wide policy would facilitate contract administration for the Government and its contractors by eliminating duplicate reviews of contractor procurement systems where more than one agency is involved. It also would facilitate interagency use of Government contract administration and audit services at contractor locations. There is no logical reason why uniformity in policies and requirements for review and approval of subcontracting transactions should not be sought.[80]

Since most review and approval requirements pertain to cost-type prime contracts, we have limited our recommendations for development of Government-wide policies to these contracts. We recognize there may be a need to require reviews and approvals in other than cost-type contracts, such as those with contractors with mixed cost centers.

The present statutory requirement for advance notification of subcontracts under cost-type contracts underscore the importance of adequate attention to contractor procurement; however, we believe this requirement is unduly restrictive and imposes an unnecessary administrative burden. Also, due to inflationary trends over the years, the monetary amount specified by statute in 1948 now affects many more procurements than was initially intended. We believe adoption of a comprehensive program for subcontract approval such as CPSR, with guidelines for review and approval of individual transactions established Government-wide will benefit all parties and will be less costly than the variable methods now used. In developing a sound, economical system, it will be important that the executive branch have the flexibility needed to adjust both monetary amount and type of approval requirements as appropriate. Accordingly, the language in 10 U.S.C. 2306(e) and 41 U.S.C. 254(b) with respect to advance notification of subcontracts under cost-type contracts should be repealed as we recommended in Chapter 3.

[80] Consideration should also be given to greater use of other contractor systems approvals such as quality control, property control, and cost estimating.

NOTIFICATION AND CONSENT REQUIREMENTS FOR DOD SUBCONTRACTS (1)

TYPE OF SUBCONTRACT	TYPE OF PRIME CONTRACT: • FIRM FIXED-PRICE • FIXED-PRICE ESCALATION — ASPR 7-104.23			ALL OTHER FIXED-PRICE CONTRACTS — ASPR 7-104.23, ASPR 23-201.1			COST REIMBURSEMENT-SUPPLY (2) — ASPR 7-203.8, ASPR 23-201.2			COST REIMBURSEMENT-R & D (2) — ASPR 7-402.8, ASPR 23-201.2			TIME & MATERIAL LABOR HOUR (6) — ASPR 7-901.10			FACILITIES — ASPR 7-702.39, ASPR 7-703.25		
	ADVANCE NOTIFICATION ONLY	ADVANCE NOTIFICATION-WITH SPECIFIC INFORMATION	CONSENT	ADVANCE NOTIFICATION ONLY	ADVANCE NOTIFICATION-WITH SPECIFIC INFORMATION	CONSENT	ADVANCE NOTIFICATION ONLY	ADVANCE NOTIFICATION-WITH SPECIFIC INFORMATION	CONSENT	ADVANCE NOTIFICATION ONLY	ADVANCE NOTIFICATION-WITH SPECIFIC INFORMATION	CONSENT	ADVANCE NOTIFICATION ONLY	ADVANCE NOTIFICATION-WITH SPECIFIC INFORMATION	CONSENT	ADVANCE NOTIFICATION ONLY	ADVANCE NOTIFICATION-WITH SPECIFIC INFORMATION	CONSENT
FIXED-PRICE SUBCONTRACTS																		
A. SUBCONTRACTS INVOLVING R & D AS ONE OF ITS PURPOSES										X		X						
B. SUBCONTRACTS BETWEEN $25,000 AND $100,000 OR 5% OF ESTIMATED CONTRACT COST							△		☒	△		☒				X		☒
C. SUBCONTRACTS OVER $100,000				☒	☒	☒	△	X	☒	△	X	☒				X	X	☒
D. SUBCONTRACTS WITH SINGLE SUBCONTRACTOR FOR RELATED ITEMS, AGGREGATING $100,000				☒	☒	☒	X	X	☒ (3)	X	X	☒ (4)				X	X	☒ (3)
E. SUBCONTRACTS FOR INDUSTRIAL FACILITIES REGARDLESS OF VALUE							X		X	X		X						
F. SUBCONTRACTS OVER $1,000 FOR SPECIAL TEST EQUIPMENT							X		X	X		X						
COST REIMBURSEMENT; TIME & MATERIAL; LABOR HOUR SUBCONTRACTS																		
A. ALL SUBCONTRACTS							△ (5)		☒	△ (5)		☒				X		☒
B. SUBCONTRACTS INVOLVING R & D AS ONE OF ITS PURPOSES										△ (5)		X						
C. SUBCONTRACTS OVER $10,000				☒	☒	☒	△ (5)	X	☒	△ (5)	X	☒				X	X	☒
D. SUBCONTRACTS WITH SINGLE SUBCONTRACTOR FOR RELATED ITEMS, AGGREGATING $100,000				☒	☒	☒	△ (5)	X	☒	△ (5)	X	☒				X	X	☒
E. SUBCONTRACTS FOR INDUSTRIAL FACILITIES REGARDLESS OF VALUE							△ (5)		X	△ (5)		X						
F. SUBCONTRACTS OVER $1,000 FOR SPECIAL TEST EQUIPMENT							△ (5)		X	△ (5)		X						

KEY: X DOD REQUIREMENT; △ STATUTORY REQUIREMENT (10 U.S.C. 2306(d)); ☒ DOD REQUIREMENT WAIVED WHERE CONTRACTOR'S PROCUREMENT SYSTEM HAS BEEN APPROVED AND SUBCONTRACT IS WITHIN THE SCOPE OF APPROVAL.

FOOTNOTES:

(1) BASED ON REVISION NO. 11 TO THE 1969 EDITION OF ASPR.

(2) MODIFIED REQUIREMENTS FOR CERTAIN COST SHARING AND CERTAIN CPIF CONTRACTS NOT SHOWN – SEE ASPR 23-201.2 (b).

(3) CONSENT ONLY APPLICABLE TO INDIVIDUAL SUBCONTRACTS WHICH OTHERWISE MEET FIXED-PRICE SUBCONTRACT CATEGORIES B, E, OR F. WAIVER ONLY APPLICABLE TO INDIVIDUAL SUBCONTRACTS WHICH OTHERWISE MEET FIXED-PRICE SUBCONTRACT CATEGORY B.

(4) CONSENT ONLY APPLICABLE TO INDIVIDUAL SUBCONTRACTS WHICH OTHERWISE MEET FIXED-PRICE SUBCONTRACT CATEGORIES A, B, E, OR F. WAIVER ONLY APPLICABLE TO INDIVIDUAL CONTRACTS WHICH OTHERWISE MEET FIXED-PRICE SUBCONTRACT CATEGORY B.

(5) STATUTORY REQUIREMENT APPLIES TO CPFF SUBCONTRACTS ONLY.

(6) CONSENT REQUIRED FOR ALL SUBCONTRACTED WORK EXCEPT RAW MATERIALS AND COMMERCIAL STOCK ITEMS.

Source: Commission Studies Program.

Figure 2

administrative procedures and forums for resolving subcontractor claims, would create management responsibility problems, particularly with regard to fixed-price prime contracts. Not all disputes affecting subcontractors involve matters for which the Government is responsible, and there is no reason why the Government should assume responsibility for deciding purely private matters. Even if restricted to matters involving the Government, direct access could increase the workload of agency personnel and dilute the responsibility of prime contractors to manage their contract work.

Therefore, we do not recommend changes with respect to the rights and procedures for handling subcontractor claims.[69] At the same time, we do consider this matter to be an important aspect of a good procurement system and believe that the agencies should pay special attention to how their prime contractors approach sponsorship of subcontractor claims.

We have made a number of recommendations in Part G which, although primarily aimed at Government-prime contractor disputes, also would benefit subcontractors. Included are recommendations to:

- Establish regional Small Claims Boards of Contract Appeals to resolve quickly and economically claims not exceeding $25,000
- Pay interest on successful contract claims
- Encourage negotiated settlements of disputes through the use of an agency informal review conference
- Upgrade the agency boards of contract appeals
- Allow claimants the option of direct access to the courts for the resolution of their claims.

The disputes-resolving system will continue for the most part to require prime contractor sponsorship of subcontractor claims against the Government, but once such sponsorship is gained, subcontractors as well as prime contractors will find the system more flexible and better suited to their needs.

[69] See Part G for additional analysis of subcontractor claims.

Bid Shopping

Concerns about "bid shopping" [70] by prime contractors as well as by higher-tier subcontractors have been expressed by members of Congress and industry. Some agencies have initiated efforts to curtail such practices by special contract clauses. This general subject is covered in Part E.

Conclusions

In many respects the problems of subcontractors in Government procurement are the same as those of prime contractors. In some areas they are exacerbated because the subcontractor must deal with Government as well as prime contractor requirements. Although the Government has a real stake in how subcontracting is done, there are valid reasons why Government should make a distinction between its responsibilities and obligations to prime contractors and subcontractors.

It is neither desirable nor possible for the Government to regiment all of the relationships, practices, and procedures between contractors, their subcontractors, and lower-tier subcontractors, suppliers, and other business entities furnishing supplies and services for Government contract work. However, we believe many of our recommendations would eliminate or minimize the kinds of special problems now experienced by subcontractors in doing Government work. For example, our recommendation to establish a system of Government-wide coordinated procurement regulations would provide the mechanism and authority for:

- Obtaining clarity and consistency in the requirements for flowdown of clauses and obligations to subcontractors
- Standardizing and establishing consistent requirements for the review and approval of subcontracts
- Providing consistent application of cost principles and the cost and pricing data re-

[70] As used herein the term "bid shopping" refers to the efforts to use the lowest bid already received on a subcontract as leverage to gain an even lower bid.

Truth in Negotiations Act

The Truth in Negotiations Act [68] (Public Law 87–653) requires the submission of cost and pricing data by subcontractors under negotiated defense contracts if the price of their subcontracts or any changes or modifications thereto are expected to exceed $100,000. It also requires certification that all such data are accurate, complete, and current. Similar requirements are imposed by FPR on subcontractors performing under civilian agency prime contracts.

Subcontractors are concerned with the implementation of these requirements, and particularly that both contracting agencies and prime contractors often require essentially complete cost and pricing data for subcontracts of less than $10,000. Allegations exist that many prime contractors go beyond the requirements of the act and require subcontractors to indemnify them against loss of profit resulting from defective subcontractor data.

In Part J we recommend the extension of the Truth in Negotiations Act to contracts of all Government agencies and the development of consistent implementation policies. The statute serves a useful purpose, although there are difficulties in the language of the act which cause problems. Overimplementation of reports and certifications under the act are not good substitutes for adequate analysis and negotiation at either the prime contract or subcontract level. These matters should be considered carefully in developing Government-wide policies concerning this statute.

Patents and Technical Data

The problems of subcontractors with respect to patents and technical data are, in general, quite similar to the problems of prime contractors. Our recommendations in these areas are contained in Part I.

Our studies identified some special problems for subcontractors. Some prime contractors apparently require subcontractors to indemnify the Government against infringement. Most agencies permit prime contractors to publish data generated under their contracts, but this right is not always passed on to subcontractors. Although prime contractors may not be specifically required to obtain background patent and data rights from their subcontractors, some do so anyway. Technical data of subcontractors is not always given the same protection accorded technical data of prime contractors and subcontractors complained that some prime contractors refuse to accept technical data with any restrictive legend, even when ASPR would permit use of the "limited rights" legend.

These situations are inequitable and contracting agencies should try, where possible, to avoid ambiguity in subcontract requirements. However, we do not believe it is desirable or feasible to establish across-the-board mandatory requirements regarding prime contractor/subcontractor relationships in patent and data areas. The acceptance of our recommendations for the uniform implementation of the Presidential Statement of Government Patent Policy and for uniform policies and clauses concerning rights in technical data and treatment of data submitted with proposals, publications, and copyrights in data would benefit subcontractors as well as prime contractors.

Quality Assurance

Government requirements for quality assurance create additional problems for subcontractors because agencies impose different quality assurance specifications upon prime contractors. The requirements of these specifications then flow down through the prime contractor-subcontractor chain, often with differences in interpretation at every level. In addition, contractors and subcontractors usually have their own requirements (imposed by company policies) for quality determinations, quality system requirements, and quality rating systems. The result can be the imposition of quality assurance requirements on subcontractors which are greater than those required by Federal specification and a wide diversity of quality assurance programs within a single plant, possibly for similar or identical products. Companies with subcontracts from several

[68] 10 U.S.C. 2306f (1970).

the equipment is truly surplus and is not needed by the Government, the alternative of a negotiated sale is necessary to provide greater assurance that the Government receives a fair price for the equipment. In an advertised sale, any bidder other than the contractor in possession would have to incur the costs of dismantling, shipping, and reassembling the tools elsewhere. This gives the contractor in possession an overwhelming competitive advantage and relieves him of the normal market pressures to bid the full in-place value of the equipment. In such cases, authority to negotiate would allow the Government disposal officer to use competitive negotiations, formal advertising, or both, to produce the highest return for the Government.

SUBCONTRACTING

Subcontractors are an integral part of the Government procurement process and are essential to its effective operation. They perform many of the services and furnish much of the material required to perform prime contracts (direct Government contracts) either under contract to prime contractors or to higher-tier subcontractors. In 1970, an estimated 50 cents out of every DOD prime contract dollar went to subcontractors. An earlier DOD review showed that the top 10 prime contractors subcontracted an average of 54 percent of their contract dollars.[54]

In many procurements, no single prime contractor has the ability or capacity to perform all the technical operations or to produce all the materials required for the end product. The organization needed to develop and produce a major system, for example, requires capabilities in many technical fields, as well as large and diverse physical facilities, which seldom exist within any single organization. The Apollo program provides an example of the degree to which subcontractors are involved in Government procurement activities. Of the more than 20,000 companies included in the program, only a handful were prime contractors; the remainder were subcontractors. In construction, the prime contractor rarely has the manpower skills and equipment needed to perform all of the contract work.[55]

Although the statutes and regulations give little attention to subcontracts, many agency requirements and practices have significant impact on subcontractors. For example, defective specifications, contract changes, and terminations can have very serious implications for subcontractors. Because there is a lack of privity of contract,[56] subcontractors usually cannot seek redress directly from the Government contracting agency. Thus, there is some truth to the observation that the subcontractor is "the forgotten man in Government procurements." [57]

Many subcontract problems result from problems that affect the procurement process as a whole, such as unnecessary statutory restrictions, complex procurement regulations, variation in agency requirements, social and economic program requirements, and profit and risk policies. Subcontractors often are small businesses that have the usual problems of a small business. Since our recommendations address the basic issues in Government procurement, they generally cover subcontractor problems. However, having a dynamic, healthy family of subcontractors is so essential to the Nation's industrial base that it is important to highlight some of their concerns.

Flowdown of Contract Requirements

While subcontractors usually are subject to the same contractual obligations as prime contractors, they often do not receive the same benefits. Many prime contracts provide for advance and progress payments, but subcontracts seldom do. In addition, subcontractors sometimes are required to indemnify a prime contractor in areas where the prime contractor has no similar obligation to the Government.

Although many flowdown problems (prob-

[54] U.S. Comptroller General Report B-169434, *Need to Improve Effectiveness of Contractor Procurement System Reviews*, Aug. 18, 1970, p. 4. Reliable data on the amount of subcontracting by prime contractors with civilian agencies are not available.

[55] See Part E for a more detailed discussion.

[56] Privity of contract is the legal connection or relationship which exists between two or more contracting parties.

[57] U.S. Congress, House, Committee on Government Operations, *Government Procurement and Contracting*, part 7, hearings on H.R. 474, May 1969, p. 1832 (statement of Prof. Harold C. Petrowitz).

required plans, and 461 of the required 667 plans had been approved by December 1972.

Uniformity in Regulations

The bulk of Government property located with contractors is under the control of DOD, NASA, and AEC. As a result, their management in this field is far better developed, and their regulations are much more explicit and detailed, than those of agencies that have a relatively insignificant amount of Government property in the hands of contractors.[45] The ASPR has an entire section (part XIII) devoted to Government property, but the FPR has no similar part. However, the importance of Government property in emerging programs of other agencies is being recognized, and we understand that Government property coverage in FPR is being developed by GSA. In this connection, we refer to our recommendation in Chapter 4, for establishment of a single system of Government-wide coordinated procurement regulations which could include the requirement for uniform regulations on Government property.

Government property is a significant element of a contract and its cost. Accordingly, under the strict requirements of competitive bidding, the invitation for bid (IFB) must include all significant information concerning property to be furnished by the Government.[46] A bid is nonresponsive if it fails to comply with IFB instructions concerning Government property, or if it is conditioned on an authorization to use Government property.[47]

Possessing Government-furnished property is deemed to give an offeror competitive advantage over one who does not possess Government-furnished property. To mitigate any competitive advantage that might arise from the use of Government-furnished property, DOD and NASA policy is to charge rent, or rent equivalents, in evaluating bids and proposals; and, in the case of special tooling and special test equipment, by an evaluation of residual value. Theoretically, an offeror without Government-furnished property can bid on a par with one who possesses such property.[48]

Motivating Contractor Investment in Facilities

Recommendation 35. Provide new incentives to stimulate contractor acquisition and ownership of production facilities, such as giving contractors additional profit in consideration of contractor-owned facilities and, in special cases, by guaranteeing contractors full or substantial amortization of their investment in facilities specially acquired for Government production programs.

Every reasonable effort should be made to minimize Government provision of new production facilities for the performance of Government contracts. To the extent possible, contractors should provide such facilities at their own expense. We recognize that it is unlikely that contractors will always be willing and able to do so. In some cases, the Government will, in its own interest, have to provide facilities because of special mobilization requirements or because of the uncertainty that Government business will continue long enough for the contractor to amortize his investment in full.

Provision of facilities by the Government can and should be minimized by motivating contractors to provide their own facilities. For example, in recognition of the added investment and risk involved in the ownership of facilities,[49] contractors who provide special facilities at their own expense should be permitted to earn a higher profit than is allowed to contractors that use Government facilities. Also, if there is doubt in special cases as to the duration and extent of a Government procurement program that requires new production facilities, consideration could be given to a special cancellation charge, or similar arrangements to reimburse the contractor for any losses in-

[45] William G. Roy, *Government-Furnished Property*, 1972, p. 1.

[46] See ASPR 13-202; 13-305.2(d)(2); 2-201(a)(13)-(14); and 3-501(b)(11)-(12).

[47] 40 Comp. Gen. 701 (1971); 38 Comp. Gen. 508 (1959); Comp. Gen. Dec. B-149486, Sept. 5, 1962. See also Goodwin, *Government-Owned Property*, Government Contracts Monograph No. 6, George Washington University, 1963, p. 5.

[48] ASPR, sec. XIII, part 5; NASA PR, part 13, subpart 5.

[49] DOD allows this recognition under its Weighted Guidelines for Profit, ASPR 3-808.5(e)(1).

tems.[31] The test [32] will explore the feasibility of defining management systems by generic categories rather than by documents per se, the use of planning guides in place of the AMSL, and the use of preprinted application checklists to trace decisions. The test also will correlate and tailor management systems and data requirements to provide an integrated list of required management documentation. Although the test has not been completed, we believe the concepts being explored are sound and offer the potential for materially improving the effectiveness of the acquisition of both management systems and related data products.

DOD PERFORMANCE MEASUREMENT FOR SELECTED ACQUISITION SYSTEMS

Indicative of the costs associated with current management systems are those associated with DOD Instruction 7000.2, Performance Measurement for Selected Acquisition.[33] This directive requires the use of Cost Schedule Control System Criteria (CSCSC) on all defense programs estimated to require more than $25 million in research and development or $100 million in production funds. It is intended as an overall mechanism to monitor contractors' costs and delivery schedules.

We found varying estimates of how much it costs contractors to comply with this one system. Individual contract proposals have included as much as $4 million to establish it. Other estimates varied from 1 to 1 1/2 percent of the contract cost.[34] Some contractors were reluctant to quote figures because they could not segregate this additional cost from changes they were making voluntarily to meet their own needs. Whether such costs are separately identifiable makes little difference since the Government ultimately must pay for them.

The use of management systems by other executive agencies differ widely. NASA has requirements similar to those of DOD. GSA has little need for complex management systems because of the predominant use of fixed-price contracts based on firm specifications. GSA's quality assurance system is basically one of inspection for compliance with specifications, and its financial operations are straightforward. The newer agencies (such as Health, Education, and Welfare; Housing and Urban Development; and Transportation) are still developing management systems as their programs expand. We observed increasing concern by contractors and Government agencies that these newer organizations might be developing management systems which are incompatible with contractor systems or with Government-prescribed systems already in force.

CONCLUSIONS

A major improvement in the procurement process, with attendant cost reductions, could be achieved by more effective control over selection and imposition of management systems on contractors. Although top-level Government officials have recognized the need for improvement in this area and progress has been made, more is needed.

The concepts currently being field tested by the Air Force are sound and should enable DOD to better define and selectively use management systems. This, in turn, should enhance its ability to ensure better integration of systems requirements which are more compatible with contractors' internal operations. We urge that this test be pressed to completion in order that further improvements to the management system program can be implemented at the earliest practical date. Experience with the revised DOD program should be closely analyzed for the feasibility of Government-wide application.

GOVERNMENT PROPERTY

For procurement purposes, Government property is limited to property owned [35] by the

[31] U.S. Department of Defense, Assistant Secretary of Defense (Comptroller) Memorandum for Secretary of the Air Force, *Field Test of Proposed Improvements in the Management Systems Control Program*, Jan. 21, 1972.

[32] *Ibid.*, Encl. 2.

[33] U.S. Department of Defense, DOD Instruction 7000.2, *Performance Measurement for Selected Acquisition*, Apr. 25, 1972.

[34] Note 26, *supra*, p. 257.

[35] In some cases the Government's interest is a leasehold interest rather than full ownership or title.

A Harbridge House study of three prime contracts for the Air Force revealed that deferred delivery could have lowered total data costs by about 27 percent.[24]

PRICING OF DATA

The Government does not have an effective policy for pricing data. Although individual agencies develop cost estimates, there is no program for establishing adequate criteria for identifying data costs.

In quoting the price for data, contractors usually include only the cost of data preparation and reproduction. Thus, their stated prices rarely represent the real costs of the data since such costs often are inextricably mixed with engineering or other program costs.

CONCLUSIONS

While DOD and other agencies urge the procurement of minimum essential data, costly and nonessential data continue to be acquired. The potential for significant savings is evident from the large expenditures for this purpose.

Early requirements for data compound the problem of estimating total program costs, often result in the acquisition of unneeded data, and are of little value in the source-selection process. The acquisition of reprocurement data is inherently imperfect and may not be advantageous to the Government when all factors are considered. Deferring the procurement of data for up to two years after completion of a contract can effectively reduce data costs.

Standards and criteria for realistically estimating costs and benefits of data should be developed on a Government-wide basis. The need for data should be determined on the basis of cost-benefit analyses prepared and retained by the requestor for later validation and review.

[24] Harbridge House, Inc., *A Study of Requirements for Data and Management Control Systems in Three Engineering Development Programs*, Feb. 1970, p. VII–26.

Management Systems

Visibility of contractor operations frequently dictates the use of designated management systems for reporting specified contractual data. No single "management system" [25] exists and, in fact, no one system could produce all of the information and reports needed concerning a complex contract.

The lack of adequate criteria and standards for the imposition of management systems on contractors has resulted in a proliferation of agency systems which frequently require overlapping or duplicative information. These systems often are incompatible with the manner in which the work is performed, thus requiring a contractor to alter his existing systems or to implement separate systems to satisfy Government requirements. The uncoordinated or fragmented specification of management systems results in unnecessary frustration to both Government and industry personnel. More importantly, the excessive costs that may be incurred ultimately are passed on to the Government. As in the case of data acquisition, there is great potential for cost savings by minimizing requirements for management systems.

CRITERIA FOR MANAGEMENT SYSTEMS

Recommendation 34. Establish Government-wide criteria for management systems which are prescribed for use by contractors, including standards for determining mission-essential management data requirements.

GOVERNMENT NEEDS

Government program managers must know the details of their programs and be able to identify actual or potential problems. They are

[25] U.S. Department of Defense, DOD Instruction 7000.6, *Acquisition Management Systems Control*, Mar. 15, 1971, defines a management system as: "A documented method for assisting managers in defining or stating policy, objectives, or requirements; assigning responsibility; controlling utilization of resources; periodically measuring performance; comparing that performance against stated objectives and requirements; and taking appropriate action. A management system may encompass part or all of the above areas, and will require the generation, preparation, maintenance, and/or dissemination of information by a contractor."

about $700 million a year ahead of progress payments. Interest on that amount would be about $56 million. Thus, payment delays will become more critical.

Interim payment vouchers under cost-type contracts are handled in a variety of ways. For example:

- In DOD, all interim vouchers are submitted by the contractor directly to a DCAA audit office for provisional approval and to a disbursing office for payment.
- Under NASA Regulations, the contract auditor transmits provisionally-approved vouchers to the cognizant fiscal or financial management officer and issues NASA Form 456, "Notice of Contract Costs Suspended and/or Disapproved," through the cognizant contracting officer to the contractor.
- In other civilian agencies, there does not seem to be any uniformity in the processing. FPR 1–3.809(10)(c)(i) provides that "when the circumstances warrant, arrangements may be made for the contract auditor to examine contractor's reimbursement vouchers or invoices, and transmit those approved for payment to the cognizant contracting or disbursing officer." Agencies governed by FPR have instituted their own procedures, but these vary among agencies and sometimes within the same agency. The methods range from direct submission of vouchers to the finance office, to four levels of review before payment is made.
- Letters of credit have been used by civilian agencies to make advance payments to universities, other nonprofit organizations, and State and local governments under both contracts and grants using Department of the Treasury Circular 1075.[18] This procedure may be used with for-profit contractors, but we found it was being used only for operating contractors at Government-owned facilities. Department of the Treasury Circular 1075 is being currently revised.

Under DOD and NASA procedures interim (not final) vouchers are processed and paid within 30 days, and generally within two weeks. The audit of these vouchers is mainly clerical. A detailed audit is performed only in exceptional cases. Other agencies, however, required 45 to 90 days and, in some cases, 120 days were needed. One agency had a backlog of 75,000 unpaid purchase orders under $50.

The multiplicity of paying offices also causes delays. DOD has 500 disbursing offices in the United States, 27 of them in metropolitan Washington, D.C.[19] Many contractors must forward their vouchers to several disbursing offices. Some contractors deal with as many as 45 DOD disbursing offices,[20] while any contractor who is also doing business with civil agencies must deal with another group of paying offices.

DOD has been studying the consolidation of its paying offices since 1965.[21] A recommendation to establish a Defense Disbursing Service was not implemented although piecemeal improvements have been made, including the consolidation within DCAS at the 11 regions and a reduction from 13 to 2 Air Force Contract Management Division paying locations. These consolidations have improved efficiency, but they have done little to solve the industry problem.

The multiplicity of paying offices throughout the country is inefficient and costly for both the Government and the contractor. All contract payments for Government agencies should be processed by regional offices using standardized procedures.

CONTRACTOR-FURNISHED INFORMATION: PRODUCT DATA AND MANAGEMENT SYSTEMS

The Government often requires two kinds of information from contractors: product data on the product or service being provided and management information needed to monitor the performance of the contractor. Information requirements are spelled out in the contract. They vary from minimal product data in fixed-price contracts for standard commercial items

[18] FPR 1–30.104–1.

[19] U.S. Department of Defense, *Joint Procurement Management Review of Assigned Contract Administration Responsibilities within the DOD*, Feb. 1969.

[20] Study Group 5, *Final Report*, Feb. 1972, p. 322.

[21] U.S. Department of Defense, *Study of Disbursing Systems in Selected Areas of DOD*, Mar. 1966.

phasize consideration of the total amount of capital required, risk assumed, complexity of work, and management performance.

Recommendation 31. Evaluate procurement negotiation procedures on a continuing basis to compare results obtained in completed contracts with original objectives. This evaluation should take place Government-wide.

Profit is the basic motive of business enterprise and the Government uses this motive to stimulate efficient contract performance. However, Government policies for negotiating profit levels and the cumulative effect of many other procurement policies and practices frequently lessen profit levels so that they no longer motivate.

Requirements for unlimited contractor liability clauses, use of inappropriate contract types, and promotion of price "auctions" among competitors are examples of regulations and practices that have shifted some of the risks of contract performance from the Government to the supplier. Although contractor risks on Government contracts have increased, profits as a percentage of sales have declined. At the same time there is no accepted alternative standard, such as profit as a function of capital employed, to measure profit.

The amount of profit that a contractor should be allowed to earn is controversial, but the principle that reasonable profits are necessary to maintain a viable industry is generally accepted.[5] Companies that depend on Government contracts for business often cannot rely on other customers even when profits from Government contracts are considered too low. The implied option to drop unprofitable Government business is not a viable one for the supplier or for the Government. Highly specialized facilities, personnel, and product lines are factors that may prevent movement away from Government business.

In some extremely unprofitable situations the Government has taken extraordinary measures, such as loan guarantees, to preserve an essential supplier. In one case, the effectiveness of our national defense was at issue. The relationship created by such extraordinary measures is far beyond profit motivations and other free enterprise principles. Nevertheless, most Government suppliers depend on realistic Government profit policies and procurement practices.

In 1963, DOD adopted a formula approach to compute "going-in" (or initially established) profit rates. DOD determined an initial profit by applying a percentage factor to various elements of cost. Percentage factors also were applied to the total cost based on the supplier's assumption of cost risk, his past performance, and his dependence on the Government for financial resources or property. The new policy and procedures were intended to stimulate effective and economical contract performance by the use of the profit motive. A report by DOD in 1971 [6] showed that the use of weighted guidelines increased going-in or initial profit rates, but that final profits were significantly less than those established in the initial agreement.

DOD is revising its method of computing going-in profit objectives to recognize capital employed as a basic element of profit policy,[7] to remove the inequities of a cost-based weighted guidelines policy, and to encourage contractors to invest in facilities and equipment.[8] The new system embodies return on investment (ROI) concepts that have been under study for several years.

NEED FOR UNIFORM PROFIT GUIDELINES

Regardless of the system used for computing going-in profits, they will not be realized unless procurement policies and practices conform to profit objectives. The current emphasis on maximum competition (including discussions with competing offerors that amount to price auctions,[9] inadequate estimating and pricing, and the use of improper contract types) frequently prevents the establishment of realistic going-in profits. Agency controls that prevent

[5] See Part J for discussion and recommendation regarding the Renegotiation Act.

[6] U.S. Department of Defense, *Profit Rates on Negotiated Prime Contracts, Fiscal Year 1972.*

[7] U.S. Department of Defense, ASPR Case No. 70–41.

[8] See "Government Property," *infra*, for discussion and recommendations pertaining to disposal of Government property and facilities.

[9] See discussion in Chapter 3.

Negotiated Agreements on Price

Success in negotiating equitable price agreements requires, among other things, the ability to make sound judgments based on the amount, kind, and quality of available information, artfulness in bargaining, and time. If there is adequate price competition, the principal task is to determine which of several competing proposals will satisfy a requirement and be delivered on time for the lowest *total* cost. Further detailed price and cost analyses are usually unnecessary.

In noncompetitive situations, the objective of proposal analysis and negotiations is to achieve a price equivalent to one that would be obtained in open competition. Most offerors can be expected to propose prices they believe will afford them as much protection or profit as possible. The offeror first estimates what he believes will be the cost to perform, considering all uncertainties. He then presents the facts that best support his price proposal. The buyer, on the other hand, counters with an offer to buy at a price as low as he thinks the offeror can be persuaded to accept.

Techniques for the evaluation of proposals include (1) price analysis and (2) cost analysis.

Price analysis relates the proposed prices to the prices paid for an earlier procurement of comparable items and to current price trends in the competitive marketplace.

Cost analysis is often used to establish the basis for negotiating contract prices if price competition is inadequate or if the product or service has never been marketed. This type of analysis involves the detailed evaluation of the seller's proposal, including his assumptions, cost estimates, backup cost information, and other relevant data. Thus, cost analysis is an important tool in the negotiation of price agreements, and advancement in pricing techniques can be expected from refinements in its use.

Cost Principles

Recommendation 28. Establish Government-wide principles on allowability of costs.

Both estimated and actual costs are used in pricing various types of negotiated contracts or modifications to contracts. Cost principles are used to help judge whether or not costs are reasonable and allowable.

In cost analysis, cost principles help to identify various cost elements that can then be evaluated to determine their allowability. Factors considered in the evaluation are reasonableness, allocability, application of generally accepted accounting principles and practices appropriate to the circumstances, and limitations in the contract as to type or amount of cost.

Cost principles in the Armed Services Procurement Regulation (ASPR), Federal Procurement Regulations (FPR), and other agency regulations prescribe rules for the allowance of costs in the negotiation and payment for cost-reimbursement contracts. For example, these regulations forbid the recovery of interest, entertainment expenses, donations, and certain advertising costs. They also require use of cost principles in the pricing of fixed-price contracts and contract modifications whenever cost analysis is performed.

The tests of reasonableness and allocability are matters of interpretation, judgment, and agency policy and are the source of many disputes between Government and industry. The definitions of allocability in ASPR and FPR are identical.[1] The FPR definition is not mandatory for all civilian agencies. The Atomic Energy Commission (AEC), which performs most of its work in Government-owned, contractor-operated (GOCO) plants, has its own definition of allocability.[2] The difference is that AEC does not include the provision of the ASPR and FPR that a cost is allocable if it "is necessary to the overall operation of the business, although a direct relationship to any particular cost objective cannot be shown."[3] This variance has led to a difference in recognition of independent research and development (IR&D) and bid and proposal (B&P) costs.

The Department of Defense (DOD) Contrac-

[1] ASPR 15-201.4; FPR 1-15.201-4.

[2] U.S. Atomic Energy Commission, Office of the Controller, memorandum to all field offices, *Contract Cost Reimbursement Principles*, Mar. 2, 1971.

[3] Note 1, *supra*.

thorization process deals with annual increments of work—rather than with the entire program or integral segments of it—the more the two sets of hearings tend to concentrate on the same short-range questions and the less attention is given to overall objectives and longer-range implications. Agencies for which annual authorization is required must present their programs to four different congressional committees. They find that the presentations to both the authorizing and appropriation committees tend to concentrate on the same questions and issues and revolve around the dollar estimates for the budget year rather than providing a basis for evaluating basic objectives.[15]

The congressional committee having jurisdiction has a basic responsibility for what is to be undertaken and for such oversight as is needed to reassure Congress on such matters as program integrity, control, and methods of accomplishing the agreed-upon objectives. However, accomplishing these tasks need not depend on having annual expiration dates for the authorizations. Such alternatives as staggering the expiration dates for different programs but holding periodic program reviews could provide the authorizing committees with full control over these matters, without imposing the arbitrary limitations that result from having authorizations expire annually.[16]

[15] Interestingly, the check-and-balance system represented by the congressional rules requiring authorizing legislation before funds can be appropriated seems to have originated as an answer to late appropriations earlier in our history:

> The roots of this procedural distinction in the House of Representatives were planted by John Quincy Adams, who served in the House after he left the White House. He complained that appropriation bills had tacked on to them all sorts of legislative matters (called 'riders') which gave rise to dissensions and protracted debate in the House, "with the consequence that appropriation bills dragged their slow length along through half a year before they finally passed." His proposal was to require that appropriation bills be reported within 30 days after the commencement of each session.
>
> From early debates on the subject there resulted a House rule which requires that before an appropriation is made, the expenditure first must be authorized by law. Thus, there is set up a dual legislative process. Authorization or policy is one enactment; funds to carry it out is another and separate enactment. (Herbert Roback, *Congressional Interest in Weapons Acquisition*, a paper read at the Program Managers Course, Army Logistics Management Center, Fort Lee, Va., July 1962, pp. 14–15.)

[16] For example, the Legislative Reorganization Act of 1970, as implemented under the present House Rule XI, 29, requires the committees to conduct a review and study on a continuing basis of appropriation, administration, and execution of their jurisdictional laws. Each committee, whether House or Senate, is required to submit a biennial report on its review and study activities. There is no need, therefore, to regard the annual authorization as the only means to enable and ensure periodic program evaluations by the committees.

Also, it is imperative to distinguish between a continuing long-term activity and a one-time major project. In the latter case, there is seldom good reason for enacting authorizing legislation which does not permit completion of a usable product or achievement of a given end result. Thus, authorizations should treat either the project in full, or, at least, usable individual segments in a sequence which would produce usable results even though the remaining segments are not authorized. If such a project or integral segment extends over several years, the authorizing committee has other means, such as annual reports, and program reviews, for maintaining control over the project.

In the case of continuing activities, authorizations enacted a full year in advance (that is, in the legislative session prior to the session at which the appropriation would be considered) have two very distinct advantages. First, continuity of the program is maintained since such a system allows ample time for agencies to plan program adjustments desired by Congress, on a basis that causes far less disruption than the present system. Second, such a system eliminates the delay in considering appropriation bills because of a lack of authorization and makes it possible for the budget submissions to be much clearer, since the major elements of the program have been decided when the budget is being prepared.

In our opinion, adoption of suggestions along these lines would significantly benefit the procurement process; planning for procurement is best accomplished in terms of the natural phases of the work at hand. For many activities, these phases bear little or no relationship to a fixed period on the calendar.

Change Dates of the Fiscal Year

Under the fiscal year system, Congress receives, in January, the budget for the year beginning the following July. This leaves about six months for the congressional review and approval process.

Under one proposal to change to a calendar year, Congress would receive the budget in January for the year beginning the following January. This would, on the surface, appear to

associated startup problems and excessive administrative costs.

3. [Our company] has found it necessary to take excessive risks by spending its own monies in advance of contract receipt in order to assure meeting contract delivery schedule requirements.

The continuing resolutions passed by Congress only partially alleviate the impact. When, as often happens, the previous fiscal year's budget contains funds for only the initiation of a project or for an ascending rate of activity, the rate attained at the end of the fiscal year cannot be maintained while adhering to the previous year's overall funding level. The result is a stretchout or a complete stoppage of the project.

Continuing resolutions are interim actions, frequently on a month-to-month basis. Like any method of piecemeal or incremental funding, they are costly to administer. They require a repetitive expenditure of time and effort to process the limited funding actions and additionally, and perhaps more importantly, are completed only by expending efforts that should be devoted to other activities (for example, monitoring and directing the work itself). A DOD study describes some of the costly administrative workload resulting from incremental funding as a "paper mill," involving preparation and execution of multiple supplemental agreements or change orders for each contract in a program. In the office studied, the investigators found programs with as many as 60 contracts and cited examples of single contracts having to be modified six or more times. The investigating team concluded:

> . . . the Air Force pays dearly for this method of contracting, not only is procurement effort diverted from its primary mission, but also in the intangibles of increased risk and program uncertainty, higher prices for long leadtime items, and other contract and overhead costs . . . These funding problems make the acquisition process most difficult . . . Furthermore, funding problems that lead to stretchouts (as evidenced in the Titan III CPIF contracts) vitiate and destroy the original and meaningful premises upon which the contract incentives were based. Subsequent attempts to preserve contract incentives in an environment of stretchouts, incremental funding and resultant change orders, become exercises in futility.[9]

These examples cover only some of the adverse effects of delayed funding. Other effects include:

- Costly temporary expedients; for example, using higher-priced rentals (all kinds of equipment or space) because money to buy or execute long-term leases is temporarily delayed.
- Purchasing routine supplies more frequently and in smaller quantities (with added costs resulting from loss of quantity discounts and higher transportation costs).
- Inability to exercise options or complete award procedures on a procurement prior to the expiration date of the option or bid (necessitating readvertising and analysis of new proposals).
- Compressing time periods allowed for preparation of bids and proposals and leadtimes to start work or make deliveries in an effort to recoup part of the time lost because of the funding delay.

All of these practices are expensive and wasteful when considered in the light of the hundred of thousands of actions [10] to which they apply. The cumulative effect of even a small added cost on each would bring the dollar total to a very high level.

For the same reasons given by the Director of the Office of Management and Budget and the Legislative Reference Service,[11] we cannot accurately estimate the total impact of late appropriations on the procurement process: there are too many variables and their effect is spread over hundreds of thousands of individual procurements. It is impractical and too costly to design a reporting system that would enable one to add them up and obtain a total. Despite this inability to estimate the total ac-

[9] U.S. Department of Defense, Procurement Management Review Program, *A Review of Procurement Operations in the Space and Missile Systems Organization (SAMSO)*, Dec. 1968.

[10] There are nearly 16 million separate procurement transactions annually; since appropriation delays averaged approximately 90 days per year per appropriation bill (see *Congressional Record*, Apr. 13, 1972, pp. S6118–S6119), the number of transactions on which funding restrictions might produce waste and inefficiency could run as high as 4 million per year.

[11] See *Congressional Record*, Apr. 13, 1971, pp. S6116–S6117. Both of these agencies had been asked to provide estimates of the total cost of late appropriations, but neither was able to do so. Some of their examples indicate clearly the impact on other aspects of Government activity—Federal, State, and local.

ecutive branch proposes some viable alternative. Finally, in an area that so intimately involves the interrelationships between the legislative and executive branches and so greatly affects the operational capability of the executive branch, Congress seldom legislates entirely on its own initiative. The problem of late appropriations extends beyond Federal operations; through grant programs, it also extends to State and local government operations, including most school districts. As summarized by the late Senator Ellender:

> I think this to be a very important subject and one worthy of attention by Congress and the executive branch. Over the last 20 years, it seems that a trend or pattern of procedure gradually developed whereby long delays in the approval of appropriation acts became the accepted order of the day. The pattern was marked by an increasing number of appropriation acts which, in each session of Congress, were not approved at the beginning of the fiscal year. The trend became more pronounced during the 1960's. Many Federal agencies have been forced to operate on continuing resolutions for long periods of time during each fiscal year of the last 10 or 12.
>
> There is no question that this procedure is not in the interest of good government under our present system of financing. There can be little doubt that the question marks raised by long and unpredictable delays in the appropriations process are answered by considerable waste and inefficiency in the Government's operation.[2]

Although late appropriations have tended to become the rule rather than the exception, there is no easy way to adjust to them. Invariably, a certain number of appropriations are passed long after the beginning of the fiscal year, but since it cannot be predicted which appropriations will be late and how late they will be, there is no basis for effectively adjusting planning to meet the problem.

An ongoing function that remains unfunded at the beginning of a fiscal year is supported by a series of "continuing resolutions" that keep the function alive until the appropriation is finally passed. The continuing resolutions permit the agencies to expend funds at one of three rates based on the legislative status at the time the resolution is enacted:

- Where neither chamber has yet acted on the appropriation request, the current rate (i.e., the rate for the prior year to that for which the budget applies) or the level of the new budget, whichever is lower.
- Where both chambers have passed different versions of the bill, the lower of the two rates approved.
- Where one chamber only has acted, the rate approved by that chamber or the current rate, whichever is lower.

Once a continuing resolution has been passed, later action by either one or both chambers does not constitute permission to change the rate of expenditure unless a new continuing resolution is passed by both chambers subsequent to such action.

Although continuing resolutions permit agencies to continue their ongoing functions, they do not accommodate evolving programs nor do they reflect reduced requirements that may result from unplanned curtailments in an appropriation act. Finally, continuing resolutions do not support any new operations.

The use of continuing resolutions tends to reduce the ability of Congress to expand, contract, or eliminate programs, since a substantial portion of the fiscal year elapses before final congressional action is taken. In a statement before the Joint Committee on Congressional Operations, the Assistant Secretary of Defense (Comptroller) discussed the impact of late appropriations on changing programs:

> In addition to the Department's problems, we believe that present arrangements pose serious problems for the Congress. One result of the extensive delays in Defense bills is that, when Congressional decision points are reached, the ability to change Defense programs has been sharply diminished by the passage of time. The regular bills, enacted in the middle of the fiscal year, are subject to timing considerations. By that time, the Department has been operating for six months based on the continuing resolutions. Plans and work schedules are in being covering at least the next several months—this

[2] *Congressional Record*, Apr. 13, 1972, p. S6116.

GOVERNMENT-OWNED, CONTRACTOR-OPERATED FACILITIES

The Government sometimes contracts for a product or for management and technological skills (usually from industry) while owning the facilities used to produce the product or service. Such facilities are known as Government-owned, contractor-operated (GOCO) facilities and are neither pure in-house nor pure private sector activities. GOCOs are specifically excluded from Circular A–76, but are subject to BOB Circular A–49, "Use of Management and Operating Contracts," February 25, 1959.

GOCO facilities existed prior to World War II and DOD is still one of the largest owners of this type of resource.[26] GOCO facilities were established either to produce items that lacked commercial demand (for example, ammunition), or to provide services or facilities (for example, specialized testing facilities) too expensive for a single company to offer. DOD currently has 84 GOCO facilities, all operated by industrial firms.[27]

AEC is the other large user of GOCO facilities. The Atomic Energy Act provides for Government ownership of facilities for the production of nuclear materials and authorizes AEC to make contracts for the operation of such facilities.[28] AEC has a different view of its GOCO operations than DOD and calls them "management contractors." The use of "management contractors" to operate AEC facilities is expressly authorized.[29] This concept began with the World War II project of the Manhattan Engineer District of the War Department, which combined the resources of industry and the academic community to successfully develop nuclear weapons. The participating organizations operated under flexible cost-plus-a-fixed-fee (CPFF) contracts and the spirit of cooperation achieved is not the ordinary buyer-seller relationship.

The same spirit of cooperation and mutual interest exists today between the AEC and its 40 management contractors. They operate 63 facilities employing 90,464 persons.[30] Major AEC GOCO plants represent a capital investment of $9.3 billion[31] and annual operating costs of $2.5 billion.[32] They operate, for example, the uranium enrichment complex under the Oak Ridge Office; the production reactors and separation facilities at Richland, Washington, and in South Carolina; the AEC National Laboratories and other AEC-owned research facilities; and the AEC weapons production and test facilities. They provide miscellaneous construction services and operate many supporting facilities required for primary programs. An AEC management contract differs from other GOCO activities in that the AEC approach is oriented toward a long-term relationship and the accomplishment of an agency mission.[33]

Commercial firms that have developed goods or services that compete with GOCO goods or services point out that while the original need was generally legitimate, there is no mechanism to discontinue their operations when the private sector can fulfill the need. They feel that a GOCO is more of an in-house activity than an industry operation since the contractor has virtually no risk or investment. These critics claim that a GOCO has a significant cost advantage over a competing industrial firm. To correct this situation, the Office of Federal Procurement Policy should consider strengthening Circular A–49 by supplying guidelines on the make-or-buy decision. The information presented at the hearings that established the Commission[34] and a recent GAO study[35] supply pertinent background data.

Some GOCOs could be useful to agencies other than the sponsoring agency. For example, the GOCO test complex of the Arnold Engineering Development Center (AEDC) has been made available to all potential users. Other facilities of this type should be industrially funded and made available to all potential users.

[26] Commission Studies Program.

[27] From annual reports of the military services in compliance with DOD Instruction 4155.5, *Inspection of Departmental Industrial and National Industrial Reserve Plants.*

[28] 42 U.S.C. 2061 (1970).

[29] S. Rept. 1211, 79th Cong., 2d sess., 1946.

[30] *Annual Report to the Congress of the Atomic Energy Commission for 1971,* Jan. 1972, p. 193.

[31] *Ibid.,* p. 234.

[32] *Ibid.,* p. 227.

[33] O. S. Hiestand, Jr., and M. J. Florsheim, "The AEC Management Contract Concept," *Federal Bar Journal,* vol. 29, no. 2, spring 1969.

[34] U.S. Congress, House, Committee on Government Operations, *Government Procurement and Contracting,* hearings before a subcommittee of the Committee on Government Operations, on H.R. 474, "To Establish a Commission on Government Procurement," 91st Cong., 1st sess., 1969, part 2, p. 445 ff.

[35] U.S. Comptroller General, Report B–164105, *Procurement of Certain Products from Private Industry by the Atomic Energy Commission,* Oct. 22, 1969.

as a last resort consider in-house performance in comparison to the private sector.

Throughout our history there has been a general policy of reliance on the private sector as a source for most of the goods and services needed by the Government. As our social and economic system has become more complex and more specialized, there has been more and more need for Federal employment. This substantially larger Federal work force has led to increased Federal performance of duties that could just as easily be performed by private organizations.

It is clear that many management functions must be performed by Government employees. The Government must enhance the wealth-creation potential and performance of the Nation, provide for interstate and international commerce, ensure the national defense, perpetuate the integrity of the monetary exchange system, collect taxes needed to pay Federal expenses, and provide for other essential programs. There is always the strong temptation, however, for Federal employees to become deeply involved as participants in accomplishment, and higher rates of growth seem to be somewhat proportional to the size of Government.

Here again, it must be recognized that some Government programs have been carried out entirely with Government employees. Sometimes this is simply because a proposed program did not match any experience available in the private sector and sometimes because the program seemed to be better served by direct Government employment. Perhaps the best example of the latter case is national defense.

There is, however, a large and increasing number of services and products provided through Federal employment that are either readily available from the private sector or are so similar to those already available that the Federal "make or buy" decision has used a different basis than simple unavailability or inappropriateness of the private source.

The public policy manifested in Circular A–76 provides in a general statement for Government reliance on the private sector, but contains so many exceptions that the policy has been ineffective. One exception is that a Federal commercial or industrial activity may be authorized when "procurement from a commercial source will result in higher cost to the Government." It further specifies that cost comparisons will be based on the total (or contract) cost of the commercial alternative and on an incremental (or marginal) estimate for Federal cost. This provision tends to maximize conflict.

Many of the difficulties experienced with procurement through the use of Federal employment are inherent in our public employment process. For example, all classes of Government employees have substantially more stability in their employment than those in the private sector. Much of this stability is provided through the Civil Service law in order to remove the questions of tenure and promotion from the instabilities of political fortunes. Thus, the rules of employment for the civil servant place heavy emphasis on longevity and numbers of people supervised as qualifications for promotion and increased responsibility. (The procurement work force is discussed in greater detail in Chapter 5.) These rules very effectively serve the purpose for which they were intended, but they also provide a strong motivation for senior employees to increase the size and scope of their organizations even if it is at the expense of competing with the private sector. Once an activity is under way, it is extremely difficult to curtail or terminate it.

Industrial and commercial organizations, on the other hand, are very accustomed to the ebb and flow of people as the needs for their products and services come and go. This is especially true in industries that normally serve the Government, since the cancellation or completion of a contract frequently requires the discharge or deployment of hundreds and sometimes thousands of people within very short periods of time.

This difference between the two methods of employment is perhaps the best reason for avoiding cost comparisons when deciding to "make or buy." In the first place, it is almost impossible to make a true cost comparison. For any commercial or industrial organization it is absolutely necessary that the payment for their products and services covers all of their costs. The so-called "incremental costing analogy" sometimes used to support the method of Federal cost determination is purely an analytical tool for an industrial organization to apply

Government (by contract, by procurement from other Government agencies, or from DOD commercial or industrial activities).[18]

It is generally agreed by Government and industry spokesmen that the method used in determining the cost of Government activities in some cases may bias cost comparisons in favor of in-house performance. In some situations, this bias can defeat the policy of Government reliance on private enterprise.

In criticizing the use of incremental costing, it is necessary to look at the alternative: fully-allocated costing of Government activities. One major problem in using the fully-allocated approach is that Government accounting records are not kept on a basis that readily permits identification and allocation of all indirect costs and depreciation, particularly costs covered by the budgets of different agencies.

Despite this problem, there have been examples which indicate that fully-allocated costing might be feasible. The AEC seems to have little difficulty in making fully-allocated cost studies of its activities. GAO, in specific studies such as the charges to the Communications Satellite Corporation [19] for launching satellites, has been able to identify indirect costs and depreciation that should have been allocated to those tasks by NASA and the Air Force. In similar studies of user charges by the National Bureau of Standards,[20] the Food and Drug Administration,[21] and the Immigration and Naturalization Service,[22] GAO was also able to point out indirect and administrative costs which were properly allocable to the services being provided.

Some DOD activities, such as shipyards and support facilities that serve different activities, use an industrial fund accounting system.[23] While this system does not provide for complete, fully-allocated costing, it does involve allocation of many elements of indirect cost.

Criteria should be established for making cost comparisons for commercial and industrial activities on either an incremental or fully-allocated cost basis. Our recommended guidelines will have to be supplemented and modified by the Office of Federal Procurement Policy if they are to be effectively administered.

New Starts

Recommendation 25. Increase the BOB Circular A–76 threshold for new starts to $100,000 for either new capital investment or annual operating cost.

Recommendation 26. Increase the minimum cost differential for new starts to justify performing work in-house from the 10 percent presently prescribed to a maximum of 25 percent. (Of this figure, 10 percent would be a fixed margin in support of the general policy of reliance on private enterprise. A flexible margin of up to 15 percent would be added to cover a judgment as to the possibilities of obsolescence of new or additional capital investment; uncertainties regarding maintenance and production cost, prices, and future Government requirements; and the amount of State and local taxes foregone.) New starts which require little or no capital investment would possibly justify only a 5-percent flexible margin while new starts which require a substantial capital investment would justify a 15-percent flexible margin, especially if the new starts were high-risk ventures.[24]

A "new start" is currently defined by Circular A–76 to mean either (a) a new Government commercial or industrial activity involving additional capital investment of $25,000 or more or annual operating costs of $50,000 or more; or (b) an expansion or renovation of an existing facility with dollar thresholds double the amounts listed for new activities. Circular A–76 provides for reviews of "new starts" after 18 months to determine whether continuance of in-house activities are warranted, and for reviews after that at least once every three years.

[18] U.S. Department of Defense, DOD Directive 4100.15, *Commercial or Industrial Activities*, July 8, 1971.

[19] U.S. General Accounting Office, Report B–168707, *Large Costs to the Government Not Recovered for Launch Services Provided to the Communications Satellite Corporation*, Oct. 8, 1971.

[20] U.S. General Accounting Office, Report B–115378, *Inequitable Charges for Calibration Services; Need for Accounting Improvements at National Bureau of Standards*, June 18, 1970.

[21] U.S. General Accounting Office, Report B–164301(2), *Improvements Suggested in Accounting Methods Used in Establishing Fees for Reimbursable Testing and Related Services*, Dec. 12, 1969.

[22] U.S. General Accounting Office, Report B–125051, *Need to Revise Fees for Services Provided by the Immigration and Naturalization Service and United States Marshals*, Oct. 7, 1969.

[23] U.S. Department of Defense, DOD Directive 7410.4, *Regulations Governing Industrial Fund Operations*, Jan. 2, 1970.

[24] See dissenting position, *infra*.

TABLE 1. COMMERCIAL AND INDUSTRIAL ACTIVITIES IN THE EXECUTIVE BRANCH

Agency	*No. of activities*	*Capital investment*	*Annual operating cost*
		(Thousands of dollars)	
Department of Agriculture	70	157,845	27,536
Atomic Energy Commission	4	14,173	9,124
Civil Service Commission	1	116	287
Department of Commerce	29	7,971	17,124
Department of Defense	6,556	9,011,134	5,483,700
General Services Administration	10,717	78,365	194,399
Department of Health, Education, and Welfare	55	13,983	27,952
Department of the Interior	720	334,618	63,922
Department of Labor	5	510	5,624
National Aeronautics and Space Administration	99	104,300	42,500
Panama Canal Company	11	43,690	47,578
Department of State	5	16	577
Department of Transportation	27	53,827	61,196
Department of the Treasury	31	43,634	376,525
Tennessee Valley Authority	19	54,882	450,794
United States Information Agency	3	4,247	1,403
Veterans Administration	264	57,386	24,418
Total	18,616	9,980,697	6,834,659

Source: Letter from the Office of Management and Budget, Procurement and Property Management Branch, to the Commission, Dec. 13, 1971.

Although the military departments should have completed the first three-year cycle of reviews by June 30, 1968 they were all far behind schedule. As of June 1971, many activities had not been reviewed for the first time.

The few cost studies made showed that savings could be realized by converting activities either to in-house or to contract performance. GAO believes that these studies are indicative of significant potential savings available in activities not yet reviewed.

DOD has included in its inventory and three-year review certain activities already being performed under contract. DOD regulations strongly suggest that decisions to contract out new activities and those being performed in-house be supported by cost comparisons to ensure that the most economical source is adopted. Since the philosophy of Circular A–76 favors contracting over in-house performance, it would appear desirable for DOD to maintain records of the costs incurred in making these studies so that these costs can be compared with the benefits of the program.

GAO reviewed the program at six military installations. Because there were no definitive guidelines as to the commercial and industrial activities to be included, some significant activities were omitted from the inventories of such activities. These omissions could result in failure to provide services in the best or most economical way. Individual activities which should be reviewed separately were combined in broad aggregations; such as "aircraft depot maintenance."

The Army installations visited had started new in-house activities which had not been subjected to the analysis required under Circular A–76 nor included in the inventory as required. Installation officials were not aware of the requirement for new-start approval. The military departments should have a system to ensure that new starts are submitted for approval.

Incorporation of GAO findings in this report should not be construed to mean that DOD has been less dedicated than other agencies in the implementation of the circular. We found nothing to indicate that any other agency had devoted as much time and effort as had DOD in making the required inventories of commercial and industrial activities.

We believe that a new approach and stronger implementation of the program is needed to achieve consistent and timely Government-wide application of the policies set forth in Circular A–76. A specified method for imple-

with particular reference to military and related activities. During the 83rd Congress, the same subcommittee made an exhaustive study of all commercial and industrial activities of the Government that compete with private business. The subcommittee reported [3] that the number of such activities conducted by Government agencies posed a real threat to private industry and imperiled the tax structure. It recommended that "a permanent, vigorous, preventive and corrective program be inaugurated," which "should start from the Executive Office of the President with criteria set for general guidance of all agencies."

In 1949, the Senate Committee on Government Operations considered a House-passed bill and a companion Senate bill to terminate, to the maximum extent compatible with national security and the public interest, Government activities that compete with private industry. After hearings on these bills,[4] the House-passed bill was reported favorably in August 1954. However, action on the measure was postponed.

The First Hoover Commission reported the need for a thorough study of the extent to which the Government was competing with private enterprise. Following an examination by the Senate Committee on Government Operations of such competition of various facets, the Congress established the Second Hoover Commission to study and make recommendations for "eliminating nonessential services, functions, and activities which are competitive with private enterprise. . . ."

The Second Hoover Commission report on "Business Enterprise," filed in 1955, presented 22 recommendations designed to eliminate or decrease Government activities competing with private enterprise and urged the use of contract services to perform various activities being conducted by Government agencies.

In 1955, the Chairman of the Senate Committee on Government Operations introduced a bill [5] to establish a policy on activities of the Government that compete with private enterprise. While this bill was pending before the committee, the Director of BOB advised that the executive branch had a program underway for the review of activities so the committee postponed further action.

Between 1953 and 1960 the Senate Select Committee on Small Business conducted a continuing review of Government activities that were competing with small businesses and other private enterprise. Hearings on this subject were held in 1953, 1955, 1957, and 1960.

In 1964, the Subcommittee on Manpower Utilization of the House Committee on Post Office and Civil Service held hearings on the "Control of Labor Costs in the Department of Defense." The hearings were devoted mainly to three types of contract operations: "think factories," services formerly provided by in-house personnel, and contractor personnel working alongside and under the supervision of Government employees.

Later developments appear to have been strongly influenced by:

- Hearings and reports [6] by the Manpower Subcommittee of the House Committee on Post Office and Civil Service, concerning the effect that contracting for services was having on career Government employees.
- A report from the Comptroller General in March 1964,[7] concluding that use of contract personnel by the Air Force at a base in Japan was more costly than using Civil Service employees.
- An opinion from the General Counsel of the Civil Service Commission,[8] based on the Air Force contract in Japan, holding that contracts under which Government personnel directly supervise contract employees are illegal.
- A DOD study [9] of contract support services, completed in 1965, concluding that many service contracts were in conflict with Civil Service laws and were also more costly than in-house performance.

In 1967, the Senate Committee on Govern-

[3] U.S. Congress, House, Committee on Government Operations, H. Rept. 1197, 83d Cong., 1st sess., 1953.

[4] U.S. Congress, Senate, Committee on Government Operations, S. Rept. 2382, 83d Cong., 1st sess., 1953.

[5] U.S. Congress, Senate, Commission on Government Operations, S. Rept. 1003, 84th Cong., 1st sess., 1955.

[6] U.S. Congress, House, Committee on Post Office and Civil Service, report by the Subcommittee on Manpower, H. Rept. 129, 89th Cong., 1st sess., 1965.

[7] U.S. Comptroller General, Report B–146823, *Excessive Costs Incurred in Using Contractor-Furnished Personnel Instead of Government Personnel by the Pacific Region of the Ground Electronics Equipment Installation Engineering Agency, Air Force Logistics Command.*

[8] Letter from the U.S. Civil Service Commission, Office of the General Counsel, to the U.S. General Accounting Office, Feb. 12, 1965.

[9] U.S. Department of Defense, *Contract Support Service Project*, Mar. 1965.

quired by law, when the position requires skills and knowledge acquired primarily through military training, and when experience in the position is essential to enable personnel to assume responsibilities necessary to combat-related support and career development.

- Civilian personnel normally will be assigned to management positions when the special skills required are found in the civilian economy and continuity of management can be provided better by civilians. (Proper civilian career development will be essential in such determinations.)
- Maximum use of personnel will be effected, and no more than one person will be assigned to perform duties which can be effectively performed individually. The line of authority and supervision in support activities need not be military. Supervisory authority may be exercised in support activities by either civilian or military personnel. The exercise of supervisory authority by civilian personnel over military personnel does not conflict with exercise of authority in the military establishment.

Two unique situations creating management problems result from this dual system:

- Top-level assignments are alleged to be made to military personnel without due regard to the effect on the procurement activity.
- Rotation policies for military personnel are incompatible with their assignment to key management positions of long-term major system development and production projects.

GAO recently found less than full application of DOD's policy [28]—and this report is dated 15 years after the policy directive was first issued. In addition, we found a specific example, in writing, of direction contrary to the stated assignment policy:

> . . . the optimum military/civilian mix is determined on a building block basis. *First, the military requirements are determined, then from the remainder, the civilian needs allocated* and finally, contract services are utilized (where appropriate).
>
> Following the building block approach, positions and tasks are first examined to determine if it is essential to man the positions with military. Development of the military force structure includes consideration of military career progression requirements. *After establishing the minimum military essential force, the remainder of the workload is allocated to civilian manning (in the case of the procurement function). The civilian procurement workload manning level which remains may or may not be susceptible to an ideal career progression configuration for civilians.*[29] [Italics supplied.]

In his report, the Comptroller General recommends that the Secretary of Defense direct each military service to review all types of positions except those in deployable combat or combat-support units to determine whether:

- The position must be filled by military personnel.
- The position could be filled by either military personnel or civilians and the circumstances in which the position would be used for military personnel, such as rotation or for career development.
- The position need not be filled by a military incumbent and should be filled by a civilian.

The DOD policy needs reemphasis and enforcement. There must be educational and training requirements as well as career planning for both military and civilian personnel. Duplicate positions must be eliminated. Once military personnel are assigned to procurement management tasks involving an important time commitment, arbitrary rotation inconsistent with that commitment must be stopped. Where military personnel are used, management continuity should be provided by stabilizing assignments. Above all, military and civilian forces must be integrated so that the best man for the procurement job gets the assignment.

Efficiency and economy would be enhanced by (1) integrating, within DOD, the civilian

[28] U.S. Comptroller General, Report B–146890, *Extensive Use of Military Personnel in Civilian-Type Positions, Department of Defense*, Mar. 20, 1972.

[29] Air Force Procurement Career Development Action Plan, Project COPPER CAP, Dec. 1970, p. 10.

Each DOD school, except the Defense System Management School and the Industrial College of the Armed Forces, is an organizational element of one of the armed services.

In the area of major systems management, the Air Force Institute of Technology (AFIT) has a masters program in system management in the School of Engineering at Wright-Patterson Air Force Base; the Navy has recently established a Weapons Systems Acquisition Curriculum at the Naval Post Graduate Center; and DOD opened the Defense Systems Management School (DSMS) in July 1971.

DOD has a number of continuing procurement career development programs, primarily the Continuing Education Division, School of Systems and Logistics, AFIT; the Army Logistics Management Center (ALMC); and the Army Management Education Training Agency (AMETA). The Air Force also conducts procurement courses at the Lowry Technical Training Center, Denver, Colorado, and the Defense Contract Audit Agency (DCAA) sponsors the Defense Contract Audit Institute in Memphis, Tennessee.

Procurement courses are also included in the educational programs of three civilian agencies: The Federal Aviation Administration operates the Federal Aviation Administration Academy at Oklahoma City, Oklahoma; the U.S. Department of Agriculture conducts several procurement courses at the U.S. Department of Agriculture Graduate School in Washington, D.C.; and the General Services Administration conducts procurement courses both in Washington, D.C., and at various locations around the country.

There are no schools currently in existence, Government or civilian, dedicated to the upgrading of procurement education throughout the Government. All of the schools mentioned above have broader missions involving the teaching of courses other than procurement. Hence, it is difficult to single out any one functional element in any coordinated plan to orient faculty and teaching programs to be responsive to the special needs of procurement.

Moreover, we found that the existing fragmentation of procurement training has resulted in:

- Redundant training effort (for example, three separate programs in systems management and two basic procurement courses)
- Voids in the curriculum, particularly with respect to the management level
- A problem with the currency of some course offerings.

Federal Procurement Institute

There is general agreement among procurement management personnel on the need for a national institute or academy responsible for research and education in the field of Government procurement and charged with the general advancement of that field. Such an institute could serve to develop an elite and mobile procurement work force.

We strongly urge the establishment of a Federal Procurement Institute [24] responsible for the following:

In the Field of Research:

- Conduct and sponsor research in procurement policy and procedure. (This function would encompass the concept of the "Procurement Research Laboratory" as discussed in House Report 91–1719, Dec. 10, 1970).
- Establish and maintain a central repository and research library in the field of Federal procurement and grants.[25]
- Offer a program, similar to Sloan Fellowships, for Federal and industry personnel. This program would provide a period of

[24] Note 9, *supra*, p. 4. The Comptroller General's report recommends such an institute for DOD alone. We believe it should serve the needs of all agencies, civilian and military.

[25] The Library and collected papers assembled by the Commission on Government Procurement in conducting these studies could form the nucleus of such a collection.

The Administrator, General Services Administration, will be ultimately responsible for the disposition of the Commission's library when the Commission expires (44 U.S.C. 2905 et seq.). In view of the Commission's recommendation to establish this Institute and of the important place our library could take in such an Institute, if established, the Administrator of the General Services Administration has agreed that the Commission's library will be maintained as an operating entity for a period of one year following the submission of the Commission's report. Further, should the Congress or the executive branch establish the Institute, this factor will be given appropriate consideration in determining the ultimate disposition of the library.

Meanwhile, students of procurement (whether they be employees of the Government, private industry, or from the academic community), may use the library of the Commission on Government Procurement. Interested persons should contact the Federal Supply Service, Washington, D.C. 20406, for information regarding location and hours.

Engineers (800 Series Classification)*		Procurement (1100 Series Classification)*	
Grade	*Number*	*Grade*	*Number*
GS–17	1	GS–17	0
GS–16	4	GS–16	0
GS–15	107	GS–15	13
GS–14	211	GS–14	36
GS–13	357	GS–13	65
GS–12	7	GS–12	5

*This does not include the Administrative Contracting Officers and price analysts in the Air Force Plant Representative Offices, or the Design Engineers, who are each a part of the "Team." [17]

In today's environment, where multibillion dollar programs are being consummated, there should be appropriate recognition and pay grades for the persons responsible for negotiating and administering complex and costly procurements. A good contract negotiator is worth far more negotiating contracts than supervising the processing of paperwork.

Analysis of the grade structure of the various agencies indicated as much as a three-grade spread for similar positions in different organizations.[18] This disparity is partially attributable to the level that procurement was assigned within the respective organizational structures and partially to the inadequacy of Civil Service standards.

If we are to retain an experienced work force, agencies must take concerted action to increase the grades of contracting personnel based on responsibilities and professionalism required rather than the numbers of people supervised.

ROTATION PROGRAMS

Only a few agencies have formal or informal plans for rotation of their civilian employees from one position to another or from one occupational area to another for purposes of career development. The agencies that have intern programs provide for rotation during the first one or two years of employment for orientation. Since agencies' plans vary, there is no uniformity or consistency among agencies.

Movement across functional lines for career development purposes is negligible except in the Atomic Energy Commission, the Tennessee Valley Authority, and the Forest Service of the Department of Agriculture. Geographical rotation or planned interagency rotation policies are virtually nonexistent. The Department of Defense provides for a formal rotation-mobility plan in its civilian career program for procurement personnel,[19] but little mobility has been achieved.

A program of wholesale rotation for career development is not necessary, but one of limited mobility is essential for individuals who have demonstrated high potential for progressing to top procurement positions. The mobility of such individuals must be determined early in their careers since there is little long-range return unless the individual is indeed mobile.

CAREER DEVELOPMENT PROGRAMS

DOD has a formal, planned career program for civilian procurement personnel, but this program does not include all the procurement occupations.[20] These plans specify a range of grades for the trainee, journeyman, and management levels and a master development plan for each. They also serve as guides for determining training and development assignments for career progression.[21]

In addition to the DOD career development program for civilian personnel, each of the military services has established procurement career development and training requirements for commissioned officers. These programs are not compatible either with each other or with the civilian programs.[22]

[17] U.S. Department of the Air Force, draft study by the Directorate of Procurement Policy, "The Contracting Officer," undated. Data quoted in these two paragraphs are attributed to an earlier DOD study, *Managerial Profile of Selected Project Offices*, unpublished report, Directorate for Procurement Management, Office of the Assistant Secretary of Defense (Installations and Logistics), May 1970.

[18] Note 3, *supra*, p. 686.

[19] U.S. Department of Defense, DOD Manual 1430.10–M–1, *DOD-wide Civilian Career Program for Procurement Personnel*, Aug. 4, 1966.

[20] U.S. Comptroller General, Report B–164682, *Action Required to Improve Department of Defense Career Program for Procurement Personnel*, Aug. 13, 1970.

[21] *Ibid.*

[22] For example, only two DOD procurement courses were listed as mandatory for military officers in key positions and up to eight, based on the occupational series, were listed as mandatory for civilian counterparts.

young workers capable of being trained through experience and additional formal education to provide the managerial staff required a decade from now.

Very few agencies have recruiting programs based on forecasted workload, potential losses, and allowances for training time. Recruiting is largely an immediate reaction to an impending change in actual workload. Additional spaces are seldom available for training purposes, and training suffers from lack of time and attention devoted to it by those who can benefit from it and by those whose experience qualifies them to provide it.

Only small numbers of college graduates are being placed in the procurement work force, as illustrated by data from our work force survey. Two percent of the total procurement work force is under 25 years of age; more than one-third of these employees has from four to eight years of service.[16]

Most of the 14 agencies studied have college recruitment programs, but most do not recruit specifically for procurement jobs. The agencies normally do not make offers to the student candidate during campus visits—they use interviews to inform students of the kinds of positions available, the examination process (Federal Services Entrance Examination [FSEE] and Management Intern Examination), the selection process, and the available trainee programs. Specific offers are weeks—even months—removed from the interviews. Outstanding candidates have to be highly dedicated to a career in Government to survive such a process when private employers are in a position to act decisively at such interviews.

The agencies need to develop specific requirements in advance of college recruitment for use in conjunction with authority to make firm job offers on-the-spot to desirable applicants. Procrastination and offers of vague opportunities at some point in the future are not conducive to a dynamic recruitment program.

About half of the agencies visited during our studies had some type of formal intern or trainee programs which varied in duration from one to two years. Our studies indicated that:

- Management intern programs generally required on-the-job training, classroom training, and rotation through various areas to provide the trainee with a broad knowledge of the total procurement process.
- Trainee programs vary from agency to agency but generally are narrower in scope and provide more specialized training than intern programs. In most instances, trainee programs do not provide a well-balanced and comprehensive approach.

Each agency, and sometimes several organizations within an agency, was developing (or indicated that it planned to develop) trainee programs. These individual actions have naturally resulted in highly fragmented programs. The fact that new employees in most agencies are receiving little formal training is substantiated by the personnel characteristics data developed by Study Group 5.

Procurement demands many skilled personnel at many different levels. Although not all must be college graduates, the "pipeline" must provide the personnel capable of progressing to the highest levels and the training opportunities to ensure such progress. As evidenced by the statistical data assembled by Study Group 5, particular attention should be devoted to college recruitment and on-the-job and formal classroom training if the procurement work force is to be maintained and upgraded as retirement and other losses of the next decade take effect.

Many procurement officials stated that they were unable to carry out desired training due to lack of transportation or per diem funds, heavy workloads, or unavailability of spaces in procurement schools. Most agencies indicated that when funds were cut training was the first thing to be curtailed.

Career Development

Recommendation 17. Establish a better bal-

[16] While the overall input of college-level intern/trainees at the entry level is considered low (1.6, 2.1, 2.8 percent of those hired for fiscal years 1968, 1969, and 1970, respectively), these figures would have been considerably lower if two organizations that were hiring a large percentage of college-level intern/trainees had not been included in the statistics. The two organizations are the Defense Supply Agency and the Defense Contract Audit Agency. The Air Force has recently initiated a "procurement manager" program and has authorization for 300 trainee positions to be filled over a three-year period.

within the agency the various procurement considerations, gaining agreement with the supplier, and operating as the "business manager" of the Government's interests.

The impact on the procurement process of current social and economic changes, the complexities of the materials procured, the technological aspects of the hardware required, and most important of all the number of Federal dollars expended have generated an unwarranted and costly overreaction by all levels of authority involved in the review and approval of the contracting officer's functions. There are an inordinate number of reviews, by various levels of authority, that have been administratively created or imposed. These reviews frequently result in piecemeal decisions being made at higher levels by staff personnel not charged with procurement responsibility for either the program or the contract.

PROCUREMENT PERSONNEL

While statutes and regulations establish the goals of procurement and the framework within which procurements are made, a most important factor in carrying them out is the caliber of the work force.

The future capability of this work force is being endangered by lack of management attention. People are the most critical part of any effective procurement process. We have good people throughout all levels of procurement organizations today, but nowhere is it more apparent that concerted management attention is needed than in the area of organizing and planning for the procurement work force of the future:

- When we undertook our studies of the procurement work force it could not be determined from any single source how many people are engaged in procurement, what skills are needed, or how they are being provided.
- One fourth of the estimated work force of 80,000 people will be eligible for retirement within five years and almost half will become eligible within ten years. Most agencies have no long-range plans for recruitment and training of procurement personnel.[10]

That the actions of the procurement work force have a major impact on the effectiveness with which about one fourth of the annual Federal budget is spent—$57.5 billion annually—is worth repeating. It is also important to emphasize that procurement in fiscal 1972 involved nearly 16 million separate transactions.[11] These varied from $5 purchases (involving only a few minutes on the telephone by one buyer) to actions committing millions of dollars (resulting from many years of effort by hundreds of people). No rulebook can provide precise directions for 16 million separate transactions; the personnel executing them must be trained, qualified, and capable of exercising good judgment in carrying out their duties.

Procurement Personnel Management

Recommendation 15. Assign to the Office of Federal Procurement Policy responsibility for:

(a) Developing and monitoring, in cooperation with the procuring agencies and the Civil Service Commission, personnel management programs that will assure a competent work force.[12]

(b) Defining agency responsibilities and establishing standards for effective work force management and for development of a Government-wide personnel improvement program.

(c) Developing and monitoring a uniform data information system for procurement personnel.

[10] See Appendix E for summary of data developed through the questionnaire used by Study Group 5 to obtain basic information.

[11] In fiscal 1972, DOD statistics show more than 10.4 million separate transactions involving $38.3 billion. Data on the number of transactions for all nondefense agencies are not available. Using the $57.5 billion estimate of the total procurement workload and assuming a similar ratio of dollars to transactions, the DOD data extrapolates to nearly 16 million separate transactions for the Federal establishment.

[12] As noted earlier, our concern is with personnel who have primary responsibility for the business aspects of transactions involving use of Government funds by others, whether by contract or by grants. In Part F, we give specific attention to grants and suggest definitions and parameters for different types as well as indications of where the attention to such matters is similar to procurement situations and where it is quite different.

and the officials in charge had direct access to the agency head. Within these same agencies, the location of the procurement function was rarely as apparent.

The failure to place procurement on an organizational parity with program technical personnel resulted in frequent comments that:

> Technical personnel tend to dominate personnel engaged in the procurement process. Procurement personnel do not receive the management support they must have in order to bring their professional expertise into play in awarding and administering contracts and, as a consequence, they must often bow to the desires of requisitioners who do not have expertise in procurement.[3]

The constraints under which procurement now operates in some agencies should be removed. If the function is to operate effectively and on a parity with other functional disciplines with which it must interface, it must be placed at a level in the organization which affords a high degree of visibility to the agency head.

Role of the Contracting Officer

Recommendation 13. Clarify the role of the contracting officer as the focal point for making or obtaining a final decision on a procurement. Allow the contracting officer wide latitude for the exercise of business judgment in representing the Government's interest.

Recommendation 14. Clarify the methods by which authority to make contracts and commit the Government is delegated to assure that such authority is exercised by qualified individuals and is clearly understood by those within the agencies and by the agencies' suppliers of goods and services.

A further illustration of the necessity for giving attention to the status of procurement in an organization is found in the duties assigned to a "contracting officer," who is the individual having authority to sign a contract and commit the Government to its terms. Identical language is used in both the ASPR and FPR regarding the responsibilities of contracting officers:

> Each contracting officer is responsible for performing or having performed all administrative actions necessary for effective contracting. The contracting officer shall exercise reasonable care, skill and judgment and shall avail himself of all the organizational tools (such as the advice of specialists in the fields of contracting, finance, law, contract audit, engineering, traffic management, and cost or price analysis) necessary to accomplish the purpose as, in his discretion, will best serve the interest of the Government.[4]

In selecting individuals to serve as contracting officers, both the Federal Procurement Regulations[5] (FPR) and the Armed Services Procurement Regulation[6] (ASPR) require consideration be given to experience, training, education, business acumen, judgment, character, reputation, and ethics. These elements are essential to ensure that the individual is qualified by experience, character, and training to carry out the responsibilities of contracting for the Government.

Although the authority to commit the Government is not to be bestowed lightly on a contracting officer, Study Group 5 found:

> . . . (more than half) of the civilian agencies issuing contracts were using as contracting officers, personnel whose training, educational background, experience, and expertise were in such fields as real estate, property management, general administration, economics, engineering, transportation, etc. Contracting experience, if any, was purely incidental to the specific discipline . . .
>
> Although the criteria cited in the Federal Procurement Regulations recognize, as an *element* in the selection process, the disciplines stated above, such specialized experience, per se, does not qualify a person as a contracting officer. The personnel involved did not possess nor were they exposed to

[3] Study Group 5 (Organization and Personnel) *Final Report*, Feb. 1972, p. 104.

[4] FPR 1–3.801.2, and ASPR 3–801.2.

[5] FPR 1–1.404.1.

[6] ASPR 1–404.1.

doctrine is not applicable where a regulation is waived before the contract is entered into by approved deviation procedures.

In *G. L. Christian & Associates* v. *United States*,[45] the Court of Claims read into a contract, by operation of law, a "termination for convenience" clause prescribed by ASPR as mandatory for use in the contract. The clause had been left out of the contract. The court stated that ASPR was issued under statutory authority and, therefore, had the force and effect of law.

In the immediate aftermath of the *Christian* case, a generalization quickly developed that the "Christian Doctrine" stood for the proposition that *all* procurement regulations have the force and effect of law and are automatically incorporated into an applicable Government contract.[46] This generalization, an early reaction to the *Christian* case, has not been borne out by the case law that has developed over the nearly ten years since *Christian* was first decided. The present legal doctrine, that certain procurement regulations have the full force and effect of law, has continued to have an impact in Government contracts but to a much lesser extent than was originally anticipated.

The current rules work to the benefit of contractors as often as they do for the Government.[47] Also, a case-by-case determination by the courts is more adaptable to the circumstances of each case. Any substitute general rule would have to be somewhat arbitrary, and it is doubtful that it would do more evenhanded justice to the parties than the courts. Industry also appears to have accepted the current rules. A current evaluation of the "Christian Doctrine" by two private attorneys concludes that:

> In reviewing judicial application of the 'force of law' concept to procurement regulations, it is apparent that no particular hardship, injustice, or inequity has resulted . . . In short, the *Christian Doctrine* as applied by the Court of Claims and other courts has not resulted in general arbitrary treatment of contractors or inequitable situations.[48]

While the existing rules introduce some degree of uncertainty in Government contracts, the problem rarely arises, and when it does it is no more likely to favor one party than the other.

We have concluded that no change is necessary in the present status of the legal doctrine relating to the legal force and effect of procurement regulations.

Effect on Regulations, July 13, 1971, a revised and extended version of which was later published. See Braude and Lane, *Modern Insights on Validity and Force and Effect of Procurement Regulations—A New Slant on Standing and the Christian Doctrine*, 31 *Fed. B.J.* 99 (1972).

[45] 312 F.2d 418 (Ct. Cl. 1963), *rehearing denied*, 320 F.2d 345 (1963), *cert. denied*, 375 U.S. 954 (1963), *rehearing denied*, 376 U.S. 929 (1964).

[46] See, for example, Cibinic, *Contract by Regulation*, 32 *Geo. Wash. L. Rev.* 111 (1963).

[47] For example, *Chris Berg, Inc.* v. *United States*, 192 Ct. Cl. 176, 426 F.2d 314 (1970); *Moran Bros. Inc.*, v. *United States*, 171 Ct. Cl. 245, 346 F.2d 590 (1965); *Electrospace Corp.*, ASBCA 14520, 72-1 BCA 9455.

[48] Braude and Lane, *Modern Insights on Validity and Force and Effect of Procurement Regulations—A New Slant on Standing and the "Christian Doctrine,"* 31 *Fed. B.J.* 99, 120 (1972).

tractors and other interested parties in the formulation of procurement regulations. However, we do not favor accomplishing this simply by eliminating the present statutory exemption for contracts and making procurements subject to the APA rulemaking requirements.

Problems With APA Rulemaking for Contract Matters

The APA procedures were formulated primarily for public regulatory agencies, which generally issue regulations from a central source.[38] Procurement regulations, on the other hand, are issued by a number of offices, both headquarters and subordinate. Agency procurement directives also extend to technical and business decisions that are made at all levels in a procuring agency. Subjecting activity of this type to APA rulemaking could only create an administrative morass.

Making procurement regulations subject to APA provisions would greatly expand judicial review of procurement policies and contract awards. This, together with the interpretative problems of applying APA definitions or terms, such as "matters pertaining to agency management," "general statements of policy," and "impracticable, unnecessary, or contrary to the public interest," among others, would significantly burden the procurement process.

The proprietary interest of the Government as a contracting party must be considered a significant factor differentiating procurement agencies from regulatory agencies whose role is that of an umpire reaching a policy decision as the result of adversary activity on the part of competing groups outside the Government.[39] This proprietary interest is the main reason the exemption for contracts was granted. The extensive studies, hearings, and proposed legislation over a ten-year period that led up to the APA do not paint a picture of hasty consideration in adopting the "contract" exemption from APA "rulemaking." Contracts are a principal means of accomplishing many important Government functions. The contractual arrangement between the Government and a contractor generates legal relationships that are substantially different from the relationships between regulatory agencies and the public. Although procurement regulations sometimes prescribe contract terms, prospective contractors usually can compensate for such requirements through pricing or other negotiable aspects of contracting. These differences are sufficient in degree, if not altogether in kind, to set procurement apart from the typical arbitral-type operations of traditional regulatory agencies.

It is doubtful also that publication of procurement regulations in the *Federal Register*, as required by the APA, would reach any substantial body of people not now put on notice through the ASPR procedures and voluntary publication of significant ASPR changes by trade and professional journals. We do not quarrel with the view that soliciting opinions on proposed procurement regulations is good, as our recommendation bears out, but the "minimal formal requirements" of APA rulemaking, will not significantly benefit the Government, the contractors, or other interested parties.

We recognize that some of the unique characteristics and needs of Government procurement can be accommodated under the APA procedures by resorting to the special exceptions provided in the act.[40] But the language of the act is so unclear and unsettled as to militate against the agencies acting decisively in reliance on such exceptions. Even the research paper prepared for the Administrative Conference,[41] supporting removal of the "contracts" exception for rulemaking appears to recognize that at least some of the terms in the act involve problems that are difficult to resolve.[42]

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[38] See the basic report which led to enactment of the Administrative Procedure Act, *Administrative Procedure in Government Agencies*, report of the Committee on Administrative Procedure, S. Doc. 8, 77th Cong., 1st sess. (1941), p. 2–4.

[39] Williams, *Fifty Years of the Law of the Federal Administrative Agencies—And Beyond*, 29 *Fed. B.J.* 267, 276 (1966).

[40] 5 U.S.C. 553(a)(1); 553(a)(2); 553(b)(A) and (B) (1970).

[41] Note 31, *supra*.

[42] The courts have also struggled with the APA rulemaking provisions. For example, in *Pharmaceutical Mfgs. Assoc.* v. *Finch*, 307 F. Supp. 858, 863 (1970), the court stated that:

> [a]ttempting to provide a facile semantic distinction between an "interpretive and procedural" rule on the one hand and a "substantive" rule on the other does little to clarify whether the regulations here involved are subject to . . . Section 4 of the Administrative Procedure Act . . . The basic policy of Section 4 [5 U.S.C. 553] at least requires that when a proposed regulation

Separate manuals of regulations for specific types of procurement would:

- Reduce the mass of regulations to those needed for individual procurement functions
- Promote understanding and application of the regulations by making them easier to use
- Reduce the frequency of change for any given manual
- Focus attention on regulatory changes only in affected areas.

Although separate procurement manuals could benefit the overall procurement process, they would add to initial publishing costs by duplicating regulations and procedures which cut across functional lines.

The feasibility of providing separate procurement manuals should be decided on the basis of a cost-benefit study. While we recognize that the ASPR Committee has under study a subcommittee report which recommends against the use of separate manuals,[27] we question whether all factors have been given full consideration. A more thorough evaluation could be made by a test that emphasizes the effect separate volumes would have on the user. For this purpose, one or more functional procurement regulations could be published on a test basis to ascertain whether the benefits to users of separate manuals outweigh any added costs associated with duplicating material.

The Problem of "Readability"

Our studies indicate that the "readability" of procurement regulations presents a continuing problem for the user. This is not an original observation [28] and there is no easy solution at hand. Readability in the sense we use it involves both the speed and level of user understanding. The more understandable the text the less need there should be for adding explanatory material at each succeeding level and the greater the assurance that a given policy will be implemented uniformly.

[27] Note 25, *supra*, p. 4.

[28] For example, the ASPR Committee has studied this problem at least twice (ASPR Case 64–7 and 67–1).

Conclusions

A coordinated system of procurement regulations is needed to provide a greater integration and uniformity in the substance and format of the regulations; control their proliferation, volume, and frequency; coordinate them with socioeconomic and other collateral regulations; and make it easier for contracting officers, contractors, and their supporting personnel to correlate, understand, use, and apply procurement regulations.

PARTICIPATION IN PROCUREMENT RULEMAKING

Criteria for Participation

Recommendation 11. Establish criteria and procedures for an effective method of soliciting the viewpoints of interested parties in the development of procurement regulations.

Existing statutes authorize the Administrator of General Services, the Secretary of Defense, and other agency heads to issue procurement regulations,[29] but do not require that they first obtain the views of contractors or other interested parties. By contrast, public notice and opportunity for comment generally are required for proposed regulations in the nonprocurement areas by the rulemaking provisions of the Administrative Procedures Act (APA).[30] Matters relating to contracts are exempted from this requirement. The rationale for exempting contracts was that they involved the proprietary interests of the Government itself, as contrasted with general public regulatory matters affecting solely the interests of private parties.[31]

In recent years there has been considerable support for eliminating the exemption for matters relating to contracts from the rulemaking

[29] 5 U.S.C. 301; 10 U.S.C. 2202; 40 U.S.C. 481(a)(1); 40 U.S.C. 486(c); 41 U.S.C. 252(a) (1970).

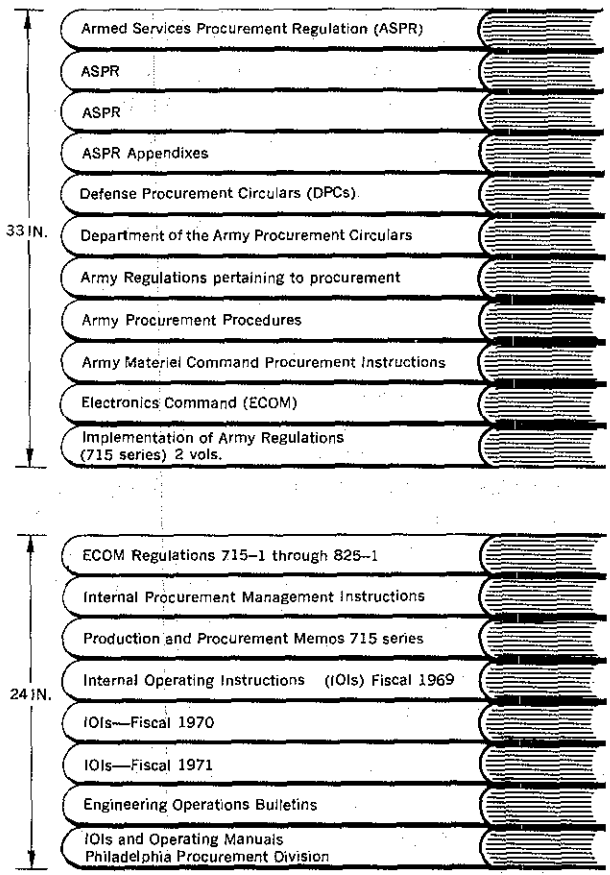
[30] 5 U.S.C. 553 (1970).

[31] A. E. Bonfield, report prepared for the Administrative Conference, a revision of which was later published. See Bonfield, *Public Participation in Federal Rulemaking Relating to Public Property, Loans, Grants, Benefits, or Contracts*, 118 *U. Pa. L. Rev.* 540, 572–573 (1970).

TABLE 1. EXAMPLES OF LACK OF UNIFORMITY IN PROCUREMENT REGULATIONS
(July 1972)

*Regulation section No.**	*ASPR*	*FPR*	*AEC*	*NASA*
2–303.4 Telegraphic bids	Late telegraphic bids shall not be considered for award regardless of the cause for late receipt, including delays caused by the telegraphic company, except for delays due to mishandling on the part of the Government.	Uniform with ASPR.	Follows FPR.	Allows acceptance of late telegraphic bids where the bidder demonstrates by clear and convincing evidence, which includes substantiation by an authorized official of the telegraph company, that the bid was filed with the telegraph company in sufficient time to have been delivered by normal procedure so as not to have been late.
2–402.3 Delay of Bid Opening	Provides policy concerning postponement of bid openings.	No coverage.	No coverage.	No coverage.
2–407.8 Protests against award	Policy in ASPR & FPR are essentially the same except ASPR makes special reference to protests involving eligibility under the Walsh-Healey Public Contracts Act.	See comment under ASPR heading.	AEC follows FPR, however it requires the contracting officer to obtain the approval of his superior officer to make an award where a protest has been filed with GAO and the matter has not been resolved. Other agencies such as VA and GSA have policies requiring approval by higher levels before a contracting officer can make award where a protest has been filed with GAO.	NASA policy differs from ASPR in that a protest which cannot be resolved by the contracting officer must be referred to NASA Hdqtrs. who will obtain views of GAO. (ASPR and FPR provide for the contracting officer to refer cases directly to GAO. NASA policy also requires approval by Hdqtrs. of an award on which a protest is pending. Also contains a statement to the effect that the policies pertaining to protest before award also apply to those protests received after award.
2–503.1(a)(6) Step one (in 2 step formal advertising)	Provides a detailed statement for inclusion in requests for technical proposals concerning acceptance of late technical proposals.	No provision for a statement in the proposals concerning late proposals. Only directs that the date by which proposals must be received be included in requests for technical proposals.	Follows FPR.	Provides for a very short statement to be included in the request for proposal to the effect that the Government reserves the right to consider technical proposals or modifications thereof received after the date specified for receipt.
2–503.1(a)(8) Step one (in 2 step formal advertising)	This paragraph in ASPR is more detailed than either FPR or NASA PR with respect to	See comment under ASPR.	Follows FPR.	Same as FPR.

EXAMPLES OF BOOKS OF REGULATIONS USED AT A LOCAL BUYING ORGANIZATION



Source: Study Group 3, *Final Report*, Nov. 1971, p. 73.

Figure 2

Lack of Uniformity

As is to be expected with a multiplicity of regulations and no authoritative central manager to coordinate and control them, there are many gaps and inconsistencies in the ASPR, FPR, and other procurement regulations. Reflecting DOD predominance and greater experience in procurement, ASPR generally has taken the lead in developing new procurement regulations and these regulations have been substantially incorporated in the FPR and NASA PR. Although there is considerable uniformity on subjects such as formal advertising and mandatory contract clauses, substantial differences remain. The ASPR covers many subjects not treated in the FPR; for example:

- Research and development contracting (ASPR section IV, part 1)
- Multi-year procurement (ASPR 1–322)
- Advance procurement planning (ASPR 1–2100)
- Government property (ASPR section XIII)
- Purchases under $250 (ASPR 3–604.1)
- Prison-made supplies (ASPR 5–400)
- Blind-made products (ASPR 5–500)
- Special treatment of Canadian supplies under Buy American Act (ASPR 6–103.5)
- Freedom of information (ASPR 1–329)
- Novation agreements (ASPR 26–400)

In addition, the ASPR includes many mandatory or optional contract clauses not in the FPR.[17]

Even when there is coverage of identical subjects, there may be substantive differences. For example:

- ASPR provides for an alternative 50 percent cost evaluation factor in addition to the basic six-percent Buy American evaluation formula used under the FPR.[18]
- ASPR makes prospective subcontractor cost or pricing data mandatory,[19] NASA PR makes it discretionary,[20] and the FPR is silent on the matter.
- ASPR and FPR use three clauses for truth in negotiations; the NASA PR uses one.[21]
- AECPR cost principles are significantly different in approach from those in ASPR and FPR.[22]

Table 1 gives other examples of substantive differences.

Even on subjects such as formal advertising and standard contract clauses for fixed-price supply contracts, where the greatest degree of uniformity has been achieved, there are many word differences. Of 48 sections in FPR and

[17] Examples are clauses for cost-reimbursement supply contracts, cost-reimbursement research and development contracts, and service contracts.

[18] Compare ASPR 6-104.4 and FPR 1–6.104–4.

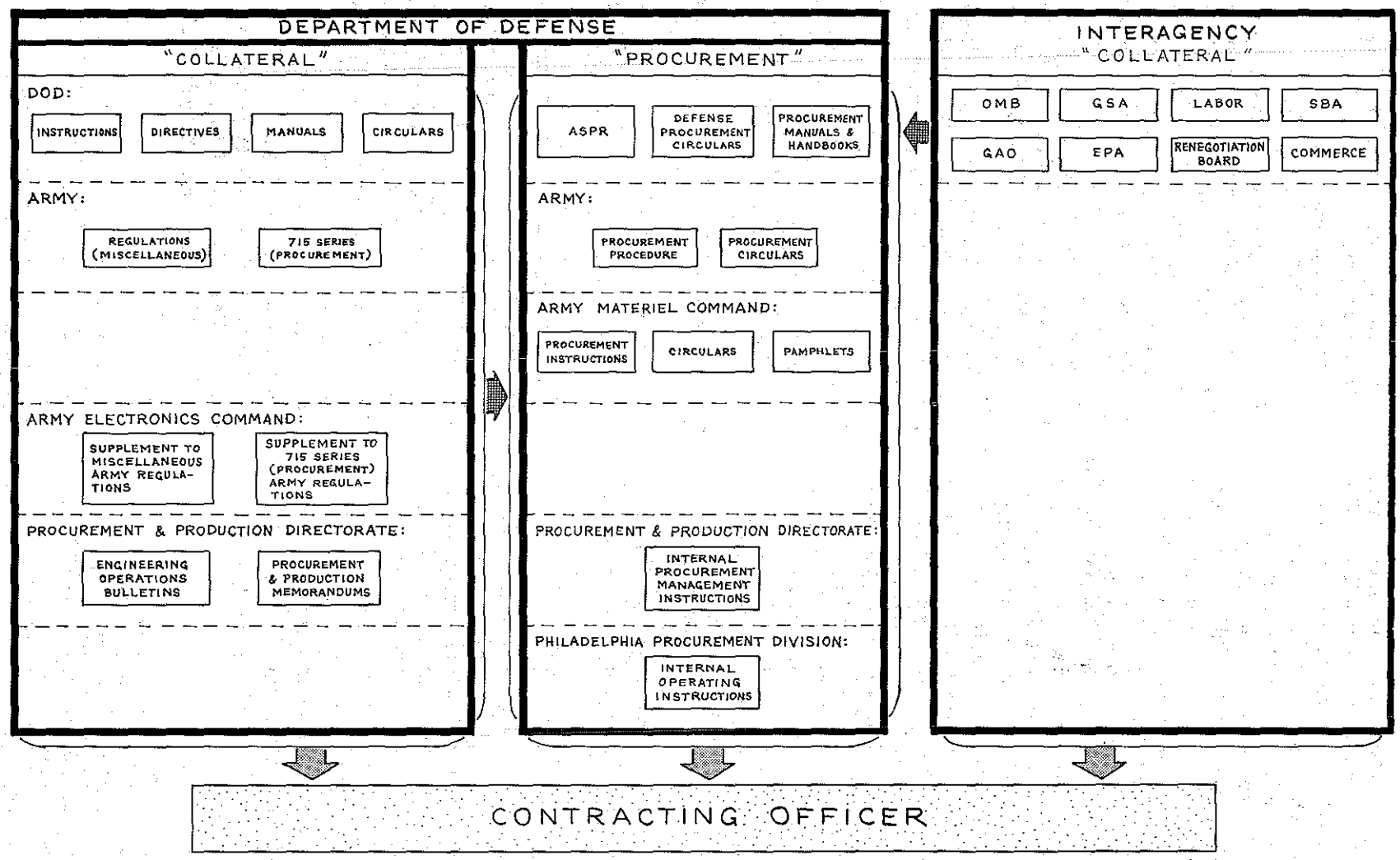
[19] ASPR 3–807.3(b).

[20] NASA Procurement Regulation Directive No. 70–2, Feb. 3, 1970.

[21] ASPR 7–104.29, 7–104.41, 7–104.42; FPR 1–3.814–1, 1–3.814–2, 1–3.814–3; NASA PR 3.807–4.

[22] Compare ASPR, section XV, and AECPR, part 9–15.

FLOW DOWN OF PROCUREMENT-RELATED REGULATIONS TO DOD CONTRACTING OFFICER



Source: Commission Studies Program.

Figure 1

the contract is canceled, the contractor and the Government negotiate the cancellation payment. In this event, the Government can pay no more than the pre-agreed cancellation ceiling which represents the estimated unpaid increment of nonrecurring costs.

Proper use of multi-year contracting appears to have yielded impressive results. In a survey conducted by the Commission, DOD reported average annual savings of over $52 million, attributable to the use of multi-year contracting for fiscal years 1968–1973.[46] These savings resulted from spreading the nonrecurring costs over several years, the purchase of items and services for more than one year, and the increased efficiency of a stable labor force.

Potential savings in the field of automatic data processing equipment (ADPE) are also impressive. In fiscal 1969, almost all of the $390 million spent on ADPE rentals involved short-term leases—usually the most expensive method of acquisition.[47] Statistics show that the ADPE is usually needed for longer than one year. If 828 of the ADPE systems rented by the Government as of June 30, 1969, were under three-year leases, costs could have been reduced by as much as $26 million over the periods of the leases. Similarly, if 666 of the systems were under five-year leases, costs could have been reduced by as much as $70 million.[48] The Comptroller General concluded that either the GSA's ADPE Fund should receive greater capitalization or legislation should authorize the ADPE Fund to contract on a multi-year basis without obligating monies to cover the full period at the time of entering into a lease.[49]

The U.S. Army Corps of Engineers noted that in the case of the Safeguard missile system a multi-year contract for approximately $43 million was awarded to one supplier. Had annual funds been involved in this procurement, thus precluding a long-term contract, the Corps doubts that it would have secured competition on the next year's procurement. Competition would have been impractical because of the special equipment and large initial capital outlay required to enter the program.[50]

Congress has been reluctant to extend authority for multi-year contracting.[51] Also, the House Committee on Armed Services, in its report covering fiscal 1973 authorizations for DOD, expressed dissatisfaction with the results in some procurements using this contract method. The multi-year contracting authority appeared to have been misused in that requirements were not firm, nor was the design specified with adequate clarity. Consequently, Congress has enacted a provision which denies DOD the use of this authority for contracts when the cancellation ceiling is more than $5 million.[52]

Despite occasional misuse of the authority, the evidence amply supports the greater use of multi-year contracts for required goods and services. Legislation is required, however, to overcome a number of statutory restrictions on the use of annual funds if this contract method is to enjoy wider use.[53]

Granting broader authority for multi-year contracting will not substantially diminish congressional control of agency expenditures. Such control still may be exercised during the authorization and appropriation process. Through the Office of Federal Procurement Policy, adequate controls could be established to assure Congress that multi-year contracting provisions are properly implemented, particularly with respect to the definitiveness of requirements and specifications.

Subcontracting Review

Recommendation 9. Repeal the current statutory requirement that the contractor provide the procuring agency with advance notification of cost-plus-a-fixed-fee subcontracts and subcontracts over $25,000 or five percent of the prime contract cost.

[46] Commission Studies Program.

[47] U.S. Comptroller General, Report to Congress, B–115369, *Multi-Year Leasing and Government-Wide Purchasing of Automatic Data Processing Equipment Should Result in Significant Savings*, Apr. 30, 1971, p. 1 of Digest.

[48] *Ibid.*, p. 17.

[49] *Ibid.*, p. 26.

[50] Attachment to a letter from the Office of the Chief of Engineers to the Commission, Sept. 1, 1971.

[51] See, for example, Multiyear Procurement Bill (H. R. 15789), hearings before the Subcommittee for Special Investigations of the Committee on Armed Services, H. Rept. 47, 90th Cong., 1st and 2d sess., under the authority of H. Res. 124, July 27, Oct. 26, 1967, and Mar. 13, 1968, p. 7558.

[52] Public Law 92–436, Act of Sept. 26, 1972.

[53] See Chapter 7 for a discussion of contract funding.

SOLE-SOURCE PROCUREMENT

Recommendation 6. Authorize sole-source procurements in those situations where formal advertising or other competitive procedures cannot be utilized, subject to appropriate documentation; and, in such classes of procurements as determined by the Office of Federal Procurement Policy, subject to the determination being approved at such level above the head of the procuring activity as is specified in agency regulations.

One reason for public concern over the procurement process is the high proportion of noncompetitive (sole-source) contracts awarded by the Government. Nevertheless, in many instances, because of urgency, lack of a reasonable competitive source, standardization, or other factors, the contracting agency has no realistic alternative to soliciting an offer from one firm. This is particularly true in DOD, NASA, and AEC, where costly items of high technology frequently are needed. For fiscal 1972, 58.6 percent of the reported DOD military procurement dollars involved noncompetitive procurements.[36]

ASPA and FPASA have provisions that limit negotiation, regardless of whether the negotiation is a competitive or a sole-source procurement. We have recommended removing the statutory restrictions insofar as they apply to competitively negotiated procurement. Lifting the restrictions against competitive negotiations, however, requires adoption of statutory safeguards for noncompetitive negotiations.

Our recommendations introduce additional safeguards. Written determinations for failure to use formal advertising are not required today for seven of the exceptions under ASPA and 11 of the exceptions under FPASA. Our recommendation would require written documentation in the file for all cases over $10,000 where formal advertising is not used and where only one source is solicited.

Moreover, the documentation in some of these procurements would require approval at an agency level above the head of the procurement office. The rationale for this is the fact that some potentially sole-source procurements will involve large expenditures or otherwise be of a sensitive nature. In such cases, we believe the issue of whether competition can be obtained should not be decided at the level within the agency which is most likely to be biased.

We recommend that the Office of Federal Procurement Policy decide which classes of sole-source procurement should be approved at a level above the contracting officer. We would leave to the discretion of each agency the exact administrative level from which the contracting officer should seek approval because the level at which an independent and detached judgment can be expected may vary.

SPECIAL PROCUREMENT TECHNIQUES

Small Purchase Procedures

Recommendation 7. Increase the statutory ceiling on procurements for which simplified procedures are authorized to $10,000. Authorize the Office of Federal Procurement Policy to review the ceiling at least every three years and change it where an appropriate formula indicates the costs of labor and materials have changed by 10 percent or more.

Under ASPA and FPASA, procurements in excess of $2,500 must be made pursuant to the statutory rules for formal advertising or negotiation. Simplified procedures are authorized in procurements of less than $2,500. These procedures include the use of competitive techniques but need not be encumbered by either the sealed-bid requirements of formal advertising or the administrative burdens ordinarily associated with a negotiated transaction. Their use is not conditioned on a written explanation of why formal advertising is not feasible or, when a single source is solicited, why competition is not being obtained.

The limit of $2,500 was placed on small purchases in 1958. Data for fiscal 1972 in-

[36] U.S. Department of Defense, *Military Prime Contract Awards, July 1971–June 1972*, p. 40. Of these dollars, the Commission calculated that 32.4 percent were "follow-on" to contracts which originally had been awarded on a competitive basis, and 67.6 percent were other sole-source procurements.

inadvertently accepting higher offers under fixed-price contracts if discussions are not held. This could occur when an offeror anticipates discussions with the Government to establish a common understanding of an imprecise specification and wishes to leave a margin in his initial price or contract terms to facilitate making appropriate concessions. For example, his experience might be that the Government often discovers through discussions that its needs are not adequately defined by the specification and asks the offeror to go beyond what is literally required by the specification without increasing the original bid price. Inadvertent acceptance of unnecessarily high offers also might occur as a result of divergent understandings of an imprecise specification; this could lead to a higher quality product than actually is needed.

When the specifications are inadequate for formally advertising the procurement, they also are unlikely to be adequate for negotiating a fixed-price procurement without competitive discussions. The low offer may be a higher price than the Government need pay, or it may offer a lower quality product than is acceptable. In short, if the specification is not sufficient to assure a common understanding by all offerors, thereby permitting a choice between offers on the basis of price, then such offers may be too high or too low, and in either event, unacceptable.

In these circumstances, the procurement regulations should require the Government to conduct discussions for the purpose of establishing a common understanding of the specifications. Such an understanding usually should permit contractor selection on the basis of the lowest price finally offered.

The statutory changes we recommend do not say how long discussions should be conducted in the attempt to achieve a common understanding of the specification. The statute should not dictate that Government buyers bargain endlessly in order to achieve such common responses to a specification as to permit selection primarily on the basis of price. This must be left to the common sense and discretion of the Government buyer.

COMPETITIVE DISCUSSIONS FOR COST-TYPE CONTRACTS

The extensiveness of competitive discussions, rather than the absence of discussions, has been a recurring complaint of contractors dealing in cost-reimbursable and R&D contracts. Representatives of the R&D industry believe that technical portions or ideas of one competitor's proposal commonly are "transfused" into another's. They allege this occurs during competitive discussions, especially when the Government points out deficiencies in a competitor's proposal and invites him to change and improve it.

They further allege that discussions in R&D procurements have been used to achieve the comparability between competing "products" which one expects in formal advertising. This tends to bring the offer of each proposer to a common level of technical excellence. Such "technical leveling" can foster a Government practice of "auctioning" the contract to the proposer who bids the lowest price.

Recent changes in procurement law suggest that agencies now are devoting much attention to this matter and that these problems may not continue to be considered acute.[35] However, the lines of distinction between improvements initiated by the offeror and those to which the Goverment may allude, on the basis of its knowledge of others' ideas, is often a difficult one to draw. Creating sensible rules in statutes, regulations, or legal decisions to facilitate drawing the line between competitive endeavors and "technical transfusion" is a hard task.

In view of the recent attempts to avoid

[35] In U.S. Comptroller General transmittal letter (p. 3) and decision B–173677 (p. 32), Mar. 31, 1972, which denied a protest against NASA's alleged illegal failure to discuss deficiencies in the protestor's R&D proposal, the Comptroller General observed:

> . . . This is a research and development procurement in which the offeror's independent approach in attaining the desired performance is of paramount importance . . . Obviously, disclosure to other proposers of one proposer's innovative or ingenious solution to a problem is unfair. We agree that such "transfusion" should be avoided. It is also unfair, we think, to help one proposer through successive rounds of discussions to bring his original inadequate proposal up to the level of other adequate proposals by pointing out those weaknesses which were the result of his own lack of diligence, competence, or inventiveness in preparing his proposal.

Also see NASA Procurement Regulation Directive 70–15 (revised), Sept. 15, 1972, providing that in cost-reimbursement and R&D competitive procurements, the contracting agency shall not point out to competitors the deficiencies in their proposals which inhere in their management, engineering, or scientific judgment.

panied by findings which, as a practical matter, can rarely be supported by verifiable evidence.

CONCLUSIONS

Our recommendations encourage the use of competitive procurement procedures. They endorse a preference for formal advertising wherever practical but eliminate the wasteful and unnecessarily expensive exercise—in both time and money—of having high-level agency reviews of decisions to use competitive procedures other than formal advertising. Thus, procuring agencies will be directed to use appropriate techniques to obtain the best possible competitive results.

Competitive Discussions

Recommendation 4. Adjust the statutory provision on solicitations and discussions in competitive procurements other than formal advertising in the following manner:

(a) Extend the provision to all agencies.

(b) Provide for soliciting a competitive rather than a "maximum" number of sources, for the public announcement of procurements, and for honoring the reasonable requests of other sources to compete.

(c) Promulgate Government-wide regulations to facilitate the use of discussions in fixed-price competitions when necessary for a common understanding of the product specifications.

(d) Require that evaluation criteria, including judgment factors to be weighed by the head of an agency when he is responsible for contractor selection, and their relative importance, be set forth in competitive solicitations involving contracts which are not expected to be awarded primarily on the basis of the lowest cost.

EXTENSION OF ACT TO ALL AGENCIES

The only general legislative requirement for written or oral discussions in negotiated procurements is found in ASPA, as amended:

> . . . proposals, including price, shall be solicited from the maximum number of qualified sources consistent with the nature and requirements of the supplies or services to be procured, and written or oral discussions shall be conducted with all responsible offerors who submit proposals within a competitive range, price, and other factors considered: *Provided, however,* that the requirements of this subsection with respect to discussions need not be applied to procurements . . . where it can be clearly demonstrated from the existence of adequate competition or accurate prior cost experience with the product, that acceptance of an initial proposal without discussion would result in fair and reasonable prices . . .[29]

Civilian agencies currently are not subject to a similar general statutory prohibition against dealing with only one of the competitors they solicit for a negotiated procurement.[30] They are covered only in the FPR which, unlike the statutory requirement, provide[31] that competitive discussions are not mandatory for some procurements; for example, cost-reimbursable and R&D contracts.

We believe a statute requiring discussions in competitively negotiated procurements is fundamental to protecting the Government's interest, and that its requirements should be applied uniformly throughout the Government.

REVISIONS TO STATUTORY REQUIREMENTS

Ten years of experience with the law on competitive discussions indicates that modest changes are desirable. Some of these changes appear to be evolving through regulations and decisions interpreting the law; others require legislation. These are discussed below.

"MAXIMUM" SOURCES

Under 10 U.S.C. 2304(g), solicitation of pro-

[29] 10 U.S.C. 2304(g) (1970).

[30] Congress enacted the requirement for discussions in Public Law 87-653. Recently, Congress enacted Public Law 92-582 requiring agencies subject to FPASA to conduct "discussions" in obtaining architect-engineer services by contract.

[31] FPR 1-3.805.

provide for reliable price comparisons of common baseline products. The acquisition of major systems usually is characterized by these features.

Another illustration is the procurement of R&D. Here the competition is generally characterized by several rival sellers offering proposals which are not expected to exhibit a broad baseline of comparable features. The Government deliberately asks rival R&D sellers to focus on innovative and individualistic approaches; thus the offers received are unlikely to exhibit the common technical baseline essential to reasonable price comparisons. In addition, the performance of these services may involve such risk that use of a fixed-price contract is not feasible.[23]

Statutory Standards for Competitive Negotiation and Formal Advertising

Recommendation 3.

(a) Require the use of formal advertising when the number of sources, existence of adequate specifications, and other conditions justify its use.

(b) Authorize the use of competitive negotiation methods of contracting as an acceptable and efficient alternative to formal advertising.

(c) Require that the procurement file disclose the reasons for using competitive methods other than formal advertising in procurements over $10,000, or such other figure as may be established for small purchase procedures.

(d) Repeal statutory provisions inconsistent with the above.

REQUIRED USE OF FORMAL ADVERTISING

Many Government procurements are entirely suitable for fixed-priced formal advertising. The prerequisite for its use, however, is an adequate specification and a number of competitors sufficient to assure the Government's receiving the best deal if it commits itself to accept the lowest bid of a responsible contractor. We recommend, therefore, that formal advertising, the competitive procurement method exhibiting the greatest safeguards against favoritism, be preferred whenever market conditions are appropriate for its use. Toward this end, we also recommend that contracting officers be required by statute to document their reasons for not using formal advertising in a competitive procurement.

Our recommendation exempts procurements under $10,000, or such other figure as may be established from time to time for small purchase procedures, from the statutory rules of solicitation which ordinarily would apply.

UNDUE RESTRAINT AGAINST COMPETITIVE NEGOTIATION

ASPA and FPASA provide that formal advertising is the preferred method for conducting Government procurement. Both statutes authorize the use of negotiated procurement, but restrict its use by numerous procedural requirements that are not related to market conditions. ASPA provides 17 and FPASA provides 15 exceptions to the requirement for use of formal advertising. Each requires that a particular condition exist in order to use negotiation instead of formal advertising.[24] Many of the exceptions require written findings and determinations, and some also require approval by the agency head. Still other provisions limit the authority of the agency head to delegate his approval function.

Nevertheless, the Government uses formal advertising for purchasing only from 10 to 15 percent of its needs in terms of reported contract award dollars.[25] The pattern of using

[23] Competition in cost-type contracts is further discussed with respect to Recommendation 4, under "Competitive Discussions for Cost-Type Contracts."

[24] See 10 U.S.C. 2304(a)(1)–(17) and 41 U.S.C. 252(c)(1)–(15). Our recommendations involve repealing those sections, as well as those concerned with justifying the use of negotiated cost and incentive-type contracts. Some of the decisions made pursuant to these sections are final and not reviewable by the General Accounting Office. See 10 U.S.C. 2310 and 41 U.S.C. 257. The mechanics of repeal will involve either rewriting or eliminating the finality presently accorded some administrative decisions to negotiate. We take no position on whether the current prohibition against GAO review should be eliminated or substantially retained with new statutory language.

[25] Calculated by the Commission. See recent annual reports, *Military Prime Contract Awards*, DOD, and *Procurement for Civilian Agencies*, GSA, Office of Finance. These sources also indicate that

regulations. The success of procurement within the statutory framework we recommend will require strong leadership in the executive branch and a means for implementation of the statutory policies governing procurement. Only such leadership can ensure a more consistent treatment of day-to-day procurement problems and a more harmonious and responsible relationship with Congress.

Summary

The unconsolidated structure of the two primary procurement statutes generate unessential or troublesome distinctions in basic procurement policies and procedures of various components of our Government. A clear rationale does not exist for two acts setting forth separate policies and procedures for that part of the Nation's business conducted by contract; or for either of them permitting the extent of diversity exhibited by today's regulatory systems. Efficiency, economy, and effectiveness of Government procurement would be increased if:

- The basic procurement statutes were consolidated
- The consolidated statute concentrated on fundamental procurement policies and procedures
- The fundamental procurement policies and procedures were implemented under the leadership of the Office of Federal Procurement Policy.

FUNDAMENTAL POLICIES FOR A CONSOLIDATED STATUTE

Background

The procedure by which the Government solicits offers, establishes terms and conditions, and selects a contractor, is the heart of the procurement process. The statutes traditionally have classified these methods as either "formal advertising" or "negotiation." The terminology and distinctions connoted by the terminology obscure as much as they explain. Understanding these terms, and the relation they bear to the degree of competition available in markets from which the Government procures, is essential to understanding our recommendations concerning competitive methods of procurement.

FORMAL ADVERTISING

"Formal advertising" denotes a sealed-bid technique of obtaining offers from several competitors. The rules of this sealed-bid procedure are designed to forbid "private" bargaining and to encourage open disclosure upon award. Formal advertising presumes a specification that dictates a common baseline of technical features and contract terms. This in turn obviates any need for discussions with competitors about their bids and provides an objective means for distinguishing among capable competitors on the basis of price. Therefore, a fixed-price contract is always awarded to the lowest-price offeror, provided he does not take exception to the specification and is a responsible producer. These and other rules discourage a buyer's inclination to unfairly favor award to one contractor over another.

Private business generally does not refer to any of its procurement practices as "formal advertising." Occasionally, they do use a sealed-bid technique in which they "advertise" a procurement to potential suppliers. However, they are not as likely to broadcast their solicitation of offers as widely as does the Government, to commit themselves as unequivocally to accept the lowest price received, or to foreclose the possibility of having discussions with an offeror before awarding him a contract (as the Government does when it announces it will use the "formal advertising" method of procurement).

NEGOTIATION

Negotiation permits contracting agencies greater latitude in the selection of contractors than is allowed by formal advertising procedures. It embraces procurements in which all potential contenders are invited to participate as well as those that involve only one seller. We are concerned here only with those which

quires,[4] but FPASA does not, that proposals for negotiated contracts be solicited from a maximum number of qualified sources and that discussions be conducted with all sources in a competitive range.

- *Truth in Negotiations.* ASPA requires,[5] but FPASA does not, that contractors and subcontractors submit cost or pricing data.
- *Negotiation Authority for Research and Development.* Both acts require agency head approval to negotiate research and development (R&D) contracts. Under ASPA someone below the head of the agency can approve contracts of up to $100,000.[6] Under FPASA, the limit is $25,000.[7]
- *Negotiation of Certain Contracts Involving High Initial Investments.* ASPA includes,[8] but FPASA does not, an exception to the advertising requirement for negotiating certain contracts requiring a high initial investment.
- *Specifications Accompanying Invitations for Bid (IFB).* ASPA states that an inadequate specification makes the procurement invalid.[9] Comparable language is not found in FPASA.

Although some of the inconsistencies stem from special problems originally encountered by only one or a limited number of agencies, most of them arise simply because there are two basic procurement statutes, and because each is amended at different times in different ways by different legislative committees. These basic inconsistencies have proliferated to an overwhelming degree in the "flowdown" from the statutes to agency, bureau, and local policies, regulations, procedures, and practices. This results in serious inefficiencies and adds enormously to the procurement-related costs incurred by the Government and its contractors.

The merger of ASPA and FPASA into one Government-wide statute will minimize the need for future amendments, although special problems will have to be treated by specific provisions in the merged statute. However, these occasions will be fewer in number because problems that originally were unique to one or a limited number of agencies have tended to become problems for other agencies and have required separate legislative treatment each time the problem arose.

A case in point is the provision of ASPA, but not in FPASA, that allows negotiation where performance requires a large initial investment.[10] In the 1940's this provision only had application to the Department of Defense (DOD). Special legislation was required later because the Department of Transportation needed similar authority for its air navigation equipment contracts.[11] The need for this negotiation authority may increase as other civilian agencies become involved in more expensive and more technical procurements.

Many of the differences between the acts arose through legislation initiated by a congressional committee which had jurisdiction over only one of the basic acts. For example, the Truth in Negotiations Act and the statutory provisions requiring competitive discussions were added to ASPA but not to FPASA. Thus, major substantive issues were resolved in only one act because the legislation had been drafted to cover the military departments only.

A comparable situation occurred recently when Congress enacted Public Law 92–582, establishing Federal policy with respect to the selection of architect-engineers. The statute amends FPASA but not ASPA. Although the Senate Report (92–1219) noted this fact, it concludes that DOD was already following the new provisions and no amendment to ASPA was needed. The result is that the civilian agencies are required by statute to have "discussions" with A–E firms before making a selection but not for other types of contracts. On the other hand, DOD is not required to conduct "discussions" with A–E firms but is required to conduct discussions for other types of contracts.

Another example is the addition of language in ASPA requiring complete specifications to be prepared in connection with invitations for bid under formal advertising. The new language [12] was added to ASPA as part of a bill

[4] 10 U.S.C. 2304(g) (1970).
[5] 10 U.S.C. 2306(f) (1970).
[6] 10 U.S.C. 2311 (1970).
[7] 41 U.S.C. 257(b) (1970).
[8] 10 U.S.C. 2304(a)(14) (1970).
[9] 10 U.S.C. 2305(b) (1970).
[10] 10 U.S.C. 2304(a)(14) (1970).
[11] 49 U.S.C. 1344(e) (1970).
[12] 10 U.S.C. 2305(b) (1970).

Legislative Base

The Office of Federal Procurement Policy should be established by law. In the long run, only an organization solidly based in statute can have the prestige, stature, and assurance of continuity of effort necessary for so important a function. By enacting the basic statutory authority for the policy office, Congress can make clear the relationship it intends to maintain with the executive branch in policy development.

Executive Branch Action

We view the establishment of an Office of Federal Procurement Policy as long overdue and urgently required. Therefore, recognizing that the Congress will want to consider with care the legislation establishing the procurement policy office, we suggest the President give immediate consideration to establishing the office by Executive order, without waiting for the legislative process to be completed. The office could then begin to give prompt attention to the problems highlighted in our report and to work with Congress and the agencies in considering and implementing our recommendations.

Relationship of Recommendation 1 To Other Recommendations

Throughout this report, we refer to the Office of Federal Procurement Policy either in recommendations or in the accompanying text. The purpose is to highlight the potential role of the office. We emphasize, however, that such recommendations are not contingent on the establishment of an Office of Federal Procurement Policy. Each of our recommendations has merit independent of the existence of such an office.

In Part F, we discuss the lack of consistency across Government, and within agencies, in the use of contracts and grants. We highlight the confusion caused by inconsistent and often interchangeable use of these instruments and the hodgepodge of clauses and administrative techniques employed.

Effects on the Procurement Process

Throughout this report, we discuss many problems caused by the lack of central executive branch leadership in developing policies and effectively monitoring ongoing procurement operations. Our conclusions are summarized below:

- Government procurement policies and procedures are needlessly diverse. Although complete uniformity is neither desirable nor attainable, there is no justification for much of the diversity that exists.
- Contractors frequently are bewildered by the variety of requirements from different agencies but lack an effective route in the executive branch through which to appeal for more realistic treatment.
- There is no unit in the executive branch prepared to interact with Congress and GAO on a Government-wide basis with respect to recommendations and advice for improving the procurement process.
- There is no systematic Government-wide effort to improve training or qualifications of procurement personnel or for continuing study of ways to improve the process.
- When agencies disagree on the best procurement policy to adopt, the only arbiter available is OMB, which is not staffed to provide the needed decisions in a timely fashion.
- No authoritative source in the executive branch is knowledgeable of how the public and private sector interface is affected by procurement, how much agencies are procuring, or how well they are implementing existing Government-wide policies.
- Data on the operation of the procurement process is either nonexistent or collected with little regard for Government-wide management use or comparative analyses.

THE OFFICE OF FEDERAL PROCUREMENT POLICY

Major Attributes

We have concluded that a central Office of Federal Procurement Policy is urgently needed. The office should have the following attributes:

Be independent of any agency having procurement responsibility. Objectivity requires separation of basic procurement policymaking from operational concerns and biases. Judicious use of advice and personnel from the procuring agencies will avoid the dangers of an ivory tower approach to policy formulation. The new office should not become involved in the award of contracts or in the administration of procurement actions.

Operate on a plane above the procurement agencies and have directive rather than merely advisory authority. A major limitation in the effectiveness of GSA as the responsible agency for the FPR has been its circumscribed authority and lack of control over other agencies in the executive branch.

Be responsive to Congress. In the basic procurement statutes, Congress should provide the executive branch ample latitude for initiative and experimentation aimed at improving procurement policies. In turn, the executive branch must provide a responsible, effective, and responsive source of Government-wide policy control and leadership within a framework of executive-legislative cooperation.

Consist of a small, highly competent cadre of seasoned procurement experts. To ensure its focus on major procurement policies and effective use of agency expertise, the Office of Federal Procurement Policy should be limited in size. Its staff should be composed of experts in major disciplines necessary for procurement; for example, business management, law, accounting, and engineering.

Representative Functions

Without attempting to define each duty and operating rule for the Office of Federal Procurement Policy, we suggest the following functions as expressing the type of organization we have in mind:

TABLE 1. SOURCES OF PROCUREMENT POLICY

Legislative Branch
Congress
- Legislation—Government-wide or limited to particular agencies or programs
- Committee reports
- Informal communications

General Accounting Office
- Legislative advice to Congress
- Reports and audits
- Decisions on individual matters
- Comments on proposed executive branch regulations
- Regulations

Executive Branch
President
- Executive orders
- Other directives

Office of Management and Budget
- Circulars
- Legislative advice to Congress

Department of Defense
- ASPR
- Other directives

General Services Administration
- FPR
- Other directives

Other procuring agencies
- Procurement regulations
- Other directives

Boards of contract appeals
- Decisions

Other agencies (for example, Department of Labor, Small Business Administration, Environmental Protection Agency)
- Regulations
- Other directives

Judicial Branch
Courts
- Decisions in contract cases

Source: Commission Studies Program.

less formal actions ranging from committee reports and investigations to individual attention to constituent complaints or suggestions. These actions may shape Government-wide policy or affect only individual agencies, groups of agencies, or units or programs within an agency. Our studies identified more than 4,000 provisions of Federal law related to procurement. Most important among these are the Armed Services Procurement Act of 1947 [2] and title III of the Federal Property and Administrative Services Act of 1949.[3] Improvements needed in these laws are discussed in Chapter 3 and in Part J (Other Statutory Considerations).

The General Accounting Office (GAO) serves as an arm of the Congress. With its responsibility for auditing and certifying to Congress the legality of specific contractual disbursements, and its continuing responsibility for closely following procurement trends, GAO exerts profound influence on procurement policy. This influence is exerted through decisions on individual matters, overall reports, audits, legislative advice to Congress, and review of proposed agency policies. Its actions may affect Government-wide patterns of practice or policy, or may relate only to particular agencies or situations.

Judicial Branch

Interpretations of statutes, regulations, and contract provisions by the Federal courts in suits involving procurement have a direct effect on the evolution of policy.

Executive Branch

Although Congress and the courts play a basic role, most procurement policy is developed in the executive branch. Much of this development consists of translating the basic policies and requirements established by the other branches into a body of rules and regulations governing procurement; keeping Congress informed as to the effects of legislation and recommending changes to make the process more effective; interpreting the requirements in specific cases for contractors, grantees, and

[2] 10 U.S.C. 2301–14 (1970).
[3] 41 U.S.C. 251–60 (1970).

Policy Goals

The law establishing this Commission declares it "to be the policy of Congress to promote economy, efficiency, and effectiveness" in the procurement of goods and services by the executive branch.[9] The methods for achieving this policy are spelled out in the law. Essentially, the law calls for (1) the reevaluation and improvement of policies for the Government to acquire goods and services in a timely, economical, and competitive manner; (2) an improvement in procurement organization and personnel; (3) the correction of duplication or gaps in laws, regulations, and directives; (4) uniformity and simplicity when appropriate; (5) fair dealing; and (6) overall coordination of Federal procurement programs.

Recommendations are contained throughout the four volumes of our report. Clearly, not all are of equal importance or of similar impact. Some call for a fundamental recasting of the procurement process; others for alleviating ills that have plagued Government and industry. Taken together, the major recommendations will achieve the policy goals set forth in the congressional mandate establishing the Commission.

An Integrated System with Central Leadership

An important objective of our recommendations is to ensure that the system fully warrants the public trust. The recommendations propose an integrated system for effective management, control, and operation of the Federal procurement process. The focus of this system is the proposed Office of Federal Procurement Policy that, if established, will provide leadership in the determination of Government-wide procurement policies.

The system we advocate will enable the executive branch to ensure that procurement operations are businesslike and orderly and that goods and services are efficiently acquired. To carry out this responsibility, Federal purchasing agencies must be provided with necessary instructions and resources. Another essential ingredient is timely information on how well procurement needs are being met, so that deficiencies and resources may be adjusted at the appropriate management level. Our system satisfies these criteria and represents the net result of our study. The ten elements of our system are:

- The creation of an Office of Federal Procurement Policy in the executive branch to assure fulfillment of Government-wide statutory and executive branch requirements in performing procurement responsibilities.
- An integrated statutory base for procurement, implemented by a Government-wide regulatory system, to establish sound policies and simplified agency procedures to direct and control the procurement process.
- Latitude for Federal agencies to carry out their responsibilities within the framework of Government-wide statutes, policies, and controls.
- Availability of funds in time to permit improved planning and continuity of needed Federal and contractor operations.
- Government-wide recruitment, training, education, and career development programs to assure professionalism in procurement operations and the availability of competent, trained personnel.
- Carefully planned agency organizations, staffed with qualified people and delegated adequate authority to carry out their responsibilities.
- A coordinated Government-wide contract administration and audit system. The objective is to avoid duplication and deal uniformly, when practical, with the private sector in the administration of contracts at supplier locations.
- Legal and administrative remedies to provide fair treatment of all parties involved in the procurement process.
- An adequate management reporting system to reflect current progress and status so that necessary changes and improvements can be made when the need appears.
- A continuing Government-wide program to develop better statistical information and improved means of procuring goods and services.

[9] See sec. 1, Public Law 91-129 (Appendix A).

ing a long leadtime. This includes not only major weapon systems but also large commercial or Government buildings and other large but conventional undertakings. Because of their magnitude and because they do not contribute directly to the fulfillment of growing domestic needs, investments in major weapon systems inevitably are singled out for special scrutiny.

Cost increases have been ascribed to early planning deficiencies, organizational rivalries, abnormal inflation, changes in design to meet new threat assessments or to counter obsolescence, weak contractor management, Government interference, contractors underestimating in order to "buy-in" to the ultimate production stages, overoptimism by program advocates, and premature progression toward more costly stages of development without adequate technical validation. The degree to which these factors contribute to cost growth is considered in the discussion of major system acquisition, Part C.

Source Selection and Competition

The procedures for selecting a contractor for a major system frequently are challenged on grounds of integrity, priority, or competence. Most major systems and many lesser procurements are subjected to such challenges. Sometimes the Government is charged with disregarding its own selection criteria to assure preservation of a needed industrial source; at other times, it is charged with conveying or transfusing information on the superior technical characteristics of one bidder to his competitor; and still other charges allege that the Government uses techniques that inhibit true competition.

Accounting Practices and Profits

During periods of crisis, the profits of major contractors often come under public scrutiny. Such scrutiny has been particularly close in the past few years. Concern over total procurement costs has led to various attempts to compare profits of defense contractors with those of other commercial enterprises. It also has led to enactment of a new law intended to promote more uniform cost accounting standards in order that costs and profit comparisons can be made with greater ease and validity.

The Industrial and Technological Base

The United States recognizes that industrial preparedness for defense is a major deterrent to war. In the post-World War II era, planning for industrial preparedness has become extremely complicated since rapidly evolving technology has accelerated the rate of obsolescence of existing equipment.

The weapons build-up caused by international tensions of the past two decades and the space and nuclear competitions have maintained and nurtured the technological and industrial base. However, recent fluctuations, adjustments, and cutbacks in almost every field of technological and industrial activity raised serious questions regarding the future viability of the base.

Characteristics of the Private Enterprise System

Coupled with concerns over the industrial base are questions related to the traditional reliance of the Government on the private sector of the economy. The diversity of Government needs has compelled it to develop new purchasing methods in order to optimize the blending of public and private skills and resources. For example, the Government furnishes industry with facilities such as machine tools or heavy equipment, and provides advance funding, thus relieving industry of many of the normal risks of commercial enterprise.

The degree of risk industry assumes is debated continually; particularly with respect to firms that are Government-fostered, partially Government-protected, and which, in some respects, operate outside of the traditional free enterprise concept. One important issue is the

ment, and providing adequate housing. The military arsenal continues to require multibillion dollar weapon systems, and undertakings of similar size and complexity are needed for space, nuclear power, and other technologically advanced programs.

Over the past 20 years, Government procurement has increased sixfold.[4] Some 80,000 [5] Federal employees are engaged in this process, and many more are employed in private industry.

Despite new programs, spiralling growth, and complicated products, military and civilian procurements still are governed primarily under laws enacted more than 20 years ago—the Armed Services Procurement Act of 1947 and the Federal Property and Administrative Services Act of 1949.

The procurement process as it has developed over the years has, in general, served the Nation well and should not be subject to blanket criticism. At the same time, it has developed in a piecemeal fashion. The magnitude of the outlays involved, the important program needs dependent on procurement, and the impact of procurement policies on the private sector underscore the importance of making certain that procurement operations are carried out as effectively and economically as possible.

Better Coordination and Management

The congressional hearings disclosed that procurement regulations, practices, and procedures are relatively uncoordinated and often inconsistent.[6] The volume of expensive paperwork swells yearly, and procurement procedures grow more complicated with each passing day. New agencies grope for direction as they begin to establish procurement ground rules. As a result each one's rules may differ from those already used by older agencies or from those being developed by other new agencies.

As the agencies generate new rules to control procurement and new devices to motivate contractors, Congress continues to receive an

THE PROCUREMENT PROCESS

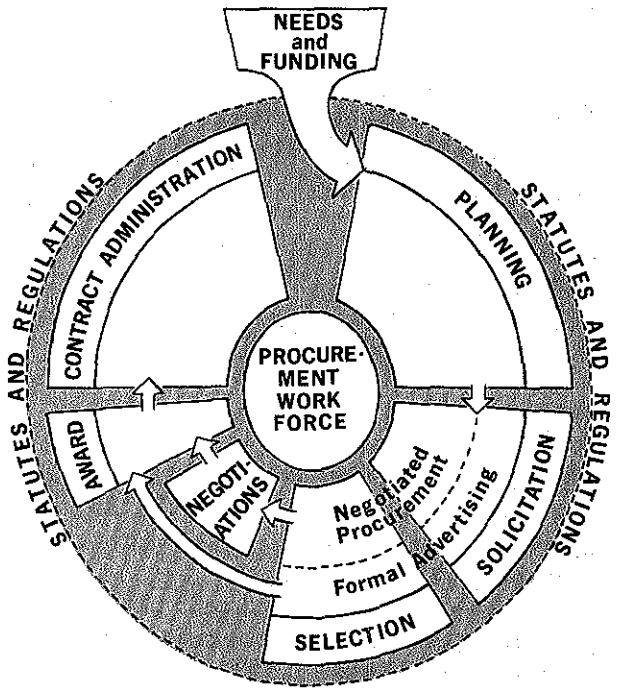


Figure 1

increasing volume of complaints, inquiries, and suggestions concerning Government procurement. Efforts to correct deficiencies or inequities have been fragmented and, at best, have produced only stopgap remedies.

The varying requirements of the agencies and the millions of individual procurement actions cannot be reduced to a single neat formula. However, the situation suggests that there is urgent need for a more unified approach to procurement.

IMPORTANCE OF PROCUREMENT

Steps in the Process

The procurement process includes all actions taken by Federal agencies in obtaining needed goods and services. The process begins with identification of a need and ends with delivery of goods or services. Key steps in the process (fig. 1) provide the setting for the subjects covered in this volume.[7] The steps do not necessarily occur in an exact sequence, and the dis-

[4] Legislative History of Commission on Government Procurement, Public Law 91–129, Nov. 26, 1969, prepared by Office of General Counsel, U.S. General Accounting Office, p. 19.

[5] See Appendix E for summary of data developed through a questionnaire used by Study Group 5.

[6] See note 2, *supra*.

[7] For an expanded description of the process, see Appendix F.

1,000 persons in 18 cities (see Appendix B); and received responses to questionnaires from nearly 60,000 individuals and many organizations. Government agencies, suppliers, and trade and professional associations all made significant contributions to the program.

Each study group was instructed to provide the Commission with recommendations for improving the procurement process and to support its recommendations with the most relevant, timely, and comprehensive information possible. The products of more than a year's intensive work by the study groups were presented to the Commission in reports totaling more than 15,000 pages.[4]

At intervals during its work and at the conclusion of its effort, each study group made detailed presentations to the Commission. These presentations and the reports prepared by the groups served as working tools for the Commission. Overall, the work of the study groups served this purpose well and provided valuable basic information and differing viewpoints for Commission deliberations.

The study effort was designed with some overlap in order to explore different viewpoints; some of the study groups reached different conclusions about the same subject matter. In some cases, the study group reports contain recommendations for improvement that the Commission has not included in its report. A number of these pertain to details of procurement procedures that merit consideration by individual agencies; some were not considered appropriate for other reasons.

The Commissioners held more than 50 days of formal meetings, in addition to participating on an individual basis with the staff and study groups. Commission studies focused on the process as a whole rather than on individual procurement decisions or transactions. Where undesirable or salutary practices and results were observed, the Commission inquired into the process to see what could be learned for the future.

The extensive study just described resulted in 149 recommendations for improving Government procurement.[5] These recommendations are presented in a Commission report consisting of ten parts packaged in four volumes (see page v).

While each Commissioner does not necessarily agree with every aspect of this report, the Commission as a whole is in agreement with the general thrust of the discussion and recommendations, except where noted. Exceptions of individual Commissioners are identified in the text as "dissenting positions."

The Commission is acutely aware of the responsibility it bears for a study of this magnitude, with recommendations that will affect tens of thousands of people and the expenditure of billions of dollars. Hopefully, this report will be received by the public and by the procurement community with the earnestness of purpose with which it was prepared, and any resulting dialogue will be directed toward constructive efforts to improve the procurement process.

[4] Copies of the Study Group reports will be filed with both the House and Senate Committees on Government Operations; and, after Feb. 15, 1973, reference copies will be available in the Commission's Library; interested persons may contact the Federal Supply Service, General Services Administration (GSA), Washington, D.C. 20406 for information regarding location and hours.

[5] See Appendix H for a list of recommendations in Parts A–J.

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December 31, 1972

The Honorable Spiro T. Agnew
President of the Senate
Washington, D. C.

and

The Honorable Carl B. Albert
Speaker of the House of
Representatives
Washington, D. C.

Gentlemen:

In accordance with the requirements of Public Law No. 129, Ninety-first Congress, as amended by Public Law No. 47, Ninety-second Congress, the Commission on Government Procurement submits herewith its report.

Respectfully yours,

E. Perkins McGuire

E. Perkins McGuire
Chairman

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