FOB	Free on board
FPASA	Federal Property and Administrative Services Act
FPR	Federal Procurement Regulations
FPMR	Federal Property Management Regulations
FSC	Federal Supply Classification
FSG	Federal Stock Group
FSN	Federal Stock Number
FSS	Federal Supply Service
GAO	General Accounting Office
GBL	Government bill of lading
GPO	Government Printing Office
GS	General Schedule
GSA	General Services Administration
GTR	Government Transportation Request
ICP	Inventory Control Point
IRS	Internal Revenue Service
MAC	Military Airlift Command
MILSCAP	Military Standard Contract Administration Procedures
MILSTAMP	Military Standard Transportation and Movement Procedures
MILSTEP	Military Supply and Transportation Evaluation Procedures
MILSTRAP	Military Standard Transaction Reporting and Accounting Procedures
MILSTRIP	Military Standard Requisitioning and Issue Procedures
MIS	Management Information System
MOCAS	Mechanization of Contract Administration Services
MOWASP	Mechanization of Warehousing and Shipment Processing
MSC	Military Sealift Command
MTMTS	Military Traffic Management and Terminal Service
NADC	Naval Air Development Center
NASA	National Aeronautics and Space Administration
NBS	National Bureau of Standards
NOAA	National Oceanic and Atmospheric Administration
NSL	Not Stock Listed
OEM	Original equipment manufacturer
OMB	Office of Management and Budget
OSD	Office of the Secretary of Defense
PHS	Public Health Service
RTC	Regional term contract
SAC	Strategic Air Command
SAMMS	Standard Automated Materiel Management System
SIC	Standard Industrial Classification
SPANS	Sealift Procurement and National Security
TVA	Tennessee Valley Authority
USAF	United States Air Force
USAFE	United States Air Force, Europe
USARPAC	United States Army, Pacific
U.S.C.	United States Code
USDA	Department of Agriculture
USPS	U.S. Postal Service
VA	Veterans Administration

Part E—Acquisition of Construction and Architect-Engineer Services

CONTENTS

CHAPTER 1

Introduction

Nine percent of Federal procurement funds in fiscal 1972 was used for construction of various civil and public works and military facilities. Our review of construction procurement was initiated through study groups on Architect-Engineer Services and Construction. These groups recommended numerous changes in agency practices. We suggest that the agencies consider the detailed matters covered by the study groups and reflected in their reports.

In addition to direct procurement of construction, the Government also supports construction through grants to State and local governments, educational institutions, and other grantees. Construction accomplished through grant programs usually requires the addition of grantee funds. The individual grantees procure and administer these construction programs under their own procedures. under procedures promulgated by the grantor agency, or under a mixture of Federal and individual procedures. We did not study the procurement of construction by grantees. The general topic of grants is covered in Part F.

The seasonally adjusted annual rate of total new construction put in place in the first quarter of 1972 was $121.8 billion,[1] 11 percent of the estimated 1972 Gross National Product.[2] Of the estimated 870,000 construction contractors in the United States, only 1,200 (about one-tenth of 1 percent) employ 100 or more people.[3] From this data it is apparent that the industry requires the integrated input of many separate participants.

[1] U.S. Department of Commerce, Report C30–72–7, *Value of New Construction Put in Place*, Sept. 1972, p. 1 (July 1972 index).

[2] Calculated by the Commission by comparing the $121.8 billion with the Gross National Product shown in *Special Analyses of the United States Government, Fiscal Year 1973*, table C–1, p. 34.

[3] Statement of Roger Blough, Chairman, Construction Users Anti-Inflation Roundtable, before the Joint Economic Committee on Jan. 29, 1971, *Hearings*, 92d Cong., 1st sess., pt. 2, p. 347.

The Construction Contractor

In 1967, there were approximately 129,000 general building and heavy construction contractors in the United States.[4] In addition there were nearly 240,000 [5] specialty trade contractors, who only handle that portion of work for which they are specially suited, such as plumbing, heating and air conditioning, painting and decorating, masonry, roofing, carpentry, excavating and earthmoving, and iron and steel erection.

The Architect-Engineer

Although the architect-engineer (A–E) furnishes many types of services, the principal one for which the Government contracts with A–E firms is the preparation of the architectural and engineering designs, the final construction plans, and the detailed technical specifications on which construction contractors can bid accurately and competitively.

The procurement of A–E services by the Federal agencies is a very small part of overall Federal procurement. Federal procurement of these services in fiscal 1970 was about $140 million,[6] about 0.3 percent of the total direct Federal procurement reported by agencies. The dollar value of A–E services procured by the

[4] "Selected Construction Industries—Summary by Industry: 1967," *Statistical Abstract of the United States, 1971*, table 1089, p. 661.

[5] *Ibid.*

[6] Survey of Government agencies by Study Group 13–B (Architect-Engineer Services). Military prime contract awards for A–E services in fiscal 1972 amounted to over $200 million. *DOD Military Prime Contract Awards by Service Category and Federal Supply Classification, fiscal years 1969, 1970, 1971, and 1972*, Office of the Assistant Secretary of Defense (Comptroller), Sept. 12, 1972, p. 4.

Federal agencies is also a relatively small part of the market for A–E services. In 1967, there were 48,809 firms providing architectural, engineering, and land surveying services; annual receipts for firms with a payroll totaled $4.2 billion.[7] However, the Government is the largest single user of engineering and A–E services.[8] The Department of Defense awarded slightly more than half of the 3,400 Federal A–E contracts in 1970. In calendar 1969, approximately 80 percent of these DOD contracts were for $25,000 or less.[9]

Construction Craft Labor

Historically, construction workers have tended to join together by craft, and there are at least 17 national unions, 10,000 local unions, and 535 building trade councils.[10] The prominent unions include bricklayers, carpenters, laborers, electricians, operating engineers, cement masons, iron workers, plumbers, pipefitters, and sheetmetal workers.

While there are separate unions for almost every trade in the industry, the trades are formed into a single organization—the Building and Construction Trade Department, AFL–CIO. The Department of Labor reports somewhat more than three-fifths of the construction workers in this industry were employed by firms in which a majority were covered by union-management agreements.[11] We estimate that about half of all construction workers are nonunion.

Construction requires labor in different combinations of occupational skills. Operating engineers, for example, are employed in great numbers on large earthmoving projects and road construction, while comparatively few operating engineers are required in building construction. Different crafts are needed at different times and in varying numbers on the same construction project. Although the wage scales for skilled crafts provide some of the highest hourly wage rates among union workers, the median annual earnings of a full-time construction worker were $7,650 per year for 1969.[12] Some construction work is seasonal, hazardous, and subject to extensive downtime due to adverse weather, interruptions due to labor disputes and other causes, and difficulty in integrating and scheduling the work of various crafts.

Federal Construction Procurement

For fiscal 1972, the amount of direct Federal outlays for public works was estimated to be $5.4 billion,[13] most of it in the United States, representing over 4 percent of all new construction.[14]

The Federal agencies that procure a significant amount of construction are shown in table 1, along with the estimated dollar outlays and percentages of the total direct construction for fiscal 1972.

For civilian agencies, the General Services Administration–Public Buildings Service (GSA–PBS) is the central procurement authority for the construction of all general-purpose public buildings. This includes site acquisition, A–E services, and the overseeing of design, construction, extension, and remodeling of public buildings. During fiscal 1971, GSA–PBS processed $290,881,000 for procurement of construction.[15]

The civilian agencies utilize the services of GSA–PBS for general purpose building construction but may procure their own construction for special purposes related to their basic missions. For example, in the Federal Aviation Administration of the Department of Transportation, construction procurement is generally related to airport construction and

[7] "Architectural, Engineering and Land Surveying Firms—Summary by States; 1967," *Statistical Abstract of the United States, 1971*, table 1093, p. 663.

[8] Letter from Richard D. Harza to the Comptroller General of the United States, July 27, 1967, included in Appendix C of the U.S. Congress, House, *Hearings* on H.R. 16443, 91st Cong., 2d sess., June 4, 1970, p. 94.

[9] Commission Studies Program.

[10] Note 3, *supra*, pp. 346–347.

[11] U.S. Department of Labor, News Release USDL–71–312, "Results of BLS Survey of Compensation of Workers Employed by Construction Special Trade Contractors," p. 2.

[12] "Median Earnings of Civilians by Sex and by Occupation of Longest Job: 1958 to 1969," *Statistical Abstract of the United States, 1971*, table 360, p. 229.

[13] *Special Analyses of the United States Government, Fiscal Year 1973*, p. 256.

[14] *Ibid.* Grants and net lending for public works are estimated at $7.3 billion. (Percentage calculated by the Commission.)

[15] Letter from the General Services Administration to the Commission, subject: GSA Procurement for fiscal 1971, Dec. 7, 1971.

TABLE 1. DIRECT CONSTRUCTION

Agency	*Estimated fiscal 1972 outlays ($ millions)*[1]	*Percentage of total direct construction*[2]
Department of Defense: civil works Corps of Engineers—flood control, navigation, and multiple purpose projects with power	$1,119	20.62
Tennessee Valley Authority: power, water resources, and chemical facilities[3]	654	12.05
Army: military	564	10.39
Navy: military	462	8.51
Air Force: military[4]	304	5.60
Department of the Interior: Bureau of Reclamation	292	5.38
Postal Service: post office improvements and alterations[5]	276	5.09
Department of Transportation: Federal Aviation Administration	246	4.53
Atomic Energy Commission: facilities	237	4.37
General Services Administration	199	3.67
Department of Agriculture: Forest Service: roads, research, recreational, and protective facilities	195	3.59
Department of Defense: family housing	177	3.26
Veterans Administration: medical care facilities	107	1.97
Department of the Interior:		
Bonneville Power Administration	90	1.66
Bureau of Indian Affairs	86	1.58
National Park Service	81	1.49
Department of Health, Education, and Welfare: Health Services and Mental Health Administration	43	.79
Department of Transportation: Coast Guard	43	.79
National Aeronautics and Space Administration	43	.79
Department of Defense: interservice activities—construction, defense agencies	16	.30
Miscellaneous	194	3.57
Total civilian and defense public works direct construction	$5,428	100.00

[1] *Special Analyses of the United States Government, Fiscal Year 1973*, Executive Office of the President, Office of Management and Budget, pp. 260, 277, and 278.
[2] Calculated by the Commission.
[3] TVA does most of its construction with its own personnel.
[4] Construction performed by the Corps of Engineers and Naval Facilities Engineering Command.
[5] Construction performed by Corps of Engineers.

modification. In the Atomic Energy Commission, construction procurement is generally related to complex industrial-type facilities (for example, the National Accelerator Laboratory).

In the Department of Defense, the Assistant Secretary of Defense (Installations and Logistics) has responsibility for overall policy in the areas of:

Military construction, including
  Reserve forces facilities
Military family housing
Real estate and real property,
  including general purpose space.[16]

There are two primary design and construction agents, the Army Corps of Engineers and the Naval Facilities Engineering Command (NAVFAC). With the exception of family housing, for which the Air Force serves as both the design and construction agent, most of the design and construction of Air Force facilities is handled by either the Corps or NAVFAC.

Although the military agencies have limited internal capabilities to perform actual design and construction, virtually all the design functions are performed by professional A–E firms under contracts.

The Corps of Engineers is the principal construction agent for the Government in civil works, river and harbor improvements, flood control, hydroelectric power, and related projects. The Corps has responsibility for construction of military facilities for the Army and, in many areas, performs the same service for the Navy and Air Force. It contracts for design, construction, maintenance, and repair

[16] U.S. Department of Defense, DOD Directive 5126.22, *Assistant Secretary of Defense (Installations and Logistics)*, May 28, 1969.

of buildings, structures, utilities, and public and civil works on a worldwide basis and supervises the performance of such work. The Corps of Engineers has 50 division and district offices engaged in the procurement and administration of civil engineering requirements.[17]

NAVFAC is responsible for facilities design, construction, maintenance, and repair; utilities; material support for public works; floating cranes, pontoon equipment, and fleet moorings; fixed surface and subsurface ocean structures; and construction, transportation, and other heavy equipment.[18]

The Construction Procurement Process

Most Federal construction contracts are awarded through formal advertising on the basis of sealed, competitive bids and "lump-sum" or "fixed-price" contracts.

Under this system, the general contractor agrees to do the work for a fixed price. He assumes most of the risks, such as cost increases, and any cost savings accrue to his account. The general contractor usually contracts with subcontractors for portions of the work, and in many large or complex construction projects, there are numerous subcontractors and sub-subcontractors.

Development of specific construction programs for procurement by individual agencies is a rather long, detailed, and complex process. Functions and tasks developed from the basic mission and responsibilities assigned to the agency determine facility requirements. Facilities are not all authorized and funded as they are identified by the agencies; therefore, individual facility projects must compete with one another within an agency for priority and funding.

An agency construction program is far from static. It is subject to constant change during both executive and legislative reviews. The leadtime from facility requirement identification until completion of construction for a large Federal project is five years or more. The first two years are required for reviews by the agency and by the Office of Management and Budget for inclusion in the President's budget, and for congressional authorization and appropriation. The remaining three years are required for design, construction, and acceptance by the user. Some agencies shorten this period by about one year by initiating design prior to congressional authorization and appropriation for a construction project.

The design of the project is accomplished by in-house personnel of the agency, by architect-engineer contractor personnel, or frequently by the A–E with participation by agency personnel through reviews and preliminary efforts required prior to selection of the A–E. Detailed plans and specifications permit advance calculation of the bill of materials, items of equipment, labor, and methods of construction required, in order to develop the final estimate of construction cost.

It is essential that the anticipated costs of operation and maintenance of the facility be closely scrutinized during this phase of the procurement as well as during the construction phase. The cost of operating and maintaining facilities is normally the major cost over their life cycle, so cost adjustment in any of the preliminary phases may significantly affect the overall costs. For example, severe limitations in funds for design of a facility may restrict the number of concepts considered and preclude exploration of alternatives which might result in lower costs for construction, operation, and maintenance. Unduly limiting construction costs may cause substitution of marginal materials or systems, or possible elimination by the agency of certain design features which will increase future maintenance and operating costs many times over the actual "savings" in construction costs.

Upon completion of design and preparation of the final cost estimate, the agency formally advertises the project for construction bids. Wide competition and bidder interest are generally sought. Thirty to 60 days are normally allowed for bidding and bids are publicly opened and announced. Bids generally must be accompanied by a bid bond or cash deposit amounting to 20 percent of the bid. Award is made to the low, responsible, qualified bidder following such pre-award surveys as may be required to determine present workload of

[17] *National Security Management—Procurement*, Washington, Industrial College of the Armed Forces, 1968, p. 42.
[18] *Ibid.*, p. 49.

bidder, financial capability, performance on previous work, and compliance with other requirements.

Immediately after award of the contract, the contractor normally submits performance and payment bonds in the amounts of 100 percent and 50 percent, respectively, of the contract award price. Since the mechanics' lien laws are not applicable to real property owned by the United States, and in order to provide some financial protection to subcontractors, materialmen, suppliers, and laborers, the Government requires that a payment bond be posted by the contractor for the protection of such persons. In addition, it requires that a bond to guarantee performance in a proper manner be posted for protection of the Government to insure completion of the work. Preconstruction conferences usually are held to coordinate early requirements such as shop drawings submittals, concrete-mix designs, proposed construction schedule, and other data which the contracting officer requires to supervise, administer, and inspect the work.

Post-award activity falls in the following general categories:

- Scheduling and coordination of construction site activity
- Inspection and quality assurance
- Administration and enforcement of contract provisions
- Business decisions and negotiation of changes.

In all but the smallest contracts, monthly progress payments are made based on work actually completed and, in some cases, for material delivered to the site. The Government retains 10 percent of each progress payment until satisfactory performance of one-half of the work; retention may be continued if the contractor's performance is unsatisfactory. Factory inspection of manufactured equipment to be incorporated into the project is carried out or certificates of compliance from the factory accepted. Onsite work, materials, and equipment delivered to the site are also inspected for compliance. Decisions on changed conditions or conflicts in the specifications are made by the contracting officer. The agency makes a prefinal inspection and develops "punch lists" which identify the items of work left to be done or which require correction. At this point, the facility may be accepted conditionally and beneficially occupied by the user. The amount of retained funds is normally reduced to about three times the value of the outstanding work.

Federal agencies follow one of two basic sets of regulations in carrying out design and construction work by contract. The military services follow the Armed Services Procurement Regulation (ASPR), and most other Federal agencies follow the Federal Procurement Regulations (FPR). The individual agencies implement these basic regulations with their own instructions and regulations. Sometimes there are differences in implementation. Most agencies use similar construction contract forms such as Form 22, Instructions to Bidders, and Form 23–A, General Provisions (Construction Contract), and generally follow the same basic procedures and philosophy of contract administration. There are some differences, however. For example, warranties may vary from agency to agency with the most stringent calling for consequential damages in the event of failure. The warranty period is for one year, but in some cases extends to one year beyond either completion or correction of the last deficiency, whichever occurs last.

There are certain circumstances and situations in which it may be more economical to use different methods from the one outlined above. Time does not always permit design and construction to be accomplished in a sequential and orderly manner.

Private industry in general makes wider use of alternative techniques than does the Government. There are several reasons for this. There is often a need in the private sector to exploit a market or a situation quickly, which requires the construction of a plant, office building, or retail store on an expedited basis. In this situation the cost of the particular facility may be relatively unimportant compared to achieving an operating date which will permit the planned use of the facility and the associated profits. Private industry rarely uses formal advertising procedures and is not required to offer all contractors an equal opportunity to participate in its work. Accordingly, private industry enjoys much greater flexibility than Government in procuring construction ser-

vices. Industry frequently uses to advantage such construction procedures as concurrent design and construction and the use by the builder of the owner's outlined plans and specifications, with the builder providing the detailed design, material, and equipment.

CHAPTER 2

Architect-Engineer Services

In Part A, Chapter 9, we discuss the general topic of procurement of professional services by the Government. Most Federal construction is based on design effort by architect-engineer (A–E) firms under contract with the Government. The policies for selection and reimbursement of A–E firms have been matters of contention for many years and are the subject of recent legislation. Our conclusions and recommendations related to A–E services, and a dissenting position, are set forth in this chapter.

BACKGROUND

The design and engineering function is a major phase of the construction procurement cycle. In general, "architect-engineer services" may include *all* professional services associated with the research, design engineering, and construction of facilities, such as feasibility studies; planning; preparation of designs, drawings, specifications, and cost estimates for facilities; preliminary and master planning studies; consultation; investigations; and surveys.

The principal service for which the Federal Government has a demand is the preparation of final construction plans and detailed technical specifications on which construction contractors can bid accurately and competitively. In most Government A–E contracts the term "architect-engineer services" has been interpreted by the contracting agencies to mean only the preparation of plans, drawings, designs, and specifications.[1]

The Government made little use of private A–E firms prior to 1939, when Congress enacted the first of several statutes authorizing the procurement of A–E services from outside sources. These statutes limited the total compensation—or "fee"—payable to A–Es under Government contracts to six percent of construction costs.

Today the procurement of A–E services is exempt from the requirements of formal advertising for sealed bids, and Federal A–E contracts are, without exception, arrived at through negotiation. The practice has been to obtain price or fee proposals only from the A–E firm selected for negotiation of a contract.

The A–E has been characterized as a member of the Government team assigned the task of procuring a completed, functioning facility within specified budgetary and time limitations. The A–E is a part of the acquisition process and his services are not an end in themselves; rather, A–E services are a means used by the Government for obtaining a needed facility.

The A–E's overall objective should be an optimal design that will provide a facility within the construction funds available, and which satisfies aesthetic and functional requirements for the least total cost, including both the initial construction cost and operations and maintenance cost over the life expectancy of the facility. Although the cost of A–E services represents only a small part of the total cost of a project, professional design services have a profound effect on total cost of

[1] Services other than preliminary and final efforts of these kinds made up a small portion of the $140 million in A–E services contracted for by the Government in fiscal 1970. Our studies concentrated on facility design effort. Federal procedures in contracting for other A–E services should follow the procurement philosophies discussed in this chapter and Chapter 9 of Part A to the fullest extent feasible.

the structure.[2] The best opportunity for increasing efficiency and effectiveness of a facility and for minimizing life-cycle costs clearly occurs during the initial planning and design phases.

A–E services are usually purchased on the basis of a negotiated, fixed, lump-sum fee. The A–E's fee or total compensation consists of salaries, payroll costs, general and administrative costs, overhead, other direct costs, and profit. The A–E fee thus differs from the concept of fee as used in cost-plus-fee contracts, in which the fee paid is primarily profit. This type of contract is not normally used for A–E services.

In 1965, the General Accounting Office (GAO) reported[3] to the Congress that the A–E fee paid by the National Aeronautics and Space Administration (NASA) for the design of a facility in Nevada exceeded the applicable six-percent limit.[4] Thereafter, NASA proposed that the National Aeronautics and Space Act of 1958 be amended to permit NASA, in certain circumstances, to pay higher A–E fees. As a result of this proposal, the conference committee, in its report[5] on the fiscal 1967 NASA authorization bill, requested GAO to undertake a Government-wide analysis of the interpretation and application of the statutory fee limitation and submit a report to Congress as a basis for legislative action.

The resulting GAO report,[6] submitted in April 1967, concluded that the six-percent limit was impractical and unsound and should be repealed. The report noted, however, that reasonable A–E fees could be assured through use of competitive negotiation and the submission and certification of cost or pricing data under Public Law 87–653, the Truth in Negotiations Act.[7] The most controversial issue in the GAO report centered on its interpretation that the competitive negotiation requirements of the act, codified as subsection 2304(g) of the Armed Services Procurement Act, were applicable to A–E contracts. This subsection provides that in negotiated procurements over $2,500, discussions shall be held with all responsible offerors who submit proposals within a competitive range, price and other factors considered. Under this interpretation, the GAO report concluded that an A–E award should be made to the offeror whose total proposal was most advantageous to the Government, price and other factors considered.

The GAO report recommended, in view of past agency practice in the selection of A–Es, (1) that Congress clarify its intent as to whether the competitive pricing negotiation requirements of the law apply to procurement of A–E services or, in the absence of clarification of congressional intent, (2) that applicable Government regulations be modified to comply with the GAO interpretation of Public Law 87–653.

Congress responded to this GAO recommendation by enacting Public Law 92–582[8] in October 1972. The statute, which amends the Federal Property and Administrative Services Act, requires:

- Public announcement of all requirements for A–E services
- Discussion with three or more firms "regarding anticipated concepts and the relative utility of alternate methods of approach"
- Establishment and publication of criteria for ranking the firms
- Ranking of three firms in order of preference
- Negotiations, with the A–E firm considered to be most qualified, of a satisfactory contract at a compensation which is fair and reasonable to the Government.

Congress was aware at the time it enacted Public Law 92–582 that this Commission was studying and expected to make recommendations concerning the requirements and pro-

[2] U.S. Comptroller General, B–164031 (3), *Study of Health Facilities Construction Costs*, Report to Congress, Nov. 20, 1972.

[3] U.S. Comptroller General, B–152306, *Non-Compliance with Statutory Limitation on Amount Allowable for Architectural-Engineering Services for the Design of a Facility at the Nuclear Rocket Development Station, Nevada*, June 16, 1965.

[4] NASA procurement of A–E services is subject to the Armed Services Procurement Act, 10 U.S.C. 2306(b).

[5] H. Rept. 1748, 89th Cong., 2d sess.

[6] U.S. Comptroller General, B–152306, *Government-wide Review of the Administration of Certain Statutory and Regulatory Requirements Relating to Architect-Engineer Fees*, Report to the Congress, Apr. 20, 1967, p. 16.

[7] See Part J for a discussion of this law. Although it applies to only the military agencies, NASA, and the Coast Guard, its provisions have been largely adopted for the civilian agencies in the Federal Procurement Regulations.

[8] Signed into law by the President on Oct. 27, 1972. This statute, which adds a new Title to the Federal Property and Administrative Services Act, is discussed below and set forth in Appendix A to this part.

cedures for the selection of A–E firms for Government work. The reports on Public Law 92–582 and the floor debates are clear that passage of this act was not intended to foreclose modification of this action in the light of recommendations expected to be forthcoming in our report to the Congress.[9]

SELECTION OF THE ARCHITECT-ENGINEER*

Recommendation 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.

Recommendation 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.

Recommendation 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.

[9] See, for example, H. Rept. 92–1188, p. 7; S. Rept. 92–1219, p. 5; *Congressional Record*, Oct. 14, 1972, p. S18182.

*See Dissenting Position, *infra*.

Current Agency Procedures [10]

Each Federal agency selects A–E firms on the basis of an agency evaluation of the technical competence of firms under consideration. The procedures for making this selection differ among agencies. They are alike in that no agency requests an estimate of the proposed A–E fee until one firm has been selected. Nor do the agencies normally solicit from possible contractors proposals with information as to concepts of the end product, the general approach to the design effort, estimated construction costs, or estimated total economic (life-cycle) costs. In short, with limited exceptions, A–E firms are not subjected to competition of the type generally used in selecting other contractors.

A–E firms interested in Federal projects file a Standard Form 251 (U.S. Government Architect-Engineer Questionnaire) with agencies for which they would like to work. The form includes information about the type of firm, locations, key personnel, number of professionals, projects in process or completed, and estimated construction cost of projects on which the firm was the architect or engineer of record. Firms are advised to update the forms periodically and to submit photographs of recent work and other descriptive material that may reflect their qualifications.

Generally, several A–Es are considered for a particular job on the basis of factors such as prior experience and performance, professional reputation, and proximity to the construction site. The A–Es are then rated and negotiations are held with the highest ranking firm. Solicitation of a price proposal and negotiations on price are not undertaken until after one firm has been selected for negotiation. If agreement is not reached with that firm, negotiations are terminated and new negotiations are commenced with a second firm.

Over a recent two-year period, in GSA, it was necessary to go beyond the first firm selected for negotiation in only 17 instances out of 227 procurements. Table 2 shows the reasons for the failure to reach agreement.

[10] The agencies subject to Public Law 92–582 have not had time to implement this new law. The following discussion of agency procedures reflects practices in use prior to implementation of the new statute.

TABLE 2

Refusal to accept a design fee within the six-percent limitation	8
Associated firm dissolved	4
Committed to other work	2
Equipment destroyed in hurricane	1
Withdrew without giving reason	2

Source: Statement of Hon. Elmer B. Staats, Comptroller General of the United States, Hearings before a Subcommittee of the Committee on Government Operations, House of Representatives, 92d Cong., 2d sess. on H.R. 12807 and H.R. 157, Mar. 14 and Apr. 18, 1972, p. 31.

Despite the general pattern of Government procurement of A–E services, there are some important differences in the selection process among the agencies. The Army and Navy scan their lists of firms to develop a "slating board" to narrow the list.[11] Interviews are sometimes conducted during the actual selection process to determine a finalist. NASA performs a desk screening and negotiates with a preferred firm or, if unsuccessful, the next preferred firm.

The Atomic Energy Commission (AEC) appears to have the most thorough procedure for ranking potential A–E contractors and selecting one for negotiation. Following an initial Form 251 screening, selected firms are invited to submit formal, unpriced, technical proposals for specific projects. The proposals contain considerable detail on proposed organization, key personnel to perform the project under consideration, and experience on similar work. After evaluating the proposals, the AEC evaluation team visits the firms which have submitted the most favorable proposals, usually the top three to five, to ascertain their capability. Although fee, as such, is not discussed during these interviews, AEC does often ascertain the billing rates, overhead rates, and travel and other prospective costs, as well as the estimated level of effort which the firms project. Subsequently, the evaluation team gives each firm a numerical ranking based on technical qualifications. A finalist is then selected by a technical proposal evaluation board. If negotiations with the finalist are unsatisfactory, then the second-ranking firm is interviewed and negotiations begun.[12]

The General Services Administration (GSA) appoints private architect-engineers to an advisory board which recommends a small number of firms with their qualifications as evaluated by the board. To make this evaluation, GSA rates each considered firm as "excellent," "average," or "poor" on 24 items ranging from the history of the firm to proximity of the firm to the geographical site of the project. Negotiations are begun with the firm selected by the Administrator or his designee as the best from the list. If negotiations with the first firm are unsuccessful, the second firm is invited to the negotiation table.

The Department of Health, Education, and Welfare and the Veterans Administration follow procedures similar to the GSA procedure, with some variations.[13]

Public Law 92–582

H.R. 16433, introduced in the 91st Congress, supported the "traditional" selection basis by providing that A–Es for Government projects would be selected on the basis of "demonstrated competence and qualification for the type of professional services required, and at fair and reasonable prices," but without discussion of price with more than one firm. The bill was passed by the House and was reported out of Senate Committee but did not come to a vote on the Senate floor.

A modified bill, introduced as H.R. 12807 in the 92nd Congress, was passed by the House on July 27, 1972, and by the Senate on October 14, 1972. This act, Public Law 92–582, is set forth in Appendix A.

APPLICABILITY OF THE ACT

Uncertainty as to the legality of existing procedures for A–E selection stems from the GAO report discussed earlier, which raised

[11] ASPR, part 18, sets forth in some detail the procedures currently followed by defense agencies.

[12] See AEC Procurement Instruction 9–56.202–5, 9–56.250(a), (b), and (c).

[13] Interesting discussions of the A–E selection procedures of several agencies, as viewed by the agencies and the profession, are included in the *Consulting Engineer*, Mar. 1972, pp. 102–189.

the issue whether the Truth in Negotiations Act required competitive negotiations and consideration of price in the selection. The Truth in Negotiations Act applies only to agencies subject to the Armed Services Procurement Act.[14] The legislative history of Public Law 92–582 indicates that it is *not* applicable to agencies covered by the Armed Services Procurement Act. Accordingly, the issue of competitive negotiations is not fully resolved as regards agencies not covered by the law.[15]

Public Law 92–582 represents a modest step in the right direction, insofar as it requires discussions with more than one firm. But our study indicates that the A–E selection method provided by the new law would not provide for adequate competition. Frequent use of the term "traditional" in discussions of A–E selection has led to some confusion. As noted above, the *basis* for selection has been common among agencies. The procedures used vary widely. A number of agencies will need to modify their procedures immediately to conform to the provisions of Public Law 92–582. These implementing actions should be viewed as interim, and a longer term effort should be started to establish Government-wide policy guidelines for selection of A–E firms. These new statutory requirements for the selection of A–Es have many potentials for varying interpretations, divergent implementing regulations, and protests. We have observed that current agency procedures and practices for A–E selection are not uniform. We also have found there are significant differences in agency regulations implementing the procurement statutes. With this background, we have little reason to expect the new A–E selection requirements will be implemented in a consistent manner absent Government-wide guidelines. Some agencies may well interpret too broadly the repeated assertions expressed in the committee reports and floor debate that Public Law 92–582 was merely codifying existing policies and procedures, and conclude they are not required to make any changes in their A–E selection procedures. Our studies reflect that many A–E selections are made under procedures which would not meet even the requirements of Public Law 92–582.

Thrust of Commission Recommendations

Throughout our report, we have sought to recommend ways to ensure that the procurement procedures used by the Government make use of the benefits of competition to the maximum extent possible. We have also recommended that, to the fullest extent practicable, agencies follow uniform policies and procedures in like situations. We have urged that Congress avoid freezing procurement procedures into a set pattern to be followed regardless of the circumstances at hand. Each of these principles is applicable to Government contracts for A–E services.

No one familiar with the nature of A–E services, and their importance in minimizing the costs of constructing, maintaining, and using a facility, advocates formal advertising for sealed bids to do A–E work; nor do we advocate competition on the basis of the fee charged. However, we believe that the architect-engineer fee is an appropriate factor for consideration in instances where competing A–E firms are otherwise equal.[16] The legislative history of Public Law 92–582 shows a clear intent to prohibit in all cases consideration of fee as a selection factor.[17]

Competitive Negotiations

Many A–E contracts are relatively small in

[14] The military agencies, the Coast Guard, and NASA.

[15] House Report 92–1188 on H.R. 12807, which became Public Law 92–582, states that the bill does not apply to "agencies falling within the jurisdiction of the Armed Services Procurement Act of 1947." See p. 9, H. Rept. 92–1188. An attempt on the House floor to extend the bill to those agencies was defeated. 118 Cong. Rec. H6898, daily record for July 26, 1972. But see S. Rept. 92–1219, accompanying H.R. 12807, p. 6, and section 704 of the Military Construction Authorization Acts for fiscal years 1971, 1972, and 1973.

[16] We are aware of the opposition of many members of the A–E profession to estimating prices in a competitive environment. Only recently, as a result of suits brought by the Department of Justice under the antitrust laws, have the American Institute of Architects, the American Society of Civil Engineers, and other organizations dropped provisions restricting competition among their members from their canons of ethics. The Commission emphasizes at the same time that it does not favor "competitive fee bidding," a concern frequently expressed.

[17] Both H. Rept. 92–1188, p. 10, and S. Rept. 92–1219, p. 8, state that in "no circumstances should the criteria . . . relating to the ranking of architects and engineers on the basis of their professional qualifications include or relate to the fee to be paid to the firm, either directly or indirectly."

size. Those estimated to fall below the ceiling on small purchase procedures [18] should be handled informally. For larger contracts, the Government should strive for more formal competition than is now normally obtained.

Our primary recommendation is that the A–E firm be selected, where practicable, through competitive negotiations.[19] With rare exceptions, more than one firm is qualified and available to design the facility. After such screening as the agency may use to narrow the list of potential competitors to manageable proportions, negotiations should be conducted with the remaining firms. In this process, technical competence in the areas considered by the agencies today should have major significance. For example, with all but the smallest firms and most routine design tasks, the plans of the A–E for assignment of individuals to the work are important.

In appropriate cases, the A–E concepts of the end product and their preliminary estimates of construction costs should be considered during the competition. The variety of facilities involved, differing practices in the timing of A–E selection, and varying degrees of agency in-house A–E competence make hard and fast rules impractical in this area. Artist's sketches and rough cost estimates would be of little use in selecting an A–E for most Government work. But in an era of rapidly changing construction techniques and escalating prices, competition frequently can be a useful tool in fostering innovation in design concepts, selection of basic construction methods or materials, and cost reduction. The weight given these factors should depend on the situation at hand. Some agencies contract with A–E firms for the development of initial construction cost estimates. Requiring cost estimates as a factor in the competition would not make sense in such cases. In other instances, the Government has chosen the basic construction concepts before seeking A–E services. Here, design concepts would often be of little interest, although the possibility of better ideas during the competition should not always be summarily dismissed.

[18] Elsewhere, we recommend that this ceiling be set at $10,000, with provision for periodic adjustment.

[19] Our Study Group on A–E services reported complaints that A–E projects were not uniformly announced in a timely manner. At present most agency selection procedures do not require any contact between agency officials and qualified A–E firms until one firm has been selected for negotiation of a contract. We believe that the provision in Public Law 92–582 for publicly announcing needs for A–E services and requiring discussions of anticipated concepts and the relative utility of alternative methods of approach with at least three firms is the first step in strengthening opportunities for broader participation in Government work, particularly by small firms and firms that have not been able to participate previously.

ROLE OF A–E FEE

The A–E firms selected for consideration should make known their estimated fees during the competitive negotiations. The price of the A–E contract is of relatively small importance in relation to the quality of the resulting design, since the design controls facility construction and maintenance and operation costs, which are many times the A–E cost. The proposed A–E fee should therefore be the determining factor in the selection process only when other factors are essentially equal. However, knowing and discussing the proposed fee can aid the selection process in other ways. Experience in contracting for other services, such as research, has shown that analysis of the proposed price of competing contractors can often lead to a better understanding of the efforts they intend to apply (whether too much or too little) and of their comprehension of the nature of the work required. In addition, competitive price analyses can lead to "tradeoffs" in final agency decisions on the scope of work desired.

It has been argued that disclosure of proposed fee during competition will lead ultimately to excessive haggling over price, pure price competition, and consequent degrading of the quality of services performed by A–E firms. There is no objective evidence to support such a conclusion. This has not resulted in other areas of competitive negotiation for Federal contracts of a similar nature, where price estimates are required. We do not see any reason to believe it would result in the A–E selection process.

LIFE-CYCLE COSTS

As the design job increases in size and cost, it is reasonable to expect competitors to expend more effort in submitting proposals.

Where construction costs are estimated to exceed $500,000, the Government should seek A–E estimates of the life-cycle costs of the facility when practicable. As discussed above with regard to design costs, benefits could be derived from focusing the attention of competitors on ways to reduce life-cycle costs of proposed facilities.

REIMBURSEMENT OF PROPOSAL COSTS

Our recommendations for increased emphasis on competitive consideration of the kind, quality, and cost of A–E services illustrate our concern that the process of selection of A–E firms be brought more in line with practices in other areas of Government procurement. In order to achieve realistic competition in some cases, especially those involving complex, costly facilities or unusually difficult design problems, it may be desirable to carry competition through the early phases of design. This is frequently the case in research projects leading to large investments, such as weapon systems or ships. It is unreasonable to expect the typical A–E firm to bear the costs of competition in all cases; thus, where necessary, the Government should be prepared to fund the cost of design competitions in cases where carrying competition this far would be cost-effective. This principle has been followed in other areas. Both the House and Senate reports on Public Law 92–582 acknowledge that in "unique situations involving 'prestige' projects such as in the design of memorials and structures of unusual national importance, when the additional cost justifies the approach, and when time allows, the agency head can rely on design competition under the recognized procedures that have been traditionally applied to this type of procurement." [20]

In summary, we recommend a departure from current Federal practice in the selection of Architect-Engineer firms for facility design and a strengthening of Public Law 92–582. We reject the concept that present practice leads to adequate competition,[21] and that selection of A–E firms must differ from the selection of contractors to perform other similar professional services.

DISSENTING POSITION

Three Commissioners* do not support the concept presented in the Commission position. They offer the following comments on the Commission position and a recommendation they would support.

The majority report purports to urge that Congress avoid freezing procurement procedures into a set pattern but in fact proposes to freeze the procedures for procuring architect-engineer services into the same mold of procedure as for procurement of goods and nonprofessional services. The majority's first recommendation would force the Federal Government to abandon the competitive selection procedure and to follow the set pattern of taking proposals as the basis for selecting an A–E.

One of the objectives for creating the Commission was to find ways in which the bureaucratic complexity of Government procurement could be simplified. With respect to the procurement of A–E services, however, the majority's Recommendation 1, rather than streamlining, would fasten upon the Government and A–Es an unnecessarily burdensome, bureaucratic, and expensive procurement procedure.

It also states that "our study" indicated that the newly enacted Public Law 92–582 (which formally adopted the traditional competitive selection method used throughout the Government and the private sector) would not provide for adequate competition. The statement implies that inquiries were made which developed information indicating that the traditional competitive selection method was not the most effective means of securing quality in design and that selection based on competitive proposals would yield better results. In fact,

[20] H. Rept. 92–1188 at p. 10; S. Rept. 92–1219, p. 8.

[21] A recent survey shows that the top 20 A–E firms selected by four Government agencies during fiscal 1971 performed the following percentages of agency A–E business:

NASA	–	77 percent
GSA	–	71.6 percent
DOD	–	61 percent
Corps of Engineers (civil functions)	–	40.5 percent

See H. Rept. 92–1188, 92d Cong., 2d sess., p. 27 (dissenting views of Hon. Chet Holifield).

*Commissioners Gurney, Sampson, and Sanders.

however, the recommendation to base selection on evaluation of proposals is totally at variance with the conclusions to be drawn from information developed by the Study Group appointed by the Commission by hearings, interviews, and inquiries.

The majority acknowledges that the objective in selecting an A–E is obtaining *quality* of service, rather than the lowest priced design work. In footnote 21 the majority cites percentage figures purporting to show that the bulk of Government design work goes only to a few firms.

The minority would note, first, that the discussion in the majority report contains nothing to show how selection of A–Es on the basis of competitive proposals would obtain better quality of service than does the traditional method. It may be that the majority intended that the footnote 21 figures be understood as demonstrating that government design contracts are awarded to a favored few for the most part, as a means of supporting its proposition that the traditional competitive selection procedure does not generate adequate "competition." However, the figures from which the footnote percentages were drawn represent the aggregate fees paid the firms on the lists. Among the 20 top firms on the Department of Defense list are Newport News Ship Building and Dry Dock Company and the Federal Republic of Germany. Newport News performs design services of a peculiarly specialized nature for which there are few sources. It is entirely possible (or perhaps even probable) that those contracts would have been awarded to Newport News had the procurements been effected by the method outlined in the majority's Recommendation 1 rather than by the traditional method. The minority would also surmise that the contracts with the Federal Republic of Germany would have been awarded to that "firm" whatever method of A–E selection might have been current at the time. The picture the majority report would paint with the percentage statistics is further distorted by the fact that a firm which got one large design contract would appear on the list whereas another firm of equal competence, having been awarded two or even three relatively small design contracts would not. In short, the majority report fails to demonstrate that there exists any lack of competition in the selection of A–Es to support its proposal that competition should be increased by adoption of Recommendation 1.

Further, if an undue number of contracts were being awarded on the basis of favoritism rather than competence, members of the profession would be the first to urge that Congress impose some method for selecting A–Es other than the one in use throughout the Government (as well as the private sector). It is well known that the profession favors continued use of the traditional method.

That the majority's recommended method of selection would, in fact, be less effective in securing top quality professional services is almost self-evident. Under the traditional competitive selection method, the procuring agency makes its initial selection on the basis of information obtained not just from the prospects but also from independent sources. But if the selection were to be made on the basis of an evaluation of proposals, the procuring agency would find itself limited to considering only such information as the prospects themselves might choose to provide in the proposals, and unable to include in the evaluation information obtained from independent sources as to the prospects' respective abilities to produce satisfactory results for their clients.

The content of the technical proposal, which the majority would make the basis of selection, would include a concept plus the A–Es estimate of cost, the latter being the "primary factor" for selection purposes. The discussion, which ordinarily would be expected to support the recommendation, instead points out some of the objections to use of these very factors for selection purposes. The report notes that artists' sketches and rough cost estimates would be of little use; that requiring cost estimates as part of the proposal makes no sense where the services to be procured are preparation of cost estimates; and that the Government itself has frequently established the desired concept before securing design services to carry out the concept. To this list of factors which show that the type of proposal envisioned would not serve satisfactorily as a basis for selection, the minority would add other shortcomings and deficiencies. A top architect-engineer is able to generate a number of concepts, any one of which would satisfy the Government's require-

ments, with some being more acceptable or desirable than others for various reasons. The "proposal" approach could serve to eliminate the best qualified firm if it happened to choose one of its ideas, rather than another, for presentation in the proposal. Secondly, it is the minority's firmly held belief that, in most cases, it is the function of responsible officials within the Government, together with Congress, to determine the sum that should appropriately be spent in satisfying a particular need; the majority's approach would tend to move this internal governmental management decision into the hands of an outsider who would be focusing exclusively upon a single project rather than weighing the needs of a single project against competing requirements in terms of an entire program and the request for appropriation therefor.

The majority's second recommendation calls for inclusion, in the competing proposals envisaged under its first recommendation, of the respective architect-engineers' estimate of life-cycle costs. This recommendation reflects a total lack of understanding of the integral part life-cycle cost considerations play in the development of a design. Any forecast of life-cycle costs made in advance of the design development is meaningless. Development of estimated life-cycle costs is not a function of competition but one of the *services* to be provided once an A–E has been selected and awarded a contract. In developing his design, the A–E can take into consideration the comparative life-cycle cost of elements of the structure and make reasoned choices among the various possibilities open to him. Only when the design is thus firmed up, and the choices made, can a realistic estimate of total life-cycle costs for the project be made. The agency itself has the opportunity to participate in making these choices.

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.]

Professional services contracts with architect-engineers include contracts for preliminary studies; preliminary and master planning; architectural and engineering studies, consultation, investigations, and surveys; and the preparation of designs, drawings, specifications, and cost estimates.

The prevailing method for selection of an A–E is generally as follows. Information is developed from contacts within the profession and former clients to identify potential sources of the desired services. Information is obtained from the identified prospects themselves and from their professional colleagues; additional information may be developed from contacts with the builders, owners, and even the occupants or users of buildings or facilities designed by the several prospects. This information relates, but is not necessarily limited to, factors such as the following:

- The professional qualifications, registration, previously designed projects, and general reputation of the principals of the firm and key personnel other than principal.
- The extent of in-house capabilities and the extent to which the prospect ordinarily draws upon consultants or must draw upon consultants for the particular project contemplated.
- The caliber of consultants regularly or frequently engaged.
- Prior major design projects, any unusual architectural, structural, or functional design solutions developed for those projects; overall degree of client satisfaction with results or client experience with shortcomings.
- Standing within the profession.
- Record of designing within construction fund limits and on schedule.

The depth and sophistication of the inquiries vary with the resources for making inquiries

and the size of the project contemplated. In general, Federal agencies which regularly contract for design services have relatively good information-gathering resources and have the staff capability for making a relatively sophisticated evaluation of the information secured. This structured evaluation process screens out the unqualified firms, identifies those capable of providing service of a high order of quality, and ultimately pinpoints the firm best able to perform the services contemplated. At that point, the firm is approached for the purpose of negotiating a mutually acceptable agreement on price, schedule, and other details. If agreement on these elements is reached, a contract is signed. If not, the next best qualified firm is approached.

The Federal Government has detailed independent estimates made by qualified technical personnel who are experienced in the procurement of A–E services, and these estimates are used in negotiating for a reasonable price. In addition, if the price exceeds $100,000, the selected A–E must furnish cost and pricing data which he is required to certify and which is verified by a pre-award audit.

The combination of a structured evaluation of factors pertinent to, and significant in, the selection of an A–E (including evaluation of technical qualifications), together with the measures taken to ensure that the fee agreed upon is reasonable, assures the Federal Government of securing quality service at a fair and reasonable cost.

This generally recognized and accepted method of A–E selection insures continued support of the "Guiding Principles for Federal Architecture" approved by President Kennedy in 1962 and endorsed by Presidents Johnson and Nixon. President Nixon's concern for architectural excellence in Federal construction was also expressed in his speech before the Associated Council of the Arts of May 26, 1972, and in his Design Message of May 18, 1972.

In considering actions to improve and strengthen the present system, the Office of Federal Procurement Policy should prescribe a structured system for evaluation of A–E technical competence so as to achieve a greater degree of uniformity of application. Selection criteria should be consistent with the nature and scope of services to be procured. The level of effort devoted to the selection process by the Government and the competing firms should be consistent with the nature and scope of services to be provided. Government agencies should make a conscientious effort to afford opportunities to as many different firms as possible, consistent with maintaining high standards of performance and quality. Additionally, newly established or small firms should be given fair consideration for projects within their capabilities.

STATUTORY LIMITATIONS ON A–E FEES

Recommendation 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.

Five statutory provisions [22] set forth a six-percent limitation on A–E fees, measured by estimated construction costs. Initiated by a 1939 statute authorizing the use of private A–E firms by the military services, the limitation is arbitrary and inappropriate for certain services and projects.[23] Some small projects might require a 12-percent fee; others less than six percent, because they involve designs which have been used repetitively. Our studies indicate that inconsistencies and ambiguities in the five statutes limiting A–E fees have created confusion in both Government and industry.

Only those A–E services involving the preparation of designs, plans, drawings, and specifications bear a direct relationship to construction costs. Other A–E services, such as feasibility studies, site investigations, subsurface exploration, and services during the construction process vary widely in their rela-

[22] Armed Services Procurement Act, 10 U.S.C. 2306(b); Federal Property and Administrative Services Act, 41 U.S.C. 254(b); and specific A–E statutes for the Army, Navy, and Air Force, 10 U.S.C. 4540, 7212, and 9540.

[23] While Public Law 92–582 did not expressly deal with the existing statutory provisions limiting A–E fees to six percent, the broad definition of "architect-engineer services" used in the act could be construed as broadening of the kind of services subject to the limitation. H. Rept. 92–1188 indicates that the Committee considered and rejected the Comptroller General's recommendation to repeal the statutory limitation on A–E fees.

tionship to the estimated construction cost. In addition to questions as to what A–E services the limitation applies, it is unrealistic in today's market to apply a six-percent limitation to complex construction projects. Some agencies which have large in-house A–E capability contract out work within the limitation and use their own personnel to perform the remaining work. Other agencies which lack such in-house capability have difficulty in living with the current limitations.

The tie-in of the limitation to estimated construction costs also creates problems, as such costs are not necessarily related to the value of A–E services rendered and are not always known at the time the fee limitations must be applied. Furthermore, some A–E contracts do not involve construction projects.

Although some of these problems could be solved by increasing the ceiling on A–E fees, or perhaps by providing exceptions for specific types of work or projects, it is likely that over a period of time agencies would again be faced with problems similar to those prevalent under the existing statutes.

While some ceiling or control on A–E fees may be desirable for most Federal projects, the present across-the-board limitation creates problems for both agencies and A–Es on small jobs, renovation projects, and facilities requiring an usually high degree of design effort. We feel it is inappropriate for a fixed percentage of fee limitation to be set out in a statute. A specific percentage limitation set forth in a statute may over the years become outmoded and too restrictive in the light of new developments. It may also result in varying interpretations as to intended coverage. It is our opinion that the Office of Federal Procurement Policy [24] should be given the responsibility to establish appropriate policy guidelines for A–E fees and for interpretation of the controls applicable thereto. This arrangement would provide the necessary controls as well as the flexibility for adjustment and modification as deemed necessary.

Consolidation of Statutory Ceilings

If the statutory ceiling provisions are to be retained, the five existing statutes limiting A–E fees should be redrafted into a single statute applicable on a Government-wide basis and incorporating the following features:

- Application of the percentage limitation to the preparation of designs, plans, drawings, and specifications only
- Exemption from the limitation of (1) all rehabilitation, remodeling, and renovation projects; (2) projects with a construction cost estimated to be less than $500,000; (3) A–E contracts which do not involve programmed construction projects; and, (4) at the discretion of the agency head or his designee, unusual, complex, or highly technical projects which would require an especially high level of design effort.

[24] See Part A, Chapter 2, for a discussion of this recommended policy group.

CHAPTER 3

Construction Procurement Process

In earlier chapters in this part, we presented an overview of procurement of construction and A–E services and recommendations concerning the procurement of A–E services. In this chapter we discuss improvements in the process for Government procurement of construction.

PREPARING FOR CONSTRUCTION

Public Building Amendments of 1972

Our studies included a review of significant problems relating to the basic construction process. Serious shortcomings have been prevalent in the policies regarding initial decisions whether to lease or buy facilities, and in the funding of construction. Since our studies began, major changes have been made to cope with these shortcomings in public building programs. It is too early to assess how well these policy revisions will work in practice.

In recent years, construction by the General Services Administration (GSA) of a $10 million office building has taken an average of almost 5 years. The average construction period for comparable private buildings is 2 years. Citing "incremental funding" as a main cause of this disparity, the Administrator of GSA sought congressional approval for an improved pattern of approval and funding of public works.[1]

Under the incremental funding process, delays [2] or gaps in funding of sequential phases of a construction project can lead to stop-and-go efforts. With inflation, delays in completion also increase the final cost of the facility.

The improvements sought by GSA were approved in Public Law 92–313, the Public Buildings Amendments of 1972.[3] These sweeping changes in the process of approving, funding, and contracting for public buildings are outlined below.

PUBLIC BUILDING FUND

The act establishes a fund for use in design, construction or acquisition, repair, alteration, and operation of real property for the Government. The major receipts of the fund are to be in the form of "rent" paid by users, mainly the Federal agencies, for space provided by GSA.[4] Previously, agencies normally occupied GSA-controlled space without charge to their appropriations.

PROJECT APPROVAL

Until the passage of Public Law 92–313, in order to proceed with acquisition of public buildings estimated to cost more than $100,000, GSA was required to obtain specific authorization and appropriation actions by the Congress. Now, the threshold is $500,000, and GSA need only obtain approval by the Public Works Committees of the House and Senate and wait 30 days after notifying the Appro-

[1] Testimony of Robert L. Kunzig, Administrator, GSA, in Hearing before the House Subcommittee on Public Buildings and Grounds, Committee on Public Works, on H. R. 10488 and related bills, 92d Cong., 1st sess., Sept. 22, 1971, pp. 16–38.

[2] For a discussion of delays in the budget process, see Part A, Chapter 7.

[3] 86 Stat. 216, approved June 16, 1972.

[4] Kunzig, note 1, *supra*.

priations Committees of its plans to acquire a building by purchase contract. The project can then be funded from the public building fund.

PURCHASE CONTRACTS

In lieu of having public buildings built under direct Federal contract, the Administrator of GSA is authorized to contract with private entities who will construct buildings and lease them to the Government for periods of up to 30 years. At or before the end of the lease period, the building becomes the property of the United States. In the interim, the buildings are subject to State and local property taxes, unlike buildings belonging to the Government. The lease charges will take into account the fair market value of the site, cost of construction, interest charges, and other costs.

Public Law 92–313 is expected to expedite the provision of needed building space for Federal activities and reduce overall costs by greatly simplifying the construction process. We urge continuing review to assure that these new procedures fulfill their apparent promise.

Planning and Programming

A large Federal construction project may cover five years or more from the decision to include it in an agency's budget until completion. More than half of this time can be spent before construction starts. It is consumed in the budget process within the executive branch, by congressional review, apportionment of funds,[5] detailed design, advertising and award of the contract, and construction.

The rate of construction industry inflation from 1969 through 1971 ran roughly one percent per month or 12 percent per year.[6] During this period, in the typical case, beginning with an agency decision to include a project in its budget, the cost of the project would increase approximately 24 percent by the time Congress appropriated funds and nearly 37 percent by the time construction began. As of July 30, 1972, the estimated current rate of inflation in the construction industry, using the Department of Commerce Composite Cost Index for construction, appears to lie between three percent and four percent per year.[7]

In practice, the Federal Government has often not adjusted its construction cost estimates to reflect the fact that these cost increases may be expected to occur. A directive of the Office of Management and Budget (OMB)[8] requires Federal agencies to estimate the cost of a construction project at current prices, not at the price expected to be in effect during actual construction. In other words, agencies are told to estimate the cost at "today's" prices, even though the cost will probably be higher at the time construction begins. With certain exceptions, this estimate—not including inflation—is the one shown in the President's budget, the one announced to the public, and the one submitted to Congress for approval of the project.

The pertinent section of OMB Circular A–11 reads as follows:

> It will be assumed that, on the average, the general level of prices will be the same during the budget year as at the time the estimates are prepared, except where increases will result directly from laws already enacted (such as increases in FICA tax rates effective at future dates).

Recently, OMB has begun to modify its policy in certain cases, but it has not done so uniformly. The Department of Defense (DOD) now includes in its budget anticipated increases due to inflation by estimating costs on the basis of projected conditions at the date when contracts may reasonably be expected to be awarded.[9] GSA follows the same general practice. But other agencies are still required by OMB to make their estimates in terms of current prices. The practice of permitting some agencies to include varying rates of escalation is experimental and apparently is being used only in controlled and monitored situations.

[5] As noted above, Public Law 92–313, Public Building Amendments of 1972, is designed in part to reduce delays caused by these steps in the budget process.

[6] Calculated by the Commission.

[7] *Ibid.*

[8] OMB Circular A–11 (rev. June 1971), Subject: Instructions for the Preparation and Submission of Annual Budget Estimates, sect. 13.5, p. 11.

[9] U.S. Congress, House, Committee on Armed Services, Military Construction Authorization, fiscal 1971. Report by the Committee on Armed Services, House, H. Rept. 91–1098, 91st Cong., 2d sess., 1970, pp. 3–4.

The rationale for not permitting escalation to be included in construction program requests includes the difficulty in accurately predicting the rate of escalation, or of increased productivity, and the anticipated beneficial effects of fostering economy by holding estimates to low levels.

This situation poses a dilemma. From the standpoint of the procuring agency, the use of estimates which ignore the realities of inflation can have several bad effects. It can mean that agencies, during construction, must go back to Congress for more money, physically trim a construction project to fit the unrealistic estimate, cancel a project, or face costly, stop-and-go construction. From a broader perspective, Government-wide projection of inflation in preparing and executing budgets could obviously spur inflation rather than curtail it.

There is no simple answer to this problem. It is, nevertheless, important that it be recognized in considering construction procurement.

Design Prior to Authorization

One way to shorten the timespan for completion of a construction project is to begin designing it before congressional approval of the project through use of design funds previously approved by Congress as a budget item.

Some agencies do little advance planning and design work. They normally await funding by Congress for both design and construction. Design is initiated after receipt of construction funds, and when the design is completed, the project is advertised and a contract awarded. The major construction agencies design prior to approval of construction by Congress, so that construction can begin soon after funds are apportioned. The advantage of the first method is that if Congress does not approve the project, no design expenses have been wasted. The disadvantage is that, since design can take up to a year, the timespan of the project is prolonged, during which time inflation is at work and the project is denied to the user.

In the second method, agencies run some risk of designing projects which may not be authorized and appropriated in the current year's program, or possibly ever. They will carry construction project designs to 15 percent, 30 percent, 75 percent, or 100 percent of completion and stop at any of these or other points deemed reasonable based on the project's progress through the authorization and appropriation reviews. Failure of a project to receive favorable consideration during congressional review will generally cause design of the project to stop; if the project is later revived, then design will be completed. This start, stop, start routine is costly, and so is abandoned design; however, the rewards are potentially larger than costs if the agency is skilled in predicting which projects are likely to be authorized and funded by Congress.

Early design can considerably shorten the leadtime of the entire construction program, thereby reducing total cost and providing required facilities earlier. Federal agencies with construction programs should consider requesting funds for this advance planning and design.

Supplemental Views*

The basic text points out that serious shortcomings have been prevalent regarding Federal policy and procedures governing the financing and actual conduct of construction projects. Recent improvement attempts, also discussed in the basic text, hopefully will prove worthwhile, as experience is gained in their application. Generally such improvements, if forthcoming, will result from the adoption of proven commercial/industrial techniques to the field of Government construction contracting. As discussed in the concluding paragraphs of the introductory chapter to this part, private industry in general makes wider use of alternative techniques than does the Government, frequently using to advantage such construction procedures as concurrent design and construction and various combinations of owner/designer/builder/operator interests to achieve beneficial and desired results.

*Commissioners Horner, McGuire, Sanders, and Staats.

It is becoming increasingly apparent that procedures traditionally in use by the Federal Government require further continuous critical examination. Concerted steps should be taken by the various concerned agencies to explore and apply all techniques which offer potential improvement to the Federal construction process.

In our view, concerted effort should specifically be directed toward the increased use of design/construction (commonly referred to by many as turnkey) procedures. Such procedures rely on the use of a performance specification to describe facility requirements in gross terms, rather than through the use of detailed definitive plans and specifications generated either by the Government itself or by an A–E firm employed specifically for that purpose.

In the Department of Defense, the turnkey concept has been employed either by use of one-step competitive negotiation or two-step formal advertising procedures. Both procedures have been utilized in somewhat limited fashion for the acquisition of family housing, recreation facilities, and certain other facilities which are commonly provided in the commercial marketplace. The advantage of the procedure is that, with proper selection of projects, the contractors may under competitive conditions directly apply their production, manufacturing, and/or specialized construction expertise to the design and construction of a facility. In many cases, direct application of such contractor expertise and existing systems for construction produce savings in construction costs and in construction time.

Under the turnkey procedures customary control of significant details of the design are passed from the owner to the contractor. For example, finite details which affect the long-term maintenance and operation costs of the facility are left to the general discretion of the design/build contractor. Turnkey procedures are thus very attractive and offer significant potential savings when it can be established that existing industry standards and designs in use by design/build contractors will adequately provide for the Government's facility requirements in terms of both initial acquisition and life-cycle cost considerations.

In view of the advantages obtainable, Federal agencies should carefully evaluate the alternative use of turnkey for facility acquisition and increasingly utilize the technique where circumstances so warrant.

CONTRACTING PROCEDURES

In Part A of this report, we make a number of recommendations for overall improvements in the procurement process. Many of the recommendations in that part and elsewhere in this report [10] would be of considerable benefit in facilitating economical, efficient, and effective construction contracting. The most significant of these general recommendations are discussed below.

Contracting Methods

Existing statutes require that contracts for construction shall be formally advertised whenever the sealed-bid method of procurement is feasible under existing conditions, even though such conditions would also make competitive negotiation an acceptable contracting method.[11] Thus, the contracting officer must justify the use of other competitive methods on the basis that formal advertising was not feasible. This justification requires a great deal of time, effort, and paperwork.

Representatives of the construction industry take the position that because of the Government's reliance on formal advertising and its preference in most situations for the use of fixed-price contracts, the Government construction process has become an adversary procedure between the Government and the contractor. In their opinion the inflexibility of Government contract administration places a strong emphasis on litigation—rather than on

[10] Of particular importance to construction are the recommendations in Part G, on Legal and Administrative Remedies. A sample of over 2,000 Board of Contract Appeals cases indicated that about one-half of all contract disputes arise under construction contracts, although construction is only 9 percent of the dollar value of Federal procurement (calculated by the Commission).

[11] In addition to the preference for formal advertising in all Government procurement expressed in 10 U.S.C. 2304(a) and 41 U.S.C. 252(a), special treatment is given construction. See, for example, 10 U.S.C. 2304(c)(1) and 41 U.S.C. 252(e) which limit exceptions available for construction; and annual military construction appropriation acts.

a cooperative and expeditious performance of the job. The use of competitive negotiation rather than formal advertising would permit the greater use of cost-type contracts, which might be more appropriate in some circumstances, especially on complex, long-range construction projects.

Our studies show that more than 95 percent of disputes under construction contracts arise under fixed-price contracts.[12] The contract vehicle should permit risk to be reasonably allocated and provide the flexibility for necessary changes.

Some construction projects present the same problems as other large procurements where definitive design or performance specifications are not available, accurate cost estimates cannot be made, and the risk involved in complying with the specifications cannot be determined. Under these conditions formal advertising and fixed-price contracts should be avoided. There is no compelling reason for distinguishing construction contracts as a class from other types of procurement, such as production contracts, commercial product purchases, or major system acquisitions. The contract process should clearly be tailored to the nature of the work. Under present rules there is a potential for overdependence on formal advertising procedures and on fixed-price contracting to the exclusion of other methods. If the Commission's general recommendations on statutory revisions are approved and implemented, these problems in construction procurement would be greatly reduced.

Statutes and Regulations

Construction contractors who contract with two or more Federal agencies find that although their contracts are all with the Government, differing policies, procedures, and interpretations are applied by the agencies.

Consolidation of the basic procurement statutes and greater uniformity of implementing regulations, as we recommend in Part A, would facilitate construction procurement. A further aid to those who work in the construction area would be the promulgation, within a single regulatory system, of a self-contained treatment of rules for procurement of construction. Today, construction buyers and sellers must plow through voluminous regulations applicable to other areas, such as research or major system procurement, to isolate specific treatment of construction. Our suggestion for experimentation with separate, self-contained regulatory treatment of differing types of procurement could be beneficial to the procurement of construction.

Under present law, informal, expedited small purchase procedures can be used only for purchases of up to $2,500.[13] Our recommendation for increasing this ceiling to $10,000, with provision for periodic adjustment, would simplify the task of contracting for thousands of small construction and maintenance jobs each year and decrease Government and contractor administrative costs.

Subcontract "Bid Shopping"

There is no general agreement as to what constitutes "bid shopping," but to the construction industry it is an emotional subject which poses many complex management and legal problems. Although bid shopping occurs in areas of Government procurement other than construction, in no other area is it viewed with such concern by the industry. The terms "bid shopping," "bid peddling," and "bid chiseling" have been used interchangeably at times. For purposes of this discussion we use the term "bid shopping" to refer to all efforts by a prime contractor to use the lowest bid received on a subcontract as leverage to gain an even lower bid, whether these efforts occur before or after the award of the prime contract.

Subcontract bid shopping is apparently common in the construction industry. It can create vigorous competition which may provide the general contractor (or a higher-tier subcontractor who "bid shops" the lower tiers) with larger profits at the expense of subcontractors. The problem is whether the Government can take practical steps administratively or by

[12] Note 10, *supra*.

[13] Armed Services Procurement Act of 1947; 10 U.S.C. 2301 et seq. and the Federal Property and Administrative Services Act of 1949; 40 U.S.C. 471 et seq.

legislation to prevent this practice in Federal construction.

Often the time involved prior to the prime contract bid opening simply does not permit full evaluation by prospective prime contractors of the subcontractor's bids to see if (1) the bids relate precisely to their respective scopes of work, (2) the bids are reasonably priced, and (3) there are management and contractual concessions that can be made by the general contractor which would persuade the subcontractor to reduce his price. In such cases, further negotiation between the successful bidder for the prime contract and potential subcontractors may be necessary before subcontracts can be awarded.

The Code of Ethical Conduct of the Associated General Contractors of America declares bid shopping unethical per se by stating a prohibition against "bargaining down" subcontract prices by use of other bid prices.

Difficulties involved in solving the bid shopping problem become apparent upon examining the three preventive methods now in use. Various requirements for the *listing of subcontractors* are the best known and most widely used method of preventing bid shopping. Here the general contractor must list subcontractors by name in his bid and cannot make a substitution without demonstrated justification. When this method is used, subcontractors who have more than a minimum percentage of the total job are generally required to be listed.

A form of subcontractor listing is currently used by GSA and the Department of the Interior for buildings and by several States for State construction projects.

On GSA contracts for new construction estimated to cost more than $150,000, the bidders must list in their bids the names of subcontractors they will engage if awarded the contract. The listing of subcontractors for such elements as plumbing, heating, air conditioning and ventilation, electrical work, and elevators is typically required.[14]

There are two apparent difficulties with attempts to control bid shopping by the listing method. First, the general contractors often do not have time to evaluate fully and assemble the subcontractor bids. Second, a subcontractor who submits a successful bid can sharply restrict the general contractor in final negotiation on the scope of work of the subcontract. Under bid listing there is no contract between general contractor and subcontractors prior to the opening of prime contractor bids.

The listing of subcontractors may fail to prevent bid shopping because of subterfuge, both by general contractors and subcontractors. General contractors do not have to list subcontractors for those portions of the job they plan to perform themselves. For those specialty items for which the general contractor has listed no one, he can shop after bid opening until he finds a subcontractor willing to perform at the general contractor's price. Once found, the subcontractor and his employees can be retained to perform the work as employees of the general contractor.

Another approach is for the general contractor to list either a dummy or subsidiary company as his subcontractor. The bid shopping can then occur at a tier below the first-tier subcontractor, since only first-tier subcontractors must be listed. This approach has been attempted on GSA [15] and state jobs alike.

The second system, *filing of bids by prospective subcontractors,* is used primarily in Massachusetts. The State advertises separately for major portions of a job as well as for the total job. Subcontractor bids for the special portions are received by the State a week or two prior to the time fixed for receipt of general contractor bids. The subcontractor bids are publicly opened and recorded. In filing their bids with the State, the subcontractors may specify which general contractors may or may not use their bids.

This practice is necessary because subcontractors may not give the same price to all general contractors. Because of experience with factors such as compatibility and the general contractor's expertise in a particular specialty, a subcontractor's price may be lower to one general contractor than to another. There may be certain general contractors for whom a subcontractor would not want to work under any circumstances.

The third system used to protect subcontractors is the *multiple prime contractor system* employed in New York and several other States for State financed construction. Here the job

[14] 41 CFR 5B–2.202–70.

[15] See Comptroller General Decision B–162585, May 14, 1968.

is broken down into main portions, such as foundation, structural steel, electrical, and mechanical. The State lets a prime contract for each portion through competitively bid fixed-price contracts.

This system reduces the opportunity for bid shopping by making prime contractors of a number of firms which would normally be first-tier subcontractors. It does not prevent bid shopping below the prime contract level.

Of all the systems designed to protect subcontractors, the multiple prime contractor system is the most expensive and the most chaotic. A construction project is normally performed in concert by individuals brought together for that job and then disbanded. For such an assemblage there must be a leader. Traditionally, the general contractor has been that leader—coordinating the elements, pacing the work, and directing overall production. Without the general contractor in that position, the buyer must take on the effort or hire someone to do it for him—usually a contract manager. In any event, no matter how it is accomplished, another layer of management is added, at additional cost.

In summary, these efforts have reduced bid shopping only among principal subcontractors of the first-tier. The efforts burden contract administration personnel, and while protecting some subcontractors from bid shopping, they have not precluded bid shopping by the higher-tier subcontractors in the selection of lower-tier subcontractors and suppliers.

Bid shopping occurs on non-Federal as well as Federal jobs; however, attempts to develop a system to control bid shopping to the satisfaction of all parties have been largely unsuccessful. General contractors and subcontractors alike appear to be responsible for the failures in that they both appear to "bid shop" where such practice serves their best interest. Government contracting officers, engineers, and inspectors have not indicated that inferior work, higher prices, or reduced competition have resulted on jobs they suspected were "shopped."

Since 1955 bills requiring the listing of important subcontractors at the time the prime building contractor submits his bid on Federal construction projects have been periodically introduced. The most recent, H.R. 10, introduced in 1971, would require persons submitting bids on public works contracts to specify certain subcontractors who will assist in the construction. According to its sponsor, Congressman Robert L. Leggett, H.R. 10 is a measure "to save contractors and subcontractors from themselves and provide reasonable provisions to safeguard a subcontractor . . . when he has submitted a reasonable bid on Federal work." The bill appears to be in line with GSA and Department of the Interior regulations, which over the past seven years have required subcontractor listing. The Department of Defense and other agencies with major construction responsibilities have not issued similar regulations.

Both GSA and the Department of the Interior have opposed H.R. 10, stating that current administrative measures are adequate and that H.R. 10 would not afford the necessary administrative flexibility.

A system to halt all first-tier bid shopping on Federal construction, in an effort to control those general contractors who practice it, would be likely to cost the Government far more than the benefits to be gained. We do not believe the situation would be materially improved by the adoption of mandatory requirements—by legislation or otherwise—and do not recommend a mandatory Government-wide requirement for subcontract listing in Federal construction.

In Part A of our report we discuss the importance of subcontractors in the Government procurement process and urge that contracting agencies take steps to ensure the continued existence of a viable subcontractor community. Bid shopping can have adverse effects in some situations, and we believe the contracting agencies should continue to seek practical methods to reduce or eliminate such practices.

STUDY GROUP CONSIDERATIONS

Our study group on Construction reviewed a number of problems in Federal construction procurement and made detailed recommendations. Significant areas of concern identified by the study group are listed below.

Solicitation and Award

- *Professional opinions on subsurface conditions.* Interpretative analysis of factual data obtained by the Government from soil borings or drill cores is not normally furnished prospective bidders in construction projects.

- *Environmental protection requirements.* Environmental restrictions on construction operations are often not identified in bidding documents.

- *Cost estimates.* Government estimates of construction costs are normally withheld from prospective bidders.

- *Standard commercial products.* Standard commercial products known by the Government to fulfill specification requirements are often not disclosed to bidders or contractors.

Regulations and Contract Clauses

- *Truth in negotiations.* Government regulations related to disclosure of contractor cost or pricing data are not tailored to construction negotiations.

- *Warranty provisions.* Warranty clauses in construction contracts vary from agency to agency.

Contract Financing

- *Bond premiums.* The cost of payment and performance bonds is recovered by the contractor through contract payments rather than as a separate transaction between the Government and the contractor.

- *Mobilization costs.* The cost of site mobilization, or "start-up," is often not singled out for separate treatment under the contract.

- *Retained percentages of progress payments.* A percentage of progress payments is retained even if the contractor is on schedule.

Contract Administration

- *Availability of federal field construction personnel.* There is often inadequate availability at the construction site of Government personnel with authority to make technical and business decisions required by conditions at the site and by the contract terms.

- *Change orders.* Change orders are often negotiated by the Government on an "all or nothing" basis rather than on the basis of payment of the agreed amount and negotiation as to matters in disagreement.

We do not make recommendations on these detailed matters, but urge the contracting agencies to take them into consideration.

CHAPTER 4

Labor Conditions and Labor Laws Affecting Federal Procurement of Construction

Our studies revealed widespread and growing concern about the impact of labor conditions and laws on construction. Some of the problems are the result of the evolution of the labor movement in the construction industry and general labor legislation, and affect public and private construction alike. Others result from conditions peculiar to Government contracting or laws applicable to Government contracts.

In private as well as Government construction, costs have continued to increase at an alarming rate. While many inflationary factors are root causes, both Government and industry assign some of this responsibility to traditional work practices, union control over entry to crafts, training programs for apprentices, and measures which affect mobility of craftsmen. Some persons, including union representatives, also charge part of the result to construction contractors because they have allegedly abdicated responsibilities to organized labor. Although the causes of increased construction costs are many and diverse, it is apparent that Government construction activities both affect and are affected by private construction. The fact that the Government is the largest single buyer of construction has unavoidable impacts on the construction industry.[1]

In Part A, we discuss National Policies Implemented Through the Procurement Process, and make recommendations (1) for a program to reexamine the full range of social and economic programs, (2) to increase the visibility of costs associated with their implementation, (3) to provide uniformity in treatment for comparable violations, and (4) to change the dollar thresholds at which these programs are applied to the procurement process.[2] Three of the statutes affected by these recommendations are the Davis-Bacon Act,[3] the Miller Act,[4] and the Contract Work Hours and Safety Standards Act.[5] The Davis-Bacon Act provides for the establishment of minimum wages for laborers and mechanics on Federal construction projects, and the Miller Act provides for the furnishing of payment and performance bonds. The Contract Work Hours and Safety Standards Act provides, among other things, for the payment of overtime for work in excess of 40 hours a week or more than 8 hours a day.

Our study has substantiated the existence of significant problem areas with respect to these statutes which affect the economy and efficiency of Government construction.

DAVIS-BACON ACT

The most important labor law directly affecting Federal procurement of construction is the Davis-Bacon Act. It provides that Federal construction contracts exceeding $2,000 must require the contractor to pay laborers and mechanics no less than the wages determined by the Secretary of Labor to be prevailing in the city, town, village, or other subdivision of the State in which the work is to be performed.

[1] The interaction of the general labor laws between private and Government construction was examined in detail by Study Group 13C (Construction). An analysis of the situation is covered on pp. 160–179 of its report to the Commission.

[2] See Part A, Chapter 11.

[3] 40 U.S.C. 276A–276A–5.

[4] 40 U.S.C. 270a–270d.

[5] 40 U.S.C. 327–333.

While the Davis-Bacon Act applies only to construction purchased directly by the Government, some 60 other statutes make wage rates determined by the Secretary of Labor in accordance with the Davis-Bacon Act applicable to various construction programs affected by Federal grants, loans, insurance, and leases. The Department of Labor estimated that for fiscal 1971, about 59,000 direct Federal and Federally assisted contract awards totaling about $30.1 billion were covered by wage determinations.[6]

Background

The Davis-Bacon Act was aimed at the practices of construction contractors who were paying substandard wages to migrant construction workers. It was enacted during a time of economic depression when competition for limited markets forced employers to cut labor costs and both wages and prices were declining sharply. The original act applied only to contracts in excess of $5,000 and determinations as to prevailing wages were made by the contractors.

The need for strengthening the act was developed in a number of House and Senate Hearings in 1932, and again in 1934. The hearings resulted in extensive amendments to the act in 1935,[7] lowering the threshold to $2,000 and requiring that prevailing wages be determined by the Secretary of Labor rather than by the contractor. The Comptroller General was directed to pay, from accrued payments withheld under the contract, any wages found to be due laborers or mechanics.

The most recent amendment to the act in 1964,[8] extended the coverage of wage determinations to fringe benefits.

The need for consistent policy among the various agencies involved in administering the act resulted in the issuance of Reorganization Plan No. 14 of 1950.[9] Under the plan, the enforcement and compliance responsibility remained in the contracting agencies. However, the Secretary of Labor was directed to publish regulations and undertake investigations or other actions to bring about consistent administration and enforcement of the labor standards prescribed by the act.

The history of the Davis-Bacon Act has been one of considerable controversy. After the depression of the 1930's subsided and gave way to the inflationary pressures of the post-World War II period, opponents claimed that the act had outlived its usefulness and ought to be repealed. They claimed that the act contributed to inflation by the breadth and strength of its impact, by its essential denial to the Government of available competition, and by the manner in which it was administered. It was contended that the Fair Labor Standards Act of 1938 afforded sufficient minimum wage protection. There is a strong belief today among construction contractors and Government contracting agency personnel that the deterrent effects of the act outweigh its recognized social value.

Organized labor, on the other hand, maintains that, in the absence of prevailing wage protection afforded by the act, the practice of the Government to award contracts to the lowest responsible bidder would encourage nonunion firms to compete by paying wages lower than prevailing wage scales.

President Nixon, observing that the problem of excessive and inflationary wage settlements in the construction industry constituted an emergency situation, temporarily suspended the act on February 25, 1971.[10]

Problem Areas

POTENTIAL CONFLICTS BETWEEN THE DAVIS-BACON ACT AND THE NATIONAL LABOR RELATIONS ACT

The Davis-Bacon Act was enacted four years before the National Labor Relations Act.[11]

[6] U.S. Comptroller General, Report B-146842, *Need for Improved Administration of the Davis-Bacon Act Noted Over a Decade of General Accounting Office Reviews*, July 14, 1971, p. 8.

[7] 49 Stat. 1011, c. 825, Aug. 30, 1935.

[8] Public Law 88-349, July 2, 1964.

[9] 5 U.S.C. Appendix.

[10] U.S. President, Proclamation 4031, "Proclaiming the Suspension of the Davis-Bacon Act of March 3, 1931," 36 *Fed. Reg.* 3457, Feb. 25, 1971. Executive Order 11588, Mar. 29, 1971, reinstating the act, provided for a Construction Industry Stabilization Committee and directed the Secretary of Labor not to take into consideration, for wage determination purposes, any wage or salary increase in excess of that found acceptable by the Committee.

[11] 29 U.S.C. 158.

Under the National Labor Relations Act an employer has a legal obligation to bargain with the authorized representative of employees regarding terms and conditions of their employment. Once agreement has been reached, the employer cannot unilaterally modify it. If the Secretary of Labor prescribes wage rates pursuant to the Davis-Bacon Act higher than those agreed to in collective bargaining, the employer must obtain approval to depart from the collective bargaining agreement; otherwise he would breach the collective bargaining agreement and violate the National Labor Relations Act. Although there is little likelihood that a union would sue an employer for paying employees wage rates higher than the union had negotiated, the existence of separate legal obligations under the Davis-Bacon Act and the National Labor Relations Act can pose a dilemma for potential contractors for Government construction work.

Possible conflicts between the Davis-Bacon Act and the Railway Labor Act [12] were recognized by the Department of Labor in the case of construction work performed by employees of railroad companies covered by collective bargaining agreements. By administrative decision in 1942, the Secretary of Labor held he was precluded from applying the Davis-Bacon Act to construction work performed by such employees because they were subject to the Railway Labor Act which "contains a comprehensive system for the establishment and maintenance of wage rates for the employees of railroad common carriers." However, a similar rationale has not been extended to construction work performed by employees of contractors covered by collective bargaining agreements subject to the National Labor Relations Act.

THRESHOLD FOR APPLICATION OF THE ACT

The requirement for applying the Davis-Bacon Act to contracts in excess of $2,000 was established in 1935, thirty-eight years ago. Numerous small contracts exempted by that threshold in 1935 are now covered by the act because of inflation. In today's market it takes $10,200 to buy as much construction as $2,000 bought in 1935.[13]

The present $2,000 threshold of the act practically eliminates the possibility of any construction being exempted. As a result, there are increased administrative costs for both the contracting agencies and the Department of Labor. The increased number of wage determinations required of the Department of Labor also hampers the effective collection of data.[14] The number of wage decisions issued has increased from 3,884 in 1945 to about 26,000 in each of fiscal years 1970 and 1971.[15] The Department of the Interior has proposed legislation which would raise the minimum dollar amount of contracts subject to the Davis-Bacon Act from $2,000 to $25,000.[16]

Most other Federal agencies either support the Department of the Interior proposal or at least the proposition that the $2,000 threshold ought to be increased. The General Services Administration (GSA) agrees with the proposed $25,000 limitation. Of the agencies surveyed during our study, the majority supported a dollar limit of $25,000; however, suggestions ranged from $5,000 to $100,000. After $25,000, the next most common recommendation was $10,000. The reasons given are essentially the same as those advanced by the Department of the Interior.

The Assistant Administrator, Office of Government Contracts and Special Wage Standards, Wage and Hour Division of the Department of Labor, stated to our Study Group that the proposed legislation would ease the Department's workload, although the full amount of the administrative savings to the contracting agencies and to the Department of Labor is not quantifiable.

The General Accounting Office (GAO) has

[12] 45 U.S.C. 151.

[13] Calculated by the Commission from data in 1935 U.S. Department of Commerce *Composite Cost Index for Construction* converted to 1967 = 100 base from data on page 385, *Historical Statistics, Colonial Times to 1957*, series N 85–103 (1947–49 = 100); also see table 1094, "Price and Cost Indexes for Construction and Selected Components of Construction: 1950 to 1970," p. 664, *Statistical Abstract of the United States, 1971* (1957–59 = 100) and U.S. Department of Commerce Bureau of Census Construction Reports, *Value of New Construction Put in Place*, Report C30–72–7, Sept. 1972, table 18, p. 22 (July 1972 index), 1967 = 100.

[14] Letter from Leo R. Werts, Assistant Secretary for Administration, U.S. Department of Labor to Hon. Elmer B. Staats, Comptroller General of the United States, Oct. 9, 1970.

[15] Note 6, *supra*.

[16] Memorandum from the Department of the Interior to OMB, Dec. 3, 1971, transmitting the Department's proposed legislative program for the 92d Cong., 2d sess.

proposed an increase in the present $2,000 limit to an amount between $25,000 and $100,000.[17] It stated that a reduction in the number of wage determinations required would permit the Department's wage determination staff to (1) make more thorough investigations, (2) conduct more frequent detailed onsite surveys, and (3) more adequately resolve protests or problems that may arise in arriving at factual determinations.

The Legislative Research Department of the AFL–CIO has stated that the unions would strongly oppose any legislation calling for an increase in the $2,000 threshold. This opposition is based on the argument that an increase would result in significant reduction of Davis-Bacon Act protection for workers on small dollar value repair and painting contracts, the type of workers who most need protection.

RESPONSIBILITY FOR ENFORCEMENT

The Davis-Bacon Act does not expressly state who has responsibility for determining the act's applicability to a particular contract, although under Reorganization Plan No. 14 of 1950 [18] the Secretary of Labor is authorized to prescribe standards and regulations to ensure coordination of administration and consistency of enforcement of the act. While the Reorganization Plan also authorizes the Secretary to conduct investigations to ensure consistent enforcement, the basic responsibility for enforcement apparently remains with the contracting agencies.[19] The lack of clear guidance, and differences in views about enforcement responsibilities, continue to generate problems in the administration of the act.

Our review of contracting agencies disclosed that the day-to-day enforcement activities such as payroll inspections, employee interviews, and full-scale investigations are usually performed by persons responsible for the administration of contract provisions. Certain agencies—Department of Defense, AEC, and NASA—have labor relations specialists at the headquarters level and throughout their various field activities who coordinate and guide contracting personnel in enforcement matters.

With few exceptions, the interviewed agencies declared that contracting personnel at the project site need to enforce all contract provisions, to ensure performance in accordance with contract requirements.

On the other hand, the Department of Labor stated that, while many of the major procurement agencies do have established staffs which carry out enforcement, many, particularly the newer ones, do not have this capability. These latter agencies are usually those involved with Federally assisted programs rather than direct Federal construction, and it is on such contracts that the Department of Labor's Wage and Hour Division is focusing its own enforcement effort.

An Assistant Administrator in the Department of Labor's Wage and Hour Division also stated that the enforcement of Davis-Bacon labor provisions would be more efficient if centralized in the Department because of the Department of Labor's general responsibility for and experience in enforcing other labor laws.[20] He said the current level of effectiveness could not be maintained without additional staffing. The Department's San Francisco Regional Director, Employment Standards Administration, made a similar observation. He estimated that a 30 percent [21] increase in staff in that region would be necessary to achieve an acceptable level of compliance.

AUTHORITIES OF THE COMPTROLLER GENERAL AND THE DEPARTMENT OF LABOR UNDER THE ACT

Under Section 3 of the act,[22] the Comptroller General is authorized to determine violations, impose debarment, and make wage adjustments. As he interprets the law, these provi-

[17] Note 6, *supra*, p. 37.

[18] 5 U.S.C. Appendix. The Department of Labor has issued regulations (29 CFR, Subtitle A, part 5) and an *Investigative and Enforcement Manual* setting forth procedures to be followed in enforcing the Davis-Bacon Act.

[19] *Ibid.*; see also Comptroller General Decisions B–144901, Apr. 10, 1961; B–147602, Jan. 23, 1963; B–148076, July 26, 1963.

[20] Memorandum from Warren D. Landis, Assistant Administrator, U.S. Department of Labor, to Horace E. Menasco, Administrator, U.S. Department of Labor, subject: "Proposal for Decentralization of Wage Determination Functions," Sept. 3, 1971.

[21] Memorandum for the record, Study Group 2 visit to U.S. Department of Labor, Employment Standards Administration, San Francisco, California, July 13, 1971.

[22] 40 U.S.C. 276a–2.

sions place the authority and responsibility for such actions in his office.[23]

The Comptroller General has repeatedly held that the authority given the Secretary of Labor, under Reorganization Plan No. 14, does not include the power to make individual enforcement determinations or authoritative interpretative decisions. According to the Comptroller General, the actual administration and enforcement of the acts affected by the plan is the responsibility of the individual contracting agencies, and interpretative decisions of the Secretary of Labor have "advisory force only." [24] The Secretary of Labor, on the other hand, views his decisions as authoritative based on Reorganization Plan No. 14 and the "obvious intent of Congress" as reflected in section 10 of the Portal to Portal Act.[25] The Solicitor of Labor testified in 1962 before the House Special Subcommittee on Labor [26] that "the result of this situation is to frustrate effective administration and enforcement of the contract labor standards laws."

In view of the difficulties created by the current situation, the Comptroller General has suggested that this Commission consider recommending legislation which would divest GAO of its administrative responsibilities in the Davis-Bacon Act and place those responsibilities in the procurement agencies and the Department of Labor. Essentially, his proposal would give the procurement agencies such responsibilities but would provide for appeal to the Department of Labor in certain limited instances.[27]

UNCERTAINTY AS TO COVERAGE OF THE ACT

The Comptroller General and the Secretary of Labor also disagree as to the application of the act in important areas. The Secretary of Labor, for example, has taken the position that contracts for the manufacture or furnishing of elevators and generators which also call for certain installation work (like foundation preparation or pouring) may be subject to both the Public Contracts Act and the Davis-Bacon Act if the contract involves more than an "incidental" amount of erection or installation. Thus, under the Department of Labor interpretation, the Davis-Bacon Act would be applicable to the installation portion of a combination supply and installation contract, and the Walsh-Healey Act to the other work, depending upon the amount of required construction activities.[28]

The Comptroller General, on the other hand, holds that the Davis-Bacon Act applies on the basis of the contract as a whole; that the act is not applicable to any part of the work to be performed under a contract if the contract is not "essentially" or "substantially" for construction.[29]

Contracting agencies having a volume of contracts involving both supply and installation work indicated that when the installation work exceeded $2,000, they were inclined to insert the Davis-Bacon Act stipulations for lack of guidelines from the Department of Labor on what constituted more than an "incidental" amount of such work. Where the agencies follow this practice, the supply contractor must either segregate his work force and pay Davis-Bacon wage rates to those workers performing the construction-type work or subcontract out that phase.

The absence of statutory definitions of critical words or phrases used in the act also has produced controversies which are unresolved. The act provides that every covered contract shall stipulate that the contractor or his subcontractor shall pay mechanics and laborers employed directly upon the "site of the work" at wage rates not less than those stated in the advertised specifications; but the act contains no definition of "site of the work." The Solicitor of Labor's opinions have given that term a broad interpretation to include the sites of job headquarters, storage yards, prefabrication or assembly yards, quarries or borrow pits,

[23] U.S. Comptroller General, Decision B-161858, and Letter to the Secretary of Labor, Jan. 22, 1968, subject: Decision B-161858, October 11, 1967, Concerning LOFT and the Role of the General Accounting Office Under the Davis-Bacon Act. The Comptroller General does not assert this position with respect to the Service Contract Act and the Walsh-Healey Public Contracts Act, which direct the Comptroller General only to publish a debarred list pursuant to the recommendation of the procurement agency or the Secretary of Labor—a ministerial function; or the so-called Davis-Bacon "Related Acts."

[24] U.S. Comptroller General, Decision B-144901, Apr. 10, 1961.

[25] U.S. Solicitor of Labor, Opinion No. DB-1, Apr. 3, 1961.

[26] Hearings on the Administration of the Davis-Bacon Act, 87th Cong., 2d sess., pp. 831-832.

[27] Comptroller General letter of Dec. 27, 1971 (attached as Appendix B).

[28] See section 6(b), Rulings and Interpretations No. 3 under the Walsh-Healey Public Contracts Act and Solicitor of Labor's Opinion No. DB-20, Jan. 31, 1962.

[29] U.S. Comptroller General, Opinion, B-150818(1), June 6, 1963.

and batch plants, which are set up for and serve exclusively the particular construction operation and are reasonably near the construction site. When the Comptroller General has had opportunity to consider the term, he has construed it to refer to the "exact confines of the place of performance of the construction work" and not to "work off the site . . . even though performed in the immediate community." [30]

Whether particular contract work constitutes "construction of a public work" covered by the Davis-Bacon Act can have significant impacts on agency costs and programs and has been the source of disagreement between the contracting agencies and the Department of Labor. In keeping with the Department's general approach, its Solicitor has in the past construed the act broadly to cover the assembly of a mobile nuclear reactor experimental system; [31] the assembly of 40-foot waveguide modules for subsequent installation into a linear accelerator; [32] and the assembly of the crawler-transporter used at the Kennedy Space Center for lifting and transporting a launch vehicle and spacecraft to its launchsite [33]—notwithstanding the contracting agencies' determinations that the contracts involved were not subject to the act.[34]

The Davis-Bacon Act, by its terms, applies to contracts for construction, alteration, and/or repair work, but not to operating or maintenance work. The broad interpretations given to "construction," "alteration," and "repair" in Department of Labor regulations and the absence of criteria distinguishing operating and repair work have necessitated extensive administrative reviews for classifying work under contracts for the management and operation of Government-owned facilities. Employees of such contractors usually are covered by collective bargaining agreements providing for wage rates and benefits in accordance with industrial rate structures rather than construction trade rates. To avoid the complications engendered by having two rate structures for the same employees, careful reviews of work projects are made to screen out Davis-Bacon work; items of work which are considered "covered" work are subcontracted out. Both cause added costs to the Government. The lack of adequate criteria for distinguishing noncovered work in these situations also results in labor unrest—when work is contracted out to satisfy Davis-Bacon requirements, employees of the operating contractor are unhappy; when a determination is made that a particular job can be classified as operating or maintenance, there is often concern by union representatives that the Davis-Bacon Act is being undercut.

The use of operating or management contractors for conducting Government programs largely developed during and after World War II. While cooperative efforts of organized labor, contracting agencies, and the Department of Labor have resulted in some alleviation of the problems generated by the scope of this type of work, no action has been initiated to examine the overall problem.

BASIS FOR DETERMINING PREVAILING WAGES

The act provides that employees will be paid at not less than the prevailing wage rates as determined by the Secretary of Labor. The Department has defined the term "prevailing" wage rate in 29 CFR, part 1, section 1.2(a)(1) through (3), to mean:

> The rate of wages paid in the area in which the work is to be performed to the majority of those employed in that classification in construction in the area similar to the proposed undertaking.
>
> In the event that there is not a majority paid at the same rate, then the rate paid to the greater number: provided such greater number constitutes 30 percent of those so employed.
>
> In the event that less than 30 percent of those so employed receive the same rate, the average rate.

[30] U.S. Comptroller General, Opinion B–148076, July 26, 1963.
[31] U.S. Solicitor of Labor, Opinion DB–52, Oct. 14, 1966.
[32] U.S. Solicitor of Labor, Unnumbered Opinion letter to AEC, Jan. 13, 1965.
[33] U.S. Solicitor of Labor, Opinion letter to the General President of the International Association of Bridge, Structural and Ornamental Iron Workers, AFL–CIO, dated Aug. 14, 1964.
[34] In all of these situations, the agencies' positions were upheld eventually. U.S. Comptroller General, Opinion B–161858, Oct. 11, 1967; U.S. Comptroller General, Opinion B–150828, Feb. 18, 1965. In the third case, the agency appealed the Solicitor's ruling to the Department of Labor Wage Appeals Board, which reversed the Solicitor's Opinion.

This definition is generally referred to as the "30 percent rule."

The GAO report [35] discussed above noted cases where the use of the 30 percent rule resulted in the determination of minimum wage rates significantly higher or lower than the rates actually paid to the majority of the workers in a classification. An example in the GAO report involved a determination of $4.25 an hour as prevailing for carpenters in an area based on a survey of 102 carpenters—31 were paid an hourly rate of $4.25 and 71 were paid hourly wage rates between $2.50 and $4.00.

EFFECT OF IMPROPER WAGE DETERMINATIONS

In Report B–146842 the Comptroller General also summarized findings on 29 selected projects and estimated that costs were increased 5 to 15 percent, or about $9 million of the total $88 million involved, because wage rates were established at levels higher than those that actually prevailed in the area of the project. GAO's review of the Department's wage determination program disclosed many examples of "improper" wage determinations.

GAO attributed the issuance of improper wage determinations to insufficient wage and fringe benefit information.[36] Improved data collection was recommended in each of the seven reports (dating back to 1962) preceding Report B–146842. This finding was corroborated by representatives of the Department of Labor, who stated that the collection of basic hourly rate of pay and fringe benefit data was the most difficult problem in the administration of the act, particularly in the area of residential housing, where a survey is almost always necessary due to the unavailability of wage data.

The accuracy of wage determinations was one of the chief concerns of contractors and contractor associations interviewed during our study.

[35] Note 6, *supra*, pp. 22–23.
[36] Note 6, *supra*, pp. 9, 10, 28.

SUBMISSION OF WEEKLY PAYROLL RECORDS

A Department of Labor regulation [37] requires that any contract subject to the labor standard provisions of the Davis-Bacon and related acts must contain a stipulation that the contractor will submit weekly a copy of all payrolls to the contracting agency. These copies must be preserved for a period of three years from date of contract completion.

Verification of the weekly payrolls by Government personnel is a time-consuming and costly activity. Resident engineers and other contracting personnel directly responsible for the maintenance and inspection of such records were almost unanimous in their conclusion that few, if any, violations of significance were ever disclosed as a result of their review and verification of the weekly payrolls. The requirement is also costly to contractors and contributes to the cost of construction. Contractors interviewed in our studies identified as a major item in their overhead the preparation of reports such as the weekly payroll records under the Davis-Bacon Act and Standard Form 100, "Employer Information Report EEO–1" required jointly by the Office of Federal Contract Compliance and the Equal Employment Opportunity Commission. With respect to weekly payroll records, they stated that although computer payroll sheets could be submitted in lieu of a standard payroll form, the requirements were sufficiently different so as to require separate programming and extra computer time. The Associated General Contractors of America has recently estimated the annual cost *to contractors only* of compliance to be $190 million.[38]

The submission of weekly payroll records is not required under other laws containing labor standard provisions. Although it may be desirable to retain a payroll requirement for Davis-Bacon Act purposes, both costs and administrative burdens would be reduced by providing for the submission of a notarized statement at the beginning and end of each contract, with appropriate penalties for falsification, that the wages and fringes to be paid

[37] 29 CFR, part 5, section 5.5(a). Based on 40 U.S.C. 276(c).
[38] Letter from The Associated General Contractors of America to the Commission, Sept. 1972.

(and paid) on the project would (did) meet the requirements of the Davis-Bacon Act.

THE MILLER ACT

The Miller Act [39] is the Federal construction bond statute. It was enacted in 1935 and requires, in general, performance and payment bonds under any Federal contract in excess of $2,000 for the construction, alteration, or repair of any public building or public work of the United States. The act's application is coextensive with that of the Davis-Bacon Act. It was designed to replace and correct the shortcomings of the Heard Act of 1894, a law that required prime contractors to provide a single penal bond which served as both the performance and the payment bond.

Under the Miller Act, two separate bonds are required—a performance bond and a payment bond.[40] The requirement for a performance bond is intended to protect the Government against failure of the contractor to complete construction work, while the payment bond is, in effect, a substitute for the protection afforded on private construction projects by a mechanics lien, a remedy not available against the Government because of the doctrine of sovereign immunity.

Problem Areas

Although the Miller Act bonding requirements are beneficial to Federal construction procurement, the act presents a number of problems which impact the procurement process and construction costs.

[39] 40 U.S.C. 270a–270d (1970).

[40] Bidders are also customarily required to post security or bid bonds. (See ASPR 10–102 and FPR 1–19.103–3 and –4.) However, there is no general statute requiring bid security. The purpose of the bid bond is to demonstrate the good faith of the bidder and to guarantee that he will enter into the contract, if awarded, and will furnish the required payment and performance bonds.

Also, there is no general statute requiring suretyship in connection with procurement of supplies or services on behalf of the Government. Bonds are sometimes required in connection with such procurements, but purely on the basis of administrative discretion. (See ASPR 10–104 and FPR 1–19.104.2 and 1–19.105.2.)

DOLLAR THRESHOLD

In practical effect, requiring performance and payment bonds for contracts in excess of $2,000 means requiring bonds for all construction contracts—for the same reasons discussed above in connection with the Davis-Bacon Act. Our study indicates that the $2,000 threshold for bonds is expensive to the Government and limits competition on small construction jobs; either because potential construction contractors will not go through the paperwork and expense of getting bonds or are unable to do so.

The number of construction contracts under $25,000 is substantial although it represents only a fraction of the total construction expenditures; for example, in fiscal 1972 the number of actions representing military prime contract awards for construction between $10,000 and $24,999 numbered 6,095 (over 44 percent of the reported construction contracts),[41] for a value of about $94 million.[42] The types of work involved included small projects for repair and alteration, work in remote areas such as fences and cattleguards, and rehabilitation of housing in preparation for sale.

COST-TYPE CONTRACTS

The Miller Act, as currently written, authorizes DOD to waive the bonding requirements for cost-type contracts. Other agencies who do not have that authority must obtain such bonds or resort to other legal grounds for omitting this requirement.

DOD has exercised its waiver authority under the act with respect to cost-type contracts and has required that cost-type contractors obtain Miller Act "equivalent" bonds from their fixed-price subcontractors. Although these bonds are intended to provide protection equal to that under the Miller Act, they are "private bonds" and must be enforced under State law rather than the Miller Act.

Lacking the DOD waiver authority, AEC and NASA apply the bond requirements of the act to fixed-price subcontractors under their cost-type prime contractors. Although the Comptroller General has held that the bonds

[41] Calculated by the Commission.

[42] Letter from the Office of Assistant Secretary of Defense (Installations and Logistics) to the Commission, Aug. 25, 1972.

obtained from such subcontractors are Miller Act bonds, representatives of the surety industry continue to have concerns about the status of such bonds.

ADDED COSTS TO THE GOVERNMENT

GAO in a recent report [43] on the desirability of expanding the Government's self-insurer role in numerous phases of its activities, devoted considerable attention to the Miller Act requirements for payment and performance bonds on Government construction contracts.

The survey by GAO disclosed that the cost of the bonds was substantial and the number of defaults few.[44] It was indicated that the deletion of the bond requirements and the acceptance of the occasional inconveniences, disruption, and expense of an uninsured default might result in a net benefit to the Government. Agency officials and industry representatives, from whom views were solicited by GAO, expressed the belief that the value of performance and payment bonds lies not so much in the indemnification of Government losses as in the other functions performed by the sureties. The construction industry's chief concerns appear to be the screening out of unqualified contractors and the protection of suppliers and laborers. Government agencies share these concerns and want the assistance of the surety to help to avoid a default and in taking over and completing the construction project when a default does occur.

It was concluded by GAO, however, that further consideration as to the appropriateness of repeal of the Miller Act bond requirements is needed prior to any proposal to Congress for repeal.

CONTRACT WORK HOURS AND SAFETY STANDARDS ACT

The Contract Work Hours Standards Act [45] superseded a series of confusing and overlapping work-standard statutes which were enacted between 1892 and 1940 and, among other things, requires the payment of time and one-half for work in excess of 8 hours a day or 40 hours a week. Nearly all of the construction contractors queried in the Commission's study reported that this requirement increases costs, as it requires the payment of overtime costs for working over 40 hours in one week to make up for time lost due to bad weather in another week. It is also asserted to bar the adoption of a 4-day, 40-hour work week.

The Secretary of Labor is authorized to provide reasonable limitations and allow variations from the overtime requirements of the act. Recently a variation from the overtime provisions was granted to the Veterans Administration for contracts to provide nursing home care for veterans. Under this variation employees of nursing homes are permitted to work up to 48 hours in a work week without overtime compensation.

The Department of Labor held a public hearing on September 7–10, 1971, concerning adoption of a 4-day, 40-hour work week without payment of time and one-half overtime compensation for workdays exceeding 8 hours but has taken no action with respect to this matter.

The Legislative Research Department of the AFL–CIO and representatives of several AFL–CIO unions testified at the Department of Labor hearing that they opposed any variance from the established standards.

SUMMARY

The most critical problems affecting Government construction pertain to labor laws and their administration. The confusion and divergent views with respect to responsibilities and authorities under the Davis-Bacon Act, uncertainty as to the coverage of that act, and practices used in determining "prevailing" wage rates result in increased costs and delays. The dollar thresholds at which the labor and bonding statutes apply increase contract and administrative costs and restrict competition. The work hours provisions apply the same requirements to both supply and con-

[43] U.S. Comptroller General, Report B–168106, *Survey of the Application of the Government's Policy on Self-Insurance*, June 14, 1972.

[44] Estimated at between $16.5 million and $20.5 million in fiscal 1970, between $20 million and $24.4 million in fiscal 1971, and between $23 million and $28 million in fiscal 1972. *Ibid.*, pp. 51, 54, 56.

[45] Public Law 87–581, 40 U.S.C. 327 et seq.

struction contracts, although construction work is very different in character. The requirement for submission of weekly payrolls contributes significantly to the cost of construction.

In Part A we recommend a complete reexamination of the many social and economic objectives implemented through the procurement process. Although we make no recommendations on the approach to solving the problems existing under the labor standards provisions and laws applicable to Government construction projects, we believe their importance means that their review should be given a high priority. In recommending this reexamination we again emphasize our endorsement of the objectives underlying the statutes discussed above. We do not suggest the dilution of any substantive benefits they now provide. However, it would seem that through clarifying the statutes and the responsibilities for their implementation, or perhaps by the adoption of other approaches, real gains in the economy and efficiency of construction procurement could be realized without degrading the protection afforded by the labor laws.

APPENDIX A

Public Law 92–582

Public Law 92-582
92nd Congress, H. R. 12807
October 27, 1972

An Act

To amend the Federal Property and Administrative Services Act of 1949 in order to establish Federal policy concerning the selection of firms and individuals to perform architectural, engineering, and related services for the Federal Government.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Federal Property and Administrative Services Act of 1949 (40 U.S.C. 471 et seq.) is amended by adding at the end thereof the following new title:

Architects and engineers. Federal selection policy, establishment. 63 Stat. 377; 82 Stat. 1104.

"TITLE IX—SELECTION OF ARCHITECTS AND ENGINEERS

"DEFINITIONS

"SEC. 901. As used in this title—

"(1) The term 'firm' means any individual, firm, partnership, corporation, association, or other legal entity permitted by law to practice the professions of architecture or engineering.

"(2) The term 'agency head' means the Secretary, Administrator, or head of a department, agency, or bureau of the Federal Government.

"(3) The term 'architectural and engineering services' includes those professional services of an architectural or engineering nature as well as incidental services that members of these professions and those in their employ may logically or justifiably perform.

86 STAT. 1278
86 STAT. 1279

"POLICY

"SEC. 902. The Congress hereby declares it to be the policy of the Federal Government to publicly announce all requirements for architectural and engineering services, and to negotiate contracts for architectural and engineering services on the basis of demonstrated competence and qualification for the type of professional services required and at fair and reasonable prices.

"REQUESTS FOR DATA ON ARCHITECTURAL AND ENGINEERING SERVICES

"SEC. 903. In the procurement of architectural and engineering services, the agency head shall encourage firms engaged in the lawful practice of their profession to submit annually a statement of qualifications and performance data. The agency head, for each proposed project, shall evaluate current statements of qualifications and performance data on file with the agency, together with those that may be submitted by other firms regarding the proposed project, and shall conduct discussions with no less than three firms regarding anticipated concepts and the relative utility of alternative methods of approach for furnishing the required services and then shall select therefrom, in order of preference, based upon criteria established and published by him, no less than three of the firms deemed to be the most highly qualified to provide the services required.

83-081 O

86 STAT. 1279

"NEGOTIATION OF CONTRACTS FOR ARCHITECTURAL AND ENGINEERING SERVICES

"SEC. 904. (a) The agency head shall negotiate a contract with the highest qualified firm for architectural and engineering services at compensation which the agency head determines is fair and reasonable to the Government. In making such determination, the agency head shall take into account the estimated value of the services to be rendered, the scope, complexity, and professional nature thereof.

"(b) Should the agency head be unable to negotiate a satisfactory contract with the firm considered to be the most qualified, at a price he determines to be fair and reasonable to the Government, negotiations with that firm should be formally terminated. The agency head should then undertake negotiations with the second most qualified firm. Failing accord with the second most qualified firm, the agency head should terminate negotiations. The agency head should then undertake negotiations with the third most qualified firm.

"(c) Should the agency head be unable to negotiate a satisfactory contract with any of the selected firms, he shall select additional firms in order of their competence and qualification and continue negotiations in accordance with this section until an agreement is reached."

Approved October 27, 1972.

LEGISLATIVE HISTORY:

HOUSE REPORT No. 92-1188 (Comm. on Government Operations).
SENATE REPORT No. 92-1219 (Comm. on Government Operations).
CONGRESSIONAL RECORD, Vol. 118 (1972):
July 26, considered and passed House.
Oct. 14, considered and passed Senate.

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APPENDIX B

Comptroller General Letter, December 27, 1971

COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D.C. 20548

B-160725 DEC 27 1971

Mr. E. Perkins McGuire
Chairman, Commission on
Government Procurement
1717 H Street, N. W.
Washington, D. C. 20006

Dear Mr. McGuire:

In connection with the Commission's study of labor standards on public contracts, we submit the following comments relative to administration of the Davis-Bacon Act, 40 U.S.C. 276a, for your consideration.

The Davis-Bacon Act establishes a minimum wage structure for the employees of Government contractors. The Secretary of Labor is made responsible for determining and prescribing prevailing wages which must be specified in certain Federal construction contracts and which must be paid to various classes of laborers and mechanics employed thereunder (section 1). The General Accounting Office is made responsible, in all instances where compliance with the contract wage provisions has been questioned, for determining whether or not "violations" (disregard of minimum wage obligations) occurred in a sense for which punishment is directed in the form of ineligibility to receive awards of Federal contracts (debarment) for three years and, if underpayments exist and funds have been withheld therefor by a contracting officer, for paying aggrieved employees amounts to which they may be entitled (section 3).

The delegation to GAO under existing law of responsibilities to correct wage underpayments to employees and to determine violations and impose debarments in appropriate instances has the effect of excluding the Department of Labor from exercising final jurisdiction over administrative enforcement activities, and it obviously has interfered with and prevented a full centralization of administrative functions. It is otherwise undesirable because the duties so entrusted are not germane to our regular activities; they involve a duplication of work already performed in large part by individual contracting agencies and by the Department of

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Labor under Plan No. 14, and the processing of cases in different offices delays enforcement action and promotes inconsistencies.

Evidence concerning the observance of Davis-Bacon Act requirements serves three purposes. It establishes bases upon which settlement is made with a contractor for performance, upon which debarment is required, and upon which amounts are withheld from a contractor and disbursed to employees as wage adjustments. Obviously, the participation of three agencies (the contracting agency, the Department of Labor, and the General Accounting Office) in investigations to develop such evidence involves considerable duplication of effort and may be unduly burdensome upon contractors. Obviously, also, the consideration and evaluation of evidence by three separate agencies necessitates repeated transfers of records and further duplication. In addition, the well-established procedures for determining and adjusting matters of compliance with prescribed contract requirements, including appeal procedures, are disrupted and bypassed when contract settlement in the area of labor standards compliance is removed from the jurisdiction of contracting agencies and placed in the Department of Labor, or GAO, or both.

In view thereof, it is our opinion that the enforcement duties now entrusted to our Office more appropriately can be discharged by the Department of Labor and the contracting agencies concerned, and we therefore recommend that all enforcement responsibilities be transferred to their jurisdiction.

In the interest of simplification and savings, we also suggest the practicability of a greater utilization of primary responsibility in the individual contracting agencies for verifying and enforcing compliance. This responsibility would include the duties of making adequate compliance investigations, withholdings and disbursements of wage adjustments to underpaid employees when proper and necessary, and the imposition of debarment where appropriate because of violations. Adequate appeal procedures for the settlement of disagreements as to satisfactory performance of required conditions already exist under standard contract provisions. In instances where disputes arise concerning the existence or extent of a prevailing wage rate or classification, since this is a matter initially determined by the Department of Labor, it appears that appeal procedures should be established in that Department. In the case of appeals concerning the imposition of

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debarment, after appropriate statement of charges, hearings if requested, and findings of fact, it may be desirable that, in the interest of a consistent application of this sanction to violators, such appeals also should be decided by the Department of Labor.

Under such an arrangement, the Department of Labor would have responsibility for overall regulation to achieve coordination and consistency of enforcement, as well as all rate making jurisdiction, but only such investigative and appeal (in the case of rates and debarments) functions as are essential to ensure consistency of enforcement. The Department would not engage in fact finding in the contract settlement area. It is believed that, given adequate prevailing wage determinations and such guides in the form of regulations as are necessary to consistency of enforcement, the contracting agencies could take satisfactory steps to ensure compliance, wage adjustments in accordance therewith (including direct payment where necessary), and debarment, and so avoid the disruption of settlement procedures, the expense consequent upon duplication of investigative effort and repeated transfers of evidence, and the inevitable delays of fact finding and review authority in additional separate agencies.

The simplication of enforcement measures suggested would, it is believed, go far toward making possible a current and efficient handling of labor standards problems under construction contracts. There can be little doubt that cumbersome enforcement procedures result in confusion and delays and in the completion of enforcement actions only long after performance. The most pressing need at this time appears to be for simple, direct enforcement machinery which can determine labor standards compliance at the time of performance and provide for the prompt and efficient resolution of all questions (whether involving the ascertainment of prevailing wage rates for classifications of employees utilized, appropriate settlements with contractors on the basis of their performance, the enforcement of wage adjustments by direct payments to employees where necessary, or application of the debarment sanction) in a manner fair to all concerned.

In connection with the direction that the Secretary of Labor distribute lists of debarments to Federal agencies, we recommend a perfecting amendment to the Walsh-Healey Act (which now provides for reporting debarments thereunder to our Office for publication) so that a single combined list can be issued by the Secretary.

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We suggest, however, that any legislation, or recommendation for legislation, to accomplish the purposes set out above should clearly indicate that it is intended to apply only to matters involving compliance with, and enforcement of, the obligations of contractors, and is not intended to affect the jurisdiction of this Office to consider and decide other questions, such as those involving application or administration of the Act, which may be raised by protesting bidders, by contractors, by procuring agencies, or may otherwise come to our attention during the performance of our statutory functions.

If any further information or assistance is desired, we shall be pleased to cooperate.

Sincerely yours,

Comptroller General
of the United States

APPENDIX C

List of Recommendations

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.

APPENDIX D

Acronyms

A–E	Architect-Engineer
AEC	Atomic Energy Commission
AFL–CIO	American Federation of Labor—Congress of Industrial Organizations
ASPR	Armed Services Procurement Regulation
BLS	Bureau of Labor Statistics
CFR	Code of Federal Regulations
DOD	Department of Defense
FICA	Federal Insurance Contributions Act
FPR	Federal Procurement Regulations
GAO	General Accounting Office
GSA	General Services Administration
GSA–PBS	General Services Administration—Public Building Service
LOFT	Loss of Fluid Test (Facility)
NASA	National Aeronautics and Space Administration
NAVFAC	Naval Facilities Engineering Command
OMB	Office of Management and Budget
TVA	Tennessee Valley Authority
U.S.C.	United States Code

Part F—Federal Grant-Type Assistance Programs

CONTENTS

CHAPTER 1

Introduction

In the hearings preceding enactment of the law that established this Commission, it was recommended that grants be studied by the Commission.[1] Because of the importance of Federal grant activities and the uncertainty of their relationships to procurement, a limited review [2] of Federal grant-type assistance [3] was conducted. The purpose of this review was to gain an understanding of the significance, if any, of the interchangeable use of grants and contracts and of the extent to which procurement rules and regulations are or should be applied to grant-type assistance.

As data on Federal grant-type programs were examined, the focus was enlarged to include questions such as:

- What is the nature of the grant-type assistance relationships that exist between the Government and the recipient?
- Can and should grant-type assistance be distinguished from procurement?
- Can the confusion which seems to beset grant-type programs be reduced by giving relationship-based definitions for Government-wide use to terms such as contract, grant, and grant-in-aid?

These efforts led to the recognition of certain needs and the development of proposals to deal with them.

Federal grant-type activities are a vast and complex collection of assistance programs, functioning with little central guidance in a variety of ways that are often inconsistent even for similar programs or projects. This situation generates confusion, frustration, uncertainty, ineffectiveness, and waste. This disarray can be traced to three basic causes:

- Confusion of grant-type assistance relationships and transactions with procurement relationships and transactions
- Failure to recognize that there is more than one kind of grant-type relationship or transaction
- Lack of Government-wide guidance for Federal grant-type relationships and transactions.

To deal with these problems and confusions we have concluded that legislation is required to: (1) distinguish assistance from procurement by restricting the term "contract" to procurement relationships and by requiring the use of other instruments to implement assistance relationships; (2) distinguish among grant-type relationships by introducing a "new" instrument (cooperative agreement) to accommodate the assistance relationships requiring substantial Federal/non-Federal interaction during performance; (3) override statutes which prevent the agencies from using the most appropriate instrument in each grant-type and procurement situation; and (4) give the agencies new authority to use grant-type instruments in situations which call for them.

We have concluded also that Federal assist-

[1] U.S. Congress, House, Committee on Government Operations, *Government Procurement and Contracting (Part 6)*, Hearings on H.R. 474 before a Subcommittee of the Committee on Government Operations, 91st Cong., 1st sess., May 15–21, 1969, pp. 1636–1637.

[2] See Appendix A for a description of the methodology followed.

[3] The term "Federal assistance" means the provision of money, services, or real or personal property for the purpose of supporting, stimulating, strengthening, subsidizing, or otherwise aiding or assisting non-Federal activities. We have examined grant-type assistance programs, transactions, and relationships and not other types of assistance such as loans, subsidies, insurance, and the various forms of nonfinancial assistance. The best composite data on Federal assistance activities is in the *Catalog of Federal Domestic Assistance* prepared by the Office of Management and Budget.

ance programs require guidance on program implementation and a greater degree of standardization and consistency than now exists. There is a need to spell out basic assistance policies and procedures in the way that procurement regulations spell out basic procurement policies and procedures. Pending legislation that will reduce the present statutory barriers to consistency and that will give the agencies new authority for grant-type relationships, a study should be made of the feasibility of developing a Government-wide system of guidance for all Federal assistance programs.

CHAPTER 2

The Present Situation

The Federal Grant Program

During the 1950's and 1960's Federal grants to State and local governments and to nongovernmental recipients grew significantly in relative and absolute terms. Measured by the National Income Accounts, Federal grants to State and local governments increased from $2.2 billion in 1950 [1] to $21.7 billion in 1970.[2] This growth resulted largely from the highway program (initiated in 1957) and the expansion of socially oriented programs administered by the Departments of Health, Education and Welfare (HEW), Labor, and Housing and Urban Development (HUD).

The number of grant programs also rose sharply in the 1960's. In 1964, the Library of Congress identified 216 authorizations for Federal grant programs for assistance to State and local governments.[3] In 1966, the Library identified 399 authorizations;[4] most of the new programs were in the fields of education, urban development, health, welfare, and labor and were assigned primarily to HEW, HUD, and the Office of Economic Opportunity (OEO). In 1971, the Office of Management and Budget (OMB) identified more than 500 grant programs;[5] however, some of the programs listed separately are based on the same authorization.

In fiscal 1970, the value of Federal grants awarded to State and local governments (about $21.7 billion) was more than three times greater than that of awards to nongovernmental recipients (about $6.4 billion).[6] HEW dominates Federal grant programs since it funded more than half the totals to both governmental and nongovernmental grantees.[7] The largest HEW grant programs are those of the Social and Rehabilitation Service, with its $8.5 billion for programs assisting the welfare of individuals, and the Office of Education (OE), with its $3 billion in grants benefiting largely the educational systems of the country. HEW grants to State and local governments were almost three times those awarded to other HEW grantees.[8]

The next largest program is in the Department of Transportation (DOT), with its $4.5 billion in grants largely for the construction programs of the Federal Highway Administration. Other large grant programs are administered by the Departments of Labor, Agriculture, and HUD. Grants to States and local units dominate in all of these programs.[9]

Federal grant programs also grew significantly during fiscal years 1971–1973. Federal aid to State and local governments increased

[1] *1971 Statistical Abstract of the United States.* Table No. 433, Federal Grants to State and Local Governments by Purpose: 1950 to 1970, p. 273.

[2] Table 1, *infra.* The Commission estimated that an additional $6.4 billion consisted of awards to nongovernmental recipients. Statistics on these types of awards are not readily available or easily compiled as they are not reported in the *Statistical Abstract of the United States*, the *National Income Accounts*, or the *Special Analyses of the U.S. Budget.* The OMB catalog was the primary source for these data. Although the National Income Accounts do not separately identify Federal grants awarded to nongovernmental organizations and individuals, budgetary and other sources indicate substantial growth of Federal grants awarded to these recipients.

[3] U.S. Congress, Senate, Committee on Government Operations, *Catalog of Federal Aid to State and Local Governments*, hearings before the Subcommittee on Intergovernmental Relations of the Committee on Government Operations, 88th Cong., 2d sess., Apr. 15, 1964.

[4] Labovitz, *Number of Authorizations for Federal Assistance to State and Local Governments*, Legislative Reference Service, Library of Congress, July 5, 1966.

[5] *Catalog of Federal Domestic Assistance*, OMB, 1971 edition.

[6] Fig. 1.

[7] Table 1.

[8] *Ibid.*

[9] *Ibid.*

to $29.8 billion in fiscal 1971 with anticipated levels of $39.1 billion in fiscal 1972 and $43.5 billion in fiscal 1973.[10]

Statistics on the "Federal grant program" are summarized in figures 1 and 2 and in table 1.

Terminology and Practices

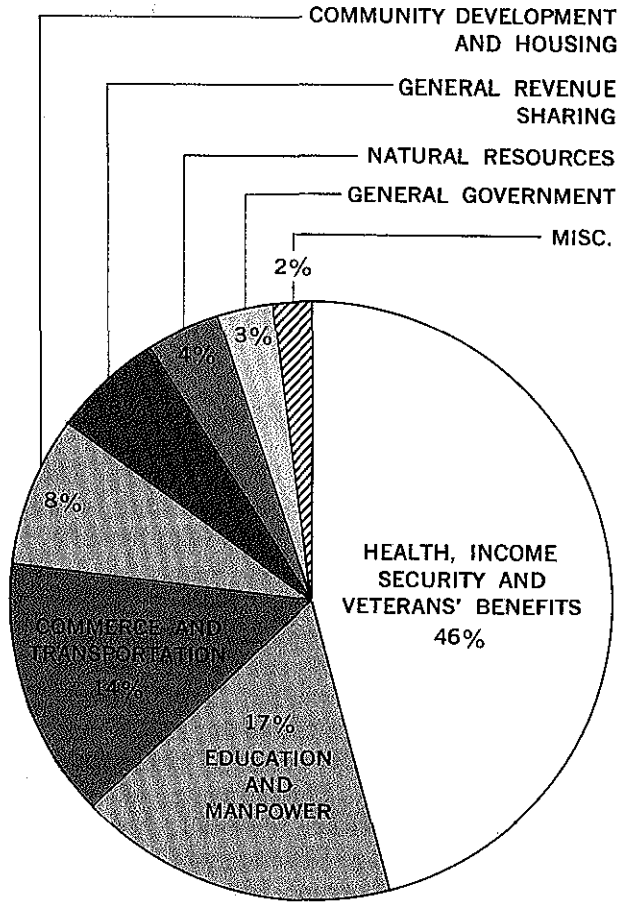
The term "grant" has no single or precise meaning. "Grant" transactions range from simple to complex. "Grants" are used by agencies such as HUD, the National Institutes of Health (NIH), and the National Science Foundation (NSF) for the support of research and demonstration projects that require little or no agency involvement or direction. An agency such as the Urban Mass Transportation Administration (UMTA) of DOT, however, exercises as much or more control over its grants, which it calls "grant-contracts," than is customary in many procurements. The Office of Saline Water of the Department of the Interior issues both grants and contracts for research but treats them in a fashion that makes them relatively indistinguishable; its decision to use a grant or a contract is based on the type of recipient rather than on the nature of the research or the agency's purpose in funding it.

The term "grant-in-aid" was originally used to describe grants to State and local governments but now it also is used to describe grants to other types of recipients. It is usually associated with the large formula-type assistance programs of HEW and DOT. The De-

TOTAL $28.1 BILLION

Source: Commission Studies Program.

Figure 1. Distribution of grant funds, by type of recipient, fiscal 1970.



$39.1 BILLION (EST.)

Source: *Special Analyses Budget of the United States Government, Fiscal Year 1973*, Table P–9, Federal Aid to State and Local Governments, pp. 251–254. Percentages calculated by Commission.

Figure 2. Federal Aid to State and Local Governments by Function, Fiscal 1972.

[10] *Special Analyses, Budget of United States Government, Fiscal Year 1973*, table P–4, Federal-Aid Expenditures by Agency, p. 245. Figures rounded by the Commission.

TABLE 1. DISTRIBUTION OF GRANT FUNDS, BY GRANTING AGENCY, FISCAL 1970

(Millions of dollars)

Agency	*Total* [a]	*Governmental* [b]	*Nongovernmental* [c]
HEW	15,758	11,566	4,192
Transportation	4,509	4,506 [a]	3
Labor	1,700	1,045	655
HUD	1,647	1,644 [a]	3
Agriculture	1,583	1,351	232
OEO	644	0	644 [a]
EPA	522 [f]	464 [a]	58 [a]
NSF	359	0	359
Regional Commissions	284	284 [a]	0
Justice	244	236	8
Commerce	224	164	60
Interior	191	127 [a]	64 [a]
OEP	184	184 [a]	0
AEC	78	0	78 [e]
NASA	69	0	69
Defense	67 [d]	44	23 [d]
State	27	27	0
VA	20	18	2
NFAH [g]	11	2	9
Other offices	8	2	6 [a]
Total	28,129	21,664	6,465

[a] From Commission analysis of *Catalog of Federal Domestic Assistance*, OMB, 1971 edition, unless otherwise noted.

[b] From Department of the Treasury, unless otherwise noted.

[c] By difference, total minus governmental, unless otherwise noted.

[d] Includes $23 million R&D grants—data from Commission analysis.

[e] "Special Research Support Agreements" and cost-reimbursement contracts for nonprofit institutional research and training are listed as "Project Grants."

[f] Represents funding for programs incorporated into EPA in fiscal 1971.

[g] National Foundation on the Arts and Humanities.

partment of Agriculture (USDA) uses the term "formula grant" instead of "grant-in-aid." The Public Health Service (PHS) Act authorizes NIH to award "grants-in-aid" in support of research and training projects but authorizes other PHS units to award "grants" in support of similar activities.

Grants and contracts are used "interchangeably" (within agencies and among agencies) for the same types of projects. For basic research, NIH and NSF use grants; the Office of Naval Research (ONR) uses contracts; and the Atomic Energy Commission (AEC) uses a "special research support agreement" which is operationally similar to the ONR contract. The interchangeable use of grants and contracts is most widespread when significant agency involvement occurs *during* performance of the assistance activity. In such cases, the "older" agencies, such as AEC and the National Aeronautics and Space Administration (NASA), tend to use contracts, but the "newer" agencies, such as DOT, HUD, and EPA, tend to write complicated grants; NSF and others do both.

Some agencies admit that they use grants to avoid the requirements, such as advance payment justifications, which apply to contracts. Some agencies use more grants in June to obligate funds before the end of the fiscal year because grants are quicker to process than contracts. Some program officials who have responsibility for negotiating and administering grants, but not contracts, tend to shift to contracts when they are busy in order to place the workload elsewhere. These practices may give Federal agencies administrative discretion not intended by the Congress.

There are wide variances in agency administrative (and presumably technical) involvement in similar kinds of projects. NSF applies less administrative effort to its basic

research grants than ONR does to its basic research contracts. The Economic Development Administration (EDA) of the Department of Commerce closely monitors construction under its grants-in-aid; HEW tries to do so but does not always succeed; OEO states that it does not have the staff to worry about construction under its grants-in-aid. UMTA procedures for administering research, development, and demonstration grants provide for very detailed Government oversight. UMTA officials state that such procedures are necessary because UMTA often deals with small municipalities and transit authorities that lack expertise in project management. HUD officials, however, report that they impose a minimum of administrative control on their Model Cities grants because the municipalities have their own rules and regulations for fiscal, procurement, and other matters. Needless to say, HUD and UMTA sometimes deal with the same municipalities.

The tendency of the executive branch to either over- or under-administer grant-type programs is generally recognized. A recent OMB report notes that:

> Federal programs still are too often cluttered by unnecessary controls, regulations, clearances, reports and other impediments . . . Wide variations in agency requirements, each of which may have some logic by itself, result in serious workloads on State and local governments with few or no national benefits which could not be realized under Government-wide standardized procedures and requirements.[11]

The General Accounting Office (GAO) and congressional committees often note underadministration (or inadequate administration) of grant-type programs. Too much, too little, or the wrong kind of Federal involvement demonstrates uncertainty concerning the relationships of the Government and the recipient in many of these programs.

Grant-type assistance instruments reveal wide variances in agency requirements. The instruments used by some agencies explicitly cover particular subjects; those used by other agencies in similar circumstances do not. Further, agency use of a nonstandard procurement provision in a grant instrument does not mean that the standard provision is inappropriate. For example, UMTA and EPA use a shortened version of the "Covenant Against Contingent Fees." This version eliminates the exceptions provided in the basic statute (41 U.S.C. 254) and, therefore, imposes more stringent prohibitions on grantees than are imposed on contractors under the Federal Procurement Regulations (FPR).

Agency practices also differ with respect to "subcontracting" under grants. EDA and HEW review and approve significant subcontracting under their grants-in-aid; the Law Enforcement Assistance Administration (LEAA) and OEO do not. Some State and local government purchasing agents believe that there is considerable waste of Federal funds because the State and local grantees often are not required by their grants to use the procurement services of State and local governments. They also note that Federal "grant" agencies often are not staffed to assist on procurement problems when asked to do so.

There is sometimes insufficient Federal involvement or use of standards when significant procurements occur under grant-type relationships. Agency staffs do not always recognize that some lower-tier procurements under a grant would benefit from the guidance provided by procurement rules, regulations, or standards.

A comparison of clauses ordinarily used in procurement contracts with those ordinarily used in grant-type instruments reveals that:

- Statutory authorizations for grant-type assistance seldom require clauses such as Buy American, Walsh-Healey, Davis-Bacon, Convict Labor, Officials Not to Benefit, and Covenant Against Contingent Fees in grant-type instruments. In the absence of Government-wide guidance on the use of such clauses, some of the agencies are using such clauses in grant-type instruments even though their utility in most such instruments is doubtful.
- Some program authorizations contain requirements such as Davis-Bacon, although the organic statutes do not apply the requirements to grant-type transactions. The resulting Government-wide uncertainty could

[11] U.S. Office of Management and Budget, *Basic Plan for the Federal Assistance Review (FAR) Program, 3rd Year*, July 1, 1971, pp. I–2 and D–16.

be reduced if statements of the applicability of requirements were in the organic statutes, not in individual program statutes.

- The clause requirements for grant-type instruments can be, but are not always, much simpler than those in procurement contracts. Government-wide guidance on "procurement-type" clause requirements for grant-type instruments would be useful and relatively easy to provide.

Statutes

Enabling and appropriation statutes for grant programs cause confusion. As a group they lack consistency in requirements, terminology, level of detail, and emphasis. Because the UMTA statute requires the use of "grants," when the agency feels that it must exercise a good deal of control, it uses "grant-contracts." NIH appropriation statutes provide funds specifically for "grants," thereby limiting agency discretion in making the most suitable arrangements. EPA inherited a number of programs with different statutory restrictions and is having difficulties trying to reconcile them.

The statutes are inconsistent in specifying the circumstances under which they require the use of grants. The agencies generally prefer to use grants for transactions that require little agency involvement or participation during performance. However, in many Federal programs the authorization statutes require the use of "grants" even though the programs require substantial agency involvement during performance as is the case of the Office of Education in its grants for construction of educational facilities; USDA in its grants for water and sewer planning; and LEAA in its grants for information system demonstration projects. The program statutes, by requiring the use of grants in such cases, are a major source of the Government-wide inconsistency, confusion, and uneven management attending Federal grant-type assistance.

Most of the agencies have inadequate statutory authority to employ grant-type instruments in grant-type transactions. Each year, for its training programs, the Department of Labor writes some 7,000 cost-reimbursement contracts with State and local governments because it does not have statutory authority to use grants. In the absence of specific statutory authority, the agencies can (under Public Law 85–934) use grants only for basic research at nonprofit institutions of higher education or at other nonprofit organizations whose primary purpose is the conduct of scientific research.

Federal Control and Guidance

There is uncertainty as to what the roles and responsibilities of the agency and the recipient should be. Agencies often do not know to what extent Congress expects Federal control of, or participation in, a program or the extent to which the agency and its program officials will be held responsible for the activities of recipients. Thus, there is an understandable tendency for Federal administrators to protect themselves by placing excessive requirements on recipients, thereby diminishing the recipient's flexibility to use the assistance effectively. Without clear direction from some source, it is natural for much of the bureaucracy to react in this self-defensive way. An OMB study in 1969 generally found overadministration of research projects at colleges and universities [12] and, as a consequence, OMB issued Circular A–101 limiting the types of approvals the agencies could require recipients to obtain.

Uncertainty at the Federal level is reflected at the recipient level. Recipients who must deal with different requirements of different agencies are uncertain of their roles and responsibilities in complying with Federal procedures.

A variety of media is used to issue Government-wide guidance to granting agencies. What guidance there is occurs in various GSA and OMB issuances, letters to agencies from

[12] U.S. Bureau of the Budget, report on the *Project Concerning the Policies, Procedures, Terms and Conditions Used for Research Projects at Educational Institutions*, June 20, 1969.

the Office of Science and Technology (OST), Presidential memorandums to heads of agencies, and Executive orders. This guidance is not issued systematically through a medium similar to procurement regulations.

Almost all agencies acknowledge the need for Government-wide guidance on grant-type activities, provided that the guidance is well conceived and administered. The need for guidance is reflected in the complaints voiced by recipients, particularly universities, that OEO, HUD, and DOT do not understand the special nature of educational institutions and try to impose on them arrangements which are appropriate only for commercial procurements. An example cited is the insistence by DOT on the use of contract provisions requiring that a recipient institution "guarantee performance" in a procurement sense, even though the institution regards the transaction as one of Federal support for research of general public interest.

The problem is that the agencies and the recipients often differ on whether a transaction or relationship is assistance or procurement. This problem is becoming more noticeable because some agencies' "grants" are more complicated than other agencies' contracts. The agencies often see their role as more than "grantors." Yet the relationships are not procurement relationships. This problem compounds the confusion and adds to the frustration felt between these agencies and recipients. Representatives of State and local government are especially emphatic and vocal about the need for making the whole system more rational.

Regulations governing Federal procurement are intended to provide all prospective contractors with a fair opportunity to meet Federal procurement needs. It is intended that anyone can pick up the procurement regulations and their implementing policies and procedures and generally determine what his rights and obligations will be if he chooses to compete for a contract award. He can also determine how to bid or propose, what the basic evaluation criteria will be, and what safeguards are built in to ensure fairness. Requests for proposals frequently specify the weights to be assigned various evaluation factors, and the contractor usually has a right to be debriefed if he is unsuccessful.

Most assistance procedures call for making awards in a different but equally fair fashion; however, the fact that the standards governing grant-type assistance are not widely understood generates suspicion of assistance awards. Criticisms of procurement awards can focus on failures to meet the published standards for procurement. Many persons in the business community regard the various agency procedures under which assistance awards are made as devices to circumvent procurement procedural requirements that are intended to ensure fairness. Thus, a standard set of assistance award procedures should be developed to promote more efficient administration of Federal grant programs in an improved atmosphere of public trust.

CHAPTER 3

Proposed Changes

Assistance and Procurement Relationships

The Government pursues its objectives in a variety of ways. Many functions are performed "in-house" by Government personnel. Needed goods and services are often purchased under contract with non-Federal sources.[1] Other Federal objectives are attained by supporting or stimulating certain activities of State and local governments, other organizations, and individuals. These activities relate to functions which historically have been performed and can be best undertaken by non-Federal governments, organizations, and individuals. The term "Federal assistance" generally designates Federal support or stimulation of these activities, and "grants" and "grants-in-aid" are instruments by which much Federal assistance is provided.[2]

Assistance, while similar to procurement in some respects, is significantly different from procurement. Assistance is intended to:

- Help a recipient carry out its functions or meet a particular need, the support or stimulation of which accords with prevailing public policy; or
- Bring about social, administrative, or technological change by the provision of Federal funds or other resources to help or encourage recipients to pursue recognized objectives.

Congress normally has preferred that the functions and objectives supported through assistance be carried out by State and local governments, educational institutions, other nonprofit organizations, and individuals rather than by or under the direct control of the Government. One reason for this policy is the belief that the meaningful participation of organizations and individuals tends to insure that the programs consider and serve local or public requirements, values, and needs in the most desirable and direct manner, while accomplishing the broader purposes or objectives of Congress.

Congress, by statute, generally establishes basic program objectives, requirements, and standards and then appropriates funds to be awarded by the agencies under arrangements such as "grants" or "grants-in-aid." Thus, congressional intent, as well as particular program purposes, distinguish grant-type assistance from procurement.

In addition to the differences in basic intent and purpose between assistance, which is to support, stimulate, or aid another party's activities, and procurement, which is to purchase or buy goods and services primarily for Government use, other differences help to distinguish assistance from procurement.

In many, if not most, grant-type assistance relationships, the Government asks the recipient to define what it will do to achieve the objectives of the program. This often is accomplished through submission of a proposal or through a State or local plan. The recipient usually is responsible for deciding what it will do or how it will do something. In most procurements the Government specifies what it wants or how it wants something done as clearly and in as detailed a fashion as it can,

[1] For a detailed treatment of the "make-or-buy" decision, see Part A, Chapter 6. The use of GSA sources is treated in Part D, Chapter 4.

[2] Assistance is also provided by loans, insurance, direct payments, nonfinancial forms such as the furnishing of property or technical assistance, and even via the procurement process in the form of preferences for small business or for labor surplus areas.

thus assuming responsibility for specifying the project scope. (There are, of course, exceptions to this in the procurement of research.)

In assistance, price or estimated cost plays a small role in the selection of the recipient. Many assistance funds are awarded, for example, on geographical or per capita bases by formula; others are awarded according to need or capability. The reasons for selection of an assistance recipient are in large part a reflection or a function of the objectives of the program. Competition, if it exists, differs considerably from competition in the traditional procurement sense where proposers or bidders compete on the basis of price and other factors for one specific award; and where basic regulations require, for example, that a procurement be awarded to the lowest responsive and responsible bidder. Under procurement, a determination must be made that an organization is "responsible," that is, capable of performing; assistance awards sometimes are made with knowledge that the recipient needs some form of aid or help in order to perform.

Under procurement, a basic arms-length buyer-seller relationship generally is expressed in a formal manner, with the rights and duties of the Government and the performer defined in detail. The Government, in the role of a buyer, has many rights which it may or may not choose to exercise. The Government may control or direct the work through its specifications, changes, inspection, and acceptance procedures; and the Government can terminate for its convenience and, where appropriate, for default. In assistance, however, there is not this buyer-seller relationship as the Government's role is not that of a purchaser but rather that of a patron or partner. For this reason, the relationship is more of a cooperative one with responsibilities for assuring performance resting largely with the recipient or shared with the Government. Assistance relationships tend to be less formal and expressed in less detail. The differences in the roles of the parties in assistance and procurement shape the different understandings and expectations of the parties.

Procurement relationships can and do vary in the extent of formality, rights, and control. Cooperative and fairly informal arrangements can be found, especially in the procurement of research. Nonetheless, procurement processes are colored by the basic purposes they serve, the obtaining of goods and services for Government use. The procurement process is made up of policies, procedures, and requirements to serve that purpose; it involves requirements that seldom apply in assistance; for example, use of formal advertising or requests for proposals; price competition; competitive evaluation of bids or proposals for a specific project; competitive negotiation and selection of a contractor; use of determinations, findings, and other justifications; use of a panoply of standard, optional, and special provisions which spell out the rights and obligations of the parties in detail; and detailed inspection and acceptance procedures.

Although assistance and procurement differ basically in their inherent purposes, other differences lie in types of recipients, bases for selection, roles and responsibilities of the parties, and basic processes and requirements. Such secondary characteristics tend to complicate the picture, but congressional intent and program purpose usually determine whether an activity should be regarded as assistance or procurement.

Agency support or stimulation of a recipient's activities, or agency cooperative participation or involvement to aid a recipient differs from Federal procurement for Federal use. Of course, the Government may wish to build a flood-control system for a community and then donate it to the community. This method, although occasionally necessary for technical reasons, is an exception to the general rule that assistance functions be carried out so far as possible by or under the direction of the recipient. That is, it is intended that the Government assist and not perform or procure.

Relationships and New Authority

Recommendation 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.

GRANT-TYPE ASSISTANCE RELATIONSHIPS

To distinguish among grant-type relationships in a way that would reduce the confusions we found, we examined a number of characteristics which are often used to distinguish among grant-type transactions. "Discretionary" project grants, in which the agency determines who gets an award and the amount of the award, are often contrasted with "nondiscretionary" formula grants for which the statutes specify recipients and/or amounts. In examining "nondiscretionary" transactions, we found a variety of formula transactions, including those which:

- Provide funds solely on the basis of formulas
- Match the amounts spent by the recipient for specified purposes
- Permit agencies to increase the amounts determined under a formula by increments based on the "needs" of the recipient
- Require agency approval of State or local plans prior to providing funds
- Permit the recipient to make discretionary grants or contract out significant amounts
- Provide basic formula amounts and additional discretionary project amounts.

The agencies have more discretion in these formula-type grant situations than is apparent from the term "formula." Although parts of the formula process may be mandatory or mechanical, the discretion left to the agency in negotiation, in rulemaking, or in establishing procedures is significant. The Department of Agriculture (USDA), for example, under some grant programs distributes funds to States based on a formula specified in the enabling legislation but requires State Experiment Stations to obtain USDA approval of individual projects before the stations can spend grant funds.

Because there are discretionary elements in most formula programs, many of the distinctions between the formula grant and the discretionary project grant break down. They are not useful for our purpose of distinguishing among grant-type relationships. Similarly, distinctions such as cost-sharing or matching, type of recipient, or the extent and character of pre-award negotiations do not seem to be useful in distinguishing among grant-type relationships. They are characteristics of grant-type transactions or relationships, but they are not characteristics which individually or in combination sort the grant-type universe into classes of transactions which would reduce the confusions and help resolve the problems we find.

However, one important characteristic does permit grant-type transactions to be divided into two meaningful classes: grant-type transactions vary according to the extent and type of interaction that occurs between the Government and the recipient *during* performance of the supported activity.

One class requires little or no Federal involvement during performance; for example, support of most activities at educational institutions, support of the work of individual artists or the travel of individual scholars, or support or stimulation of ongoing activities of State and local governments. These recipients can exercise maximum discretion in performing provided they spend funds for the purposes for which they were awarded. In some programs the purposes to be achieved are outlined and negotiated before award (resulting in an agreed-upon scope of work or a State or local plan). If there is little or no need for agency involvement during performance, the recipient is responsible for performance in accordance with the agreed-upon scope and with certain specified standards and requirements. This first class includes the largest number of grant-type transactions.

The second class is characterized by significant Federal involvement *during* performance. The programs or projects found in this second class of grant-type relationships are of such a nature that Federal/recipient interaction is necessary or desirable during performance to assure the solving of a problem or the production by the recipient of a useful product or service. While these transactions are compar-

atively few in number, they constitute an important class of grant-type relationships. This class includes those grant-type programs or projects in which:

- Federal "project management" or Federal program or administrative assistance would be helpful because of the novelty or complexity involved (for example, in some construction, information system development, and demonstration projects)
- Federal/recipient collaboration in performing the work is desirable (for example, in collaborative research, planning, or problemsolving)
- Federal monitoring is desirable to permit specified kinds of direction or redirection of the work because of interrelationships among projects in areas such as applied research
- Federal involvement is desirable in the early stages of ongoing programs, such as HEW welfare activities or LEAA programs, where standards are being developed or the application of standards requires a period of adjustment until recipient capability has been built.

These categories are not mutually exclusive. They are intended to illustrate the kinds of projects which may require substantial Federal/recipient interaction during performance.

CHOICE OF INSTRUMENTS

To clarify the distinction between grant-type assistance and procurement and to distinguish between the two classes of grant-type assistance, different instruments should be used for each of these three kinds of relationships.

The term "contract" should be restricted to procurement relationships. The term should not be used to express assistance-type relationships regardless of the type of recipient being assisted. Price-competition considerations should be kept in the procurement area. The justifications required for procurement should not complicate the processing of assistance transactions where competition, if it exists, takes a form different from competition in procurement situations. But, a "contract" should be used for a procurement relationship regardless of who the parties are (for example, contracts should be used for procurements accomplished by Federal grantees under their grants).

The terms "grant" and "grant-in-aid" should be restricted to assistance relationships in which the responsibility for performance rests basically with the recipient and, thus, little or no Federal involvement or participation during performance is required. The extent to which "grants" and "grants-in-aid" should differ from each other is not clear. However, it would be useful to standardize terminology for these types of assistance in one of the following ways:

- Use "grants-in-aid" for transactions between units of Government and "grants" for all other transactions
- Use "grants-in-aid" when the method of selection is based on a formula and "grants" when it is not
- Use "grants-in-aid" when significant cost-sharing or matching is required and "grants" when it is not

The first alternative is preferable and the most meaningful. The type of performer is easily determined and there are significant differences between units of Government and other classes of performers. The method of selection would be a poorer basis because it would denote nothing unique: many "formula" transactions, for example, are characterized by the use of substantial amounts of agency discretion. Cost-sharing or matching also is a poor criterion because there are no unique and consistent reasons used for obtaining cost-sharing or matching.

Finally, cooperative or participatory Federal/non-Federal assistance relationships in which substantial Federal involvement is needed during performance form a distinct class of relationships and they should not be referred to as "grants," "grants-in-aid," or "contracts." The term "cooperative agreement" should be used to reflect relationships requiring Federal/recipient interaction during performance. Rather than containing the unilateral Federal rights to change or terminate a contract, a "cooperative agreement" would

contain clauses reflecting the mutual interests in any changes and the nature of both parties' rights to terminate. The specifics of who does what and who is responsible for what would be expressed in the instrument that defines the relationship.

The need for the cooperative agreement mode was recognized while examining projects or programs in which grants and contracts were used interchangeably. It became apparent that the grant/contract confusion could be reduced only by segregating from both grants and contracts the relationships that were causing the confusion. Thus, the concept of a class of cooperative agreements is essential. Without it, there will be: (1) grants with all types of Federal involvement and, thus, a substantially reduced chance of getting a useful degree of Government-wide consistency in the assignment and understanding of respective responsibilities, and (2) a continuation of the pressure to move, under the rationale of the need for agency control, some of the cooperative agreement kinds of transactions into the procurement area.

NEW AUTHORITY FOR GRANT-TYPE RELATIONSHIPS

Enacting legislation to distinguish assistance from procurement by standardizing instruments to reflect types of relationships would be an important step in reducing the present confusion. A second step also is needed. Most agencies do not have authority to use these instruments in the relationship situations that call for them. At present there is no general authority for the use of cooperative agreements, although a few agencies, such as AEC and NSF, have ample authority for such an instrument, and USDA does use such an instrument in some situations. Individual programs have specific grant or grant-in-aid authority for their implementation, but the general grant authority of Public Law 85–934 is restricted, being available only for basic research in institutions of higher education or in nonprofit organizations whose primary purpose is research. The agencies need general authority to use grants, grants-in-aid, and cooperative agreements in relationship situations which, in the judgment of the agencies, call for their use.

In our review of Federal grant-type programs we found that in most programs the agencies were using instruments consistent with our recommendations, that is, based on the need for agency involvement during performance. In a significant number of programs, however, the agencies were not using instruments consistent with our recommendations. This usually occurs because (1) the authorizing statutes require the use of a grant even though the agencies believe that they should be substantially involved with the recipient in performing the work being supported or stimulated, or (2) the agencies lack grant or cooperative agreement authority. These statute-based barriers to consistency discourage agency and executive branch efforts to achieve uniformity.

Statute-caused inconsistency is a serious problem in the newer agencies. HUD's funds are earmarked for grant programs or contract programs. In UMTA and LEAA programs, where the authorizing statutes require the use of grants, there is a great deal of agency and recipient uncertainty or concern as to roles and responsibilities. LEAA is criticized for doing too little and UMTA for doing too much. It is possible that many of these relationships are cooperative-agreement types of situations in which the instruments should be tailored to the requirements of each situation by negotiation between the parties. If the parties knew that the kind of instrument used established the parameters of relationship, a more careful delineation of respective responsibilities, a greater acceptance of respective roles, and more effective performance would result.

Enactment of legislation providing the general authority we have proposed should give the agencies ample authority to assign their projects or classes of projects to the appropriate relationship categories. This does not mean, however, that the same or similar projects need be treated in the same way by all agencies. The relationship category in which a project or class of projects falls will be determined by the mission of the agency and, therefore, by how the agency views the particular project or class of projects. A given project may

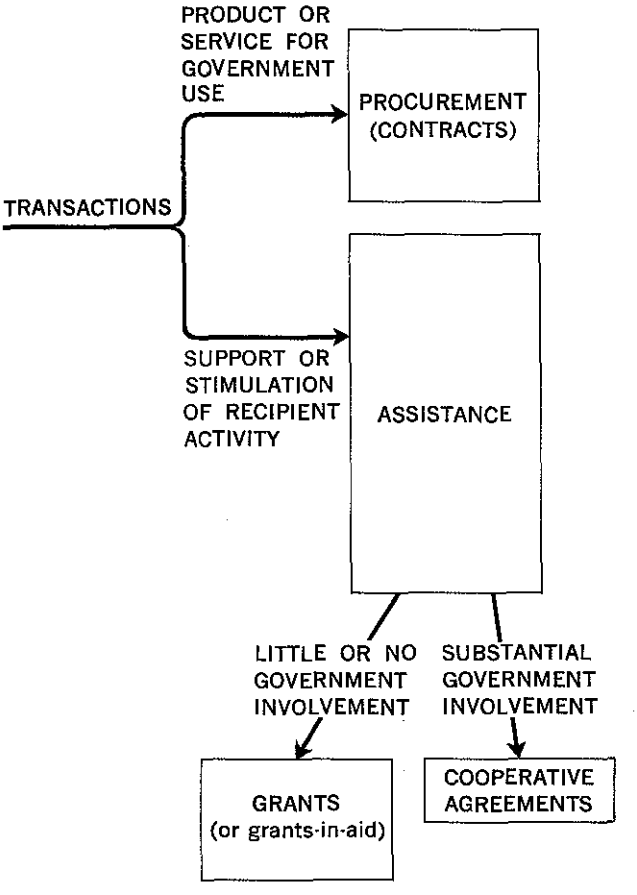
be procurement in one agency and assistance in another. But the way an agency classifies its transactions will become a meaningful public statement of how it views both the basic nature of its relationships with the non-Federal sector and its responsibilities. It is probable, therefore, that the adoption of the proposed distinctions would have beneficial effects in that comparisons of various ways of implementing programs would be easier.

The discipline enforced on the agencies by adherence to relationship-based instrument definitions should increase Government productivity. Federal agency involvement would be less a function of personal or agency preference or habit than is now the case. Each agency would have to decide before making grant-type awards what degree of involvement would be required for each class of transaction. Thus, a basic research grant might have standard cost principles, audit requirements, one or two routine types of approval, and standard technical and financial reporting requirements. A cooperative agreement might contain some of the same requirements or standards as the basic research grant, but it would also specify in detail the roles of the recipient and the agency in the light of the needs of the particular kind of project and the particular recipient. It might specify how the agency was to be involved, for example, by approving contracts for certain sorts of procurements or grants for substantive parts of the work; by requiring consultation or mutual agreement on certain types of decisions; by specifying for ongoing programs how new standards or administrative requirements are to be developed and approved.

The grant or grant-in-aid will emphasize the responsibilities of the recipient and the Federal agency in terms of basic Federal requirements and standards. These arrangements will entail routine Federal/recipient interaction during performance. The cooperative agreement would be a more tailored and explicit statement of *how* the parties will work together during performance to insure success of the project or program. It will entail active and substantial Federal/recipient interaction.

Characteristics of Grants, Cooperative Agreements, and Contracts

The basic distinctions that have been developed are illustrated in figure 1. Table 1 suggests characteristics of grants, cooperative agreements, and contracts. These characteristics are *suggestive only* and are intended simply to show that the types of basic distinctions developed can be elaborated into three types of viable instruments reflecting basic relationships.



Source: Developed by Commission Staff.

Figure 1. Proposed model for selection of instrument.

Need for Guidance

Implementation of Recommendation 1 would authorize the agencies to use several types of

instruments appropriate to several types of relationships, eliminate some problems and ambiguities, and provide a basis for greater Government-wide consistency. But the stimulus to achieve maximum efficiency, consistency, simplicity, and effectiveness is likely to come only from a Government-wide assistance system spelling out the rationale for and specific guidance on methods, techniques, and requirements for assistance transactions and relationships.

Such a system would illuminate grant-type programs and the ways they are carried out so as to permit public scrutiny and encourage better understanding and needed improvements. The rapid growth of grant-type programs in the 1960's and early 1970's has created tremendous stresses on an already overburdened Federal administrative structure. There is excessive proliferation of requirements, undue complexity, serious lack of coordination, and inadequate management.

Federal grant-type assistance should "assist" non-Federal recipients. The lack of a recognized system to assign responsibilities for grant-type assistance programs has unfortunate effects. Where there is or is considered to be recipient inadequacy, the Federal administrator tends to try to remedy it by developing more and tighter Federal rules, procedures, and standards. He then feels more secure in the face of the scrutiny to which he may be subjected. The recipient tends to see his part in this process as one of becoming a routine applier of Federal rules and regulations, with the program losing the flexibility necessary for optimum effectiveness. Without well-developed concepts of what Federal/non-Federal relationships should be, the dynamics of the process are likely to work against recipient initiative, responsibility, and growth, and against effective performance of assistance objectives. It is likely, for example, that many of the Federal and non-Federal participants in assistance projects do not recognize the "project management" needs of some projects. Assuring adequate contractor project management in a procurement context is difficult enough. We have yet to understand the need for, much less provide, guidance on assuring adequate project management in the different, supposedly cooperative, and admittedly more delicate, assistance relationship.

In emphasizing recipient responsibilities, we cannot lose sight of the Federal responsibility for assuring the effective expenditure of public funds. Assistance programs must strike a careful balance between utilizing and encouraging recipient capabilities and providing the standards and technical assistance, including management assistance, needed to assure effective performance. In view of the size of the "Federal Assistance System," this can be done effectively only with Government-wide consid-

TABLE 1. CLASSES OF RELATIONSHIPS: SUGGESTED CHARACTERISTICS

ITEM	ASSISTANCE		PROCUREMENT
	Grants	*Cooperative Agreements*	*Contracts*
Purpose	Support or stimulation of recipient activity	Support or stimulation of recipient activity	Purchase of product or service for Federal use
Governing principles	Assistance guidance	Assistance guidance	Procurement regulations
Basis for award	Technical competition or formula award, need, etc.	Technical competition or formula award, need, etc.	Maximum technical and price competition
Government involvement during performance	Little or none (e.g., routine agency approvals; standards for costs, procurement, etc.)	Substantial (e.g., monitoring to enable agency to give specified substantive approvals, or assist or advise)	Varying degrees (whatever is necessary)
Right to change	Grantee	Mutual agreement	Government
Right to terminate	Grantee	Either party	Government

Source: Commission Studies Program.

eration of programs and the way things are done. A comprehensive system of guidance is necessary if Federal and recipient staff effort is to be used effectively in assistance programs.

We found that most representatives of recipient interest groups, particularly those of State and local government, see the advantages of a more rational assistance system. They see a possibility that such a system might enhance the cooperative or partnership character of some relationships, which would reduce what they see as the tendency of Federal administrators to "impose" conditions on recipients without adequate recipient opportunity to comment or negotiate on the conditions. Most State and local recipients would like to participate to a larger extent in processes that now are often closed to them. They would welcome a structure which offered promise of open discussion and a clearer delineation of the respective roles of the Federal agencies and themselves. Of course, many of those involved in categorical programs, in and out of Government, are likely to be distrustful of any change that might affect the operation of their individual programs.

The creation of an assistance system would give the Congress a better overview that would assist it in making clearer its intentions when it authorizes new programs. It also would facilitate congressional review and oversight of how the agencies perceive and handle these programs.

GAO, in carrying out its audit and review responsibilities, makes judgments on where audit effort and attention are needed. For this reason, the question of accountability, which is closely related to responsibility, is of interest to GAO. If a basic Federal system in terms of which agency and recipient roles and responsibilities can be clarified is established, it should also permit a sharpening of the meaning of accountability. A standard framework should facilitate GAO's efforts to achieve effective accountability to the extent that it recognizes degrees and kinds of Federal and non-Federal responsibility, as well as means of associating degrees and kinds of responsibility with types of instruments or classes of transactions.

OMB has recognized the need to bring greater order to Federal assistance programs. OMB studies in 1966 and 1969 [3] were directed toward research at institutions of higher education. The current OMB Federal Assistance Review (FAR) Interagency Task Forces seek uniformity and simplicity in requirements used in transactions with several classes of performers, units of State and local governments, educational institutions, hospitals, and other nonprofits, including community-based nonprofit groups. FAR generally has not endeavored to distinguish assistance from procurement in any systematic way nor has it tried to distinguish between grants and contracts. It recognizes that the issuance of Government-wide guidance, to the extent that it requires distinguishing types of transactions, would face agency opposition and statutory barriers which would be difficult or impossible to overcome in the absence of explicit statutory authority to do so. Thus, FAR's effort to obtain interagency consensus on requirements has tended to result in establishing requirements which are least common denominators of present practice. While this effort will be helpful, what is needed is not only a simplification or standardization of present agency practices, but also a thorough examination of all kinds of assistance programs in an attempt to determine what a system of guidance for them should be. The feasibility of developing a comprehensive system should be assessed. There has been no concerted effort to examine Federal assistance programs, much less grant-type assistance programs, in systems terms.

A System of Guidance

Recommendation 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.

Much of the attention currently devoted to the hundreds of assistance programs is concentrated on achieving individual program ob-

[3] U.S. Bureau of the Budget, *The Administration of Government Supported Research at Universities*, 1966, and *Report on the Project Concerning the Policies, Procedures, Terms and Conditions Used for Research Projects at Educational Institutions*, June 20, 1969.

jectives. Much less effort has been devoted to generalizing from the methods used in assistance programs. If assistance methods can be standardized and cataloged, it should be possible to take a long step in the direction of consistency and simplicity, and at the same time enhance program effectiveness, by establishing a system of guidance for generic aspects of the management of assistance programs.

The system that needs to be developed should cover all types of assistance relationships. The need is to: (1) identify the assistance universe comprehensively; (2) examine existing techniques and related considerations; (3) generalize to the extent possible from such data; and (4) explore the possibilities of developing new techniques. An analysis and evaluation of assistance techniques should consider, in addition to the usual grant-type transactions, loans, direct payments, and all forms of nonfinancial assistance. It also should consider subsidies which usually are not regarded as "assistance." It also may be desirable to consider the applicability of assistance techniques to "revenue sharing." It is a reasonable guess that questions of accountability, oversight, and the degree of active and passive Federal involvement in revenue sharing will become issues of national importance. A systematic review of all forms of Federal assistance and their operational methods and techniques could assist in decisions on how new forms of assistance should be structured to achieve desired ends.

The major purpose of identifying the assistance universe is to permit generalization from the types of Federal/recipient interaction which occur. It should be possible to identify all types of functional purposes and then by questionnaire and interview obtain from the agencies and from recipients in each kind of program in-depth data on types of involvement or interaction.

By involvement we mean the formal and informal ways in which the agency and the recipient interact before, during, and after performance of the recipient activity. Formal interactions include the use of a program or financial plan, the approval of specific milestone decisions, the approval of contracts or grants let under the prime recipient transaction, and so on. These are "active" types of involvement. There are also formal "passive" kinds of involvement, such as the use of cost principles or other standards or requirements which must be followed.

The clauses in contracts, grants, and other instruments establish formal parameters of involvement or interaction. Some of these clauses require or lead to specific kinds of interaction. For this reason it is necessary to identify and analyze the statutory requirements for assistance programs and compare them in selected programs with the requirements added by the agencies. Beyond formal transactional requirements, there are formal agency and recipient requirements (established by agency or recipient policies and procedures) which lead to interaction.

There are also informal kinds of interaction (persuasion, use of political influence, interpersonal relationships) which should be identified to determine their significance, whether generalization from them is appropriate, and how they relate to the more formal kinds of interaction.

The data developed could be examined by matrix analysis.[4] One coordinate could list the types of involvement or interaction which are identified, for example, budgetary control, approval of change orders, etc. The other coordinate could list types of function such as research, education, construction, demonstration, planning, etc. These program functions can be subdivided to accommodate various program purposes. For example, different kinds of research and different kinds of construction may call for different kinds of involvement or interaction. Finally, factors such as the nature of the recipient (unit of government, nonprofit organization, or profitmaking organization), degree of matching required, and the relationship of audit review to agency accountability may need to be included in the matrixes. An analysis of such a matrix should permit useful generalization with respect to assistance methods, techniques, standards, clauses, and relationships.

The use of matrixes to develop data for generalizing assistance techniques or methods must be supplemented by consideration of related factors which have a direct or indirect

[4] Some OMB FAR data were put in such a form and might be helpful in this connection.

bearing on assistance techniques. Development of a system of guidance for assistance programs requires more than development of a collection of assistance methods, processes, procedures, and clauses based on an analysis of types of involvement and program functions. It also requires consideration of related matters which must be explored to enable the system to provide the kind of complete guidance required by the agencies. Some of these related matters, cast in the form of needs, are:

- An analysis of all Federal assistance statutes to (1) obtain an overall picture of statutory requirements for assistance programs and (2) determine if any legislative changes are desirable.
- A comparison in selected programs of requirements established by statute against requirements established by the agencies.
- Development of factors that should be considered by the agencies in distinguishing assistance from procurement, that is, guidelines for deciding whether a specific transaction is assistance or procurement.
- Development of factors that should be considered by the agencies in deciding on the use of the various kinds of assistance instruments: grants, grants-in-aid, and cooperative agreements.
- Recommendations on the applicability of clauses now used in procurement to assistance transactions.
- Recommendations on mandatory and optional requirements or standards which should be applied Government-wide to assistance transactions.
- Development of standards for use in procurement transactions which occur under assistance relationships.
- Recommendations as to when there should be agency involvement in procurement transactions which occur under assistance relationships.
- Recommendations as to what kinds of requirements should be specified by statute and what kinds should be developed administratively by the agencies, OMB, or GAO.
- An examination of the significance for assistance relationships of the nature of the recipient, whether it is a unit of State or local government, a nonprofit organization, or a profitmaking organization.
- An analysis of considerations such as the role of technical competition, price, and cost factors; the use of lump-sum types of arrangements; and the use of fees or surcharges in assistance transactions.
- A review of management problems that have hampered assistance programs.
- An examination of the needs for agency and Government-wide data and reporting on assistance programs.
- An examination of the role of assistance recipients in the process of developing requirements for new programs and developing or modifying requirements for ongoing programs.

These factors, or needs, will overlap many of the considerations which will arise from an analysis of the matrix data. That is desirable in that separate consideration of these factors should point up omissions and emphasize interrelationships. The resulting network of interrelated considerations is especially important for the development of a system of guidance for assistance programs, as it would become an integral part of such a system.

The system of guidance that is needed can be regarded tentatively as an analogue of a system of procurement regulations. It is a reasonable expectation that it might take similar form. Thus, it should be possible to take the generalized techniques, methods, procedures, processes, and relationships that are yielded by use of matrixes, consider them in the context of the results of the related considerations listed above, and develop the elements that will make up the system. The character of those elements will influence the kind of system which is developed, but the structure of procurement regulations suggests a framework that should be considered:

Introduction (scope, applicability, arrangement, deviations)
Definitions of terms
General policies (for example, nature of assistance relationships)

Public participation in policy and procedure formulation
Public information on assistance programs
Application for awards
Solicitation of proposals
Evaluation of proposals and selection of recipients
Financial and technical capabilities of prospective recipients
Negotiation
Types of instruments (when to use)
Clauses for grants
Clauses for grants-in-aid
Clauses for cooperative agreements
Clauses for other agreements
(optional and mandatory clauses and standards)
Special clauses for various functional programs (construction, planning, etc.)
Price and cost policies and techniques
Methods of payment
Third-party arrangements
Project management
Relationship to procurement regulations (when and how to use procurement requirements)
Audit
Patents, data, and copyrights
Property
Non-project-related technical assistance
Use of GSA sources
Cost principles
Program evaluation
Standard and suggested forms and formats.

The system that results should present a catalog of alternative kinds of relationships spelled out in sufficient detail to enable Congress, the executive agencies, and recipients to better judge the full import of a transaction or class of transactions. For example, if responsible decentralization is a desirable goal, judgments as to how it can be accomplished (as well as its desirability) are best made on the basis of as much operational detail as possible on what a specific relationship would entail in terms of roles and responsibilities.

An important by-product of an effort to spell out the operational detail and operational considerations pertinent to a system of guidance for assistance relationships is likely to be the emergence of better ways of defining the nature of Federal assistance. For this reason, the development of a system is not just a Federal function. Defining a Federal role defines a recipient role. An analysis of Federal assistance techniques, which considers the relationships between Federal agencies and recipients, requires the involvement of recipients and their representatives, as well as representatives of the Federal agencies. Today, assistance recipients' major complaint is that they do not play the role they feel they should play in the establishment of requirements that are placed upon them. They are not providing supplies or services for Federal use. They are endeavoring to accomplish congressionally established objectives with the assistance of the Federal agencies. Assistance recipients are affected and involved differently from Government contractors, hence, their different roles in program formulation and in rulemaking should be explicitly determined with their cooperation.

Pending the enactment of legislation to reduce the existing statutory barriers to consistency, a study of the kind suggested above should be undertaken to determine the feasibility of developing a system of guidance. This may be done in conjunction with or apart from the activities being conducted by the OMB Federal Assistance Review. It should be done so that a determination can be made at an early date of the utility of a system of guidance. A systematic examination of the questions that must be dealt with in developing such a system should provide evidence of the need for executive branch guidance to the agencies and should also identify specific changes requiring legislative action by Congress. The continuing increase in the number, size, and complexity of Federal assistance programs and the increasing billions of dollars appropriated for assistance underline the urgency of this task.

APPENDIX A

Methodology

In April 1971, the Commission activated a small group to conduct a limited review of Federal grant-type activities. In view of the nature, magnitude, and complexity of grant-type activities and the constraints of time and resources, the grants study was not intended to be comprehensive or extensive. It was to be of limited scope and undertaken at a lower level of effort than other Commission studies. The group that was established was designated a "Grants Task Force" rather than a "Study Group" to indicate its somewhat different scope and purpose.

The Grants Task Force was asked by the Commission to (1) develop data to put the "Federal Grant Program" in perspective, (2) examine the extent to which "grants" and "contracts" are used interchangeably by Federal agencies, and (3) analyze the extent to which "procurement rules and regulations" are and should be applied to "grant-type" transactions.

To put the "Federal Grant Program" in perspective the Grants Task Force:

- Defined the "Federal Grant Program" in terms of the best available composite data on Federal grant activities: the 1971 edition of the *Catalog of Federal Domestic Assistance* prepared by the Office of Management and Budget (OMB). This catalog is a comprehensive listing and description of Federal programs and activities which provide assistance or benefits in monetary and other forms to other governmental units, nongovernmental organizations, and individuals. It includes more than 1,000 programs administered by 60 different Federal departments, independent agencies, commissions, and councils. These data were examined, and about 500 of the programs, which are established by law or administrative rule and practice as "grant" or "grant-in-aid" programs, were identified. Loan, subsidy, and insurance programs and forms of nonfinancial assistance were excluded from consideration.
- Developed or obtained from OMB data on each of the 500 programs in order to show:

  Whether the program is a formula grant program, a project grant program, or a mix of the two

  The funds obligated for each program for fiscal 1970 and the estimated amounts for fiscal years 1971 and 1972

  Any matching or cost-sharing requirements

  The functional purpose of the program, for example, systems development, demonstration, planning and administration, education and training, research, etc.

  The eligible recipients of the program awards.
- Examined data derived from the Federal Budget, the National Income Accounts, and other sources to place Federal expenditures for grant-type transactions in the context of overall Federal expenditures for a ten-year period.
- Consulted with other Government activities that are concerned with Federal grants, such as the OMB Federal Assistance Review Program (FAR), the Advisory Commission on Intergovernmental Relations, and the Administrative Conference of the United States.
- Consulted with members of congressional staffs, representatives of State and local governments, educational institutions, other re-

cipients of Federal grant funds, and other persons knowledgeable in grant activities.

- Examined data gathered by Study Group 11 (Research and Development) and drew on their experience resulting from interviews with nongovernmental recipients of Federal grant funds.

To examine the interchangeable use of grants and contracts, the Grants Task Force visited 11 departments or agencies [1] and reviewed 17 of their programs in order to develop sample data on the extent to which Federal agencies either (1) within their own operations, or (2) in comparison with each other, use grants in ways and for purposes for which contracts often are used. The major criterion initially used in selecting programs to review was the likelihood that the program might reveal the use of grants where in similar circumstances contracts are used, or the use of contracts where in similar circumstances grants are used. It became apparent, however, that using the criterion of the interchangeable use of grants and contracts for selecting programs would not produce a representative sample of the entire grant-type universe. Although grants and contracts are used interchangeably in some cases, the fact that the terms "grant" and "contract" have in practice varying meanings indicated that an examination solely on their "interchangeability" would not be very productive. Thus, after exploring the possibility, it was decided that a review of a representative sample of all grant-type transactions, including grant-in-aid or formula-type programs, whether or not there was interchangeability, might be more productive.

To determine whether processes and standards of the kind set forth in the Armed Services Procurement Regulation and the Federal Procurement Regulations are and should be applied to grant-type activities, the Grants Task Force:

- Undertook an analysis of the applicability and use in ten grant programs of 28 clauses normally used in contracting
- Analyzed a sample of statutes that authorize grant programs to determine, for example, the extent to which the statutes require the imposition of procurement-type requirements on grant transactions
- Examined certain data collected under the Federal Assistance Review Program (FAR) on requirements imposed by various agencies
- Endeavored to understand the objectives or purposes of the 17 programs reviewed, why they are implemented in the fashion they are, the degree of Federal control deemed necessary by Congress or the agency, and the type of grant recipient. This review was conducted by consulting with responsible agency and some grant recipient officials, by an examination of pertinent statutes, congressional hearings, agency and other pertinent literature, and by visits to each of the agencies.

Agency representatives interviewed were generally cooperative and candid and appeared capable and conscientious. Many of their comments do not represent the official positions of their agencies. The facts reported and especially the observations made in the Grants Task Force report are inferential to some extent and might not be agreed to by those interviewed. However, the members of the Grants Task Force and the participating members of the Commission staff have reviewed and agreed on the accuracy of the facts or observations reported.

In examining data on Federal grant-type programs, it became clear that Federal grant-type activities are a vast and complex collection of programs, functioning with little central guidance in a variety of ways that are often inconsistent even in the case of similar programs or projects. Because these initial findings coincided with the opinions of most knowledgeable observers of Federal programs, the Grants Task Force decided that it would be more productive to explore what might be done to improve the present situation rather than to develop detailed documentation of facts which are already generally agreed upon.

The significant causes of the disarray besetting grant-type assistance activities were perceived to be:

- Confusion of grant-type assistance relationships and transactions with procurement relationships and transactions
- Failure to recognize that there is more

[1] See list of agencies visited and programs reviewed on the next page.

than one kind of grant-type relationship or transaction

- Lack of Government-wide guidance for Federal grant-type relationships and transactions.

Consideration of these causes led to questions such as:

- What is the nature of the grant-type assistance relationships that exist between the Federal Government and the non-Federal sector?
- Can and should grant-type transactions be distinguished from procurement transactions?
- Is it possible to reduce the confusion which seems to beset grant-type programs by giving relationship-based definitions for Government-wide use to terms such as contract, grant, and grant-in-aid?

Hypotheses were developed to deal with the foregoing questions and the findings that had generated them. These hypotheses are expressed in the Commission's recommendations.

The Commission also gathered useful post-study data on grant-type programs. When the Grants Task Force presented its recommendations to the Commissioners in February 1972, the Commissioners asked that examples be gathered on cooperative-agreement types of relationships. To provide the data sought, the Commission sent to the departments and agencies a questionnaire which was designed to obtain, by functional class or category of awards to State and local units of Government and all other nonprofit organizations, the following kinds of information: (1) when they use a particular type of instrument: grant, grant-in-aid, contract, or other, (2) why they use the particular type of instrument for a given class of transaction, (3) the nature of the agency participation or involvement that occurs during performance, and (4) whether the department or agency regards that involvement as "minimal" or "substantial."

The data gathered were helpful in developing examples of cooperative-agreement types of relationships. The data gathered in response to item 3 above also support the utility of the Commission's recommendations. The data indicate that, although each agency's programs may be different from other agencies' programs in purposes and objectives, there are a limited number of kinds of involvement (methods, techniques, or "kinds of grants") that fall into the degrees-of-involvement (minimal or substantial) categories that are outlined in the report.

AGENCIES VISITED AND PROGRAMS REVIEWED

Department of Agriculture
  Contracts and grants for scientific research
Department of Commerce
Economic Development Administration
  Economic development grants and loans for public works facilities
Department of Health, Education, and Welfare
Health Services and Mental Health Administration
  Health services research and development
Social and Rehabilitation Service
  Medicaid
Office of Education
  Manpower development and training
National Institutes of Health
  Heart and lung research
Department of Housing and Urban Development
  Operation Breakthrough
  Model Cities
Department of the Interior
Office of Saline Water
  Saline water research and development
Department of Justice
Law Enforcement Assistance Administration
Department of Labor
Manpower Administration
  Job Corps
Department of Transportation
Urban Mass Transit Administration
  Research, development, and demonstration
Environmental Protection Agency
  Water pollution control research and development
National Science Foundation
  Basic research
  Course content improvement
  Science information activities
Office of Economic Opportunity
  Research, evaluation, and program development

APPENDIX B

List of Recommendations

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.

APPENDIX C

Acronyms

AEC	Atomic Energy Commission
ASPR	Armed Services Procurement Regulation
DOT	Department of Transportation
EDA	Economic Development Administration
EPA	Environmental Protection Agency
FAR	Federal Assistance Review (Program)
FPR	Federal Procurement Regulations
GAO	General Accounting Office
GSA	General Services Administration
HEW	Department of Health, Education and Welfare
HUD	Department of Housing and Urban Development
LEAA	Law Enforcement Assistance Administration
NASA	National Aeronautics and Space Administration
NFAH	National Foundation on the Arts and the Humanities
NIH	National Institutes of Health
NSF	National Science Foundation
OE	Office of Education
OEO	Office of Economic Opportunity
OEP	Office of Emergency Preparedness
OMB	Office of Management and Budget
ONR	Office of Naval Research
OST	Office of Science and Technology
PHS	Public Health Service
R&D	Research and Development
UMTA	Urban Mass Transportation Administration
U.S.C.	United States Code
USDA	Department of Agriculture
VA	Veterans Administration

APPENDIX B

Acronyms

AEC	Atomic Energy Commission
AFPC	Air Force Procurement Circular
ASPR	Armed Services Procurement Regulation
CODSIA	Council of Defense and Space Industry Associations
DOD	Department of Defense
DPC	Defense Procurement Circular
NASA	National Aeronautics and Space Administration
NASA PR	National Aeronautics and Space Administration Procurement Regulations
USAF	United States Air Force
U.S.C.	United States Code

Part I—Patents, Technical Data, and Copyrights

CONTENTS

CHAPTER 1

Introduction and Summary of Recommendations

Government policies concerning the treatment of patents, technical data, and copyrights in the procurement process have a significant impact on contractors, private innovators, and the general public. Thousands of inventions are made each year by contractors and subcontractors performing under Federal research and development contracts. The disposition of patent rights in these inventions can have important effects on the likelihood they will be perfected and marketed and on the maintenance of competitive markets. Many Government contracts may require the contractor or subcontractor to use inventions covered by private patents. The manner in which the Government uses these patents affects the quality of its programs and the equities of the private patent owner.

Government contractors are frequently required to prepare and supply various forms of documentation, such as drawings and other detailed data concerning the products, processes, and elements thereof that they are supplying or developing. This data may involve information concerning products or processes previously developed by a contractor at his own expense and maintained as a "trade secret." The contractual rights established in technical data can be of critical importance to both the Government and the competitive posture of the contractor. Similar considerations prevail when data is submitted to the Government as part of a proposal for a contract.

Government contracts may involve the use or development of material particularly susceptible to publication and wide dissemination. This is especially true in areas of social science research. In such cases the Government's attitude toward publication and copyrights may be of major concern.

Agency policies in these areas, despite their importance, lack uniformity. Legislative coverage is generally limited in scope and varies from agency to agency. Indeed, most agencies lack any statutory guidelines. This varied and incomplete legislative framework has created ambiguities concerning the authority of a number of agencies in many important areas. Likewise, there has been little administrative effort to achieve uniformity, except in the area of rights in inventions developed under Government contracts. Agencies have fashioned data and copyright policies, as well as many aspects of patent policy, without any central guidance or overall coordination. This has resulted in many different approaches and contractual clauses, even where agency goals and needs may be similar.

This report examines Government contractual policies concerning intellectual property, with separate chapters devoted to patents, technical data, and copyrights. Based on our findings and conclusions, we recommend a number of changes, many of which require legislation. Hence, we have included draft legislation as appendixes to this report.

Our recommendations are designed to achieve a number of goals which we believe either are not being achieved or are being only partly achieved under present law, policies, and practices. These goals and some of our primary recommendations to achieve them are summarized next.

We believe that the Government's policy should encourage the maximum utilization of inventions made under Government contracts, prevent unjust enrichment of contractors, and foster the reasonable availability of such inventions to the public. The recently revised Presidential Statement of Government Patent

Policy is designed to meet these goals, and we believe that policy should be promptly and uniformly implemented so that its effectiveness can be more fully evaluated. In particular the impact of the new exclusive licensing program and liberalization of the granting of contractor rights in identified inventions must be measured. To enhance the chances of the Presidential policy succeeding, we recommend the granting of clear-cut statutory authority to agencies to issue exclusive licenses. An alternate system developed during our studies is presented. The alternate system calls for Government-wide legislation allowing, as a general rule, the developing contractor or inventor commercial rights in inventions subject to a strengthened system of "march-in" rights under the administration of a central board.

In connection with the use by the Government or its contractors of privately-owned patents, we have found that the bar to injunctions in existing law (28 U.S.C. § 1498) should be retained and expanded to eliminate uncertainty in borderline cases. On the other hand, we believe that greater flexibility is needed by the agencies to waive the bar against injunctions in particular cases as regards specific patents. To achieve these aims, we recommend legislation amending 28 U.S.C. § 1498. We feel it only fair, however, that a patent-owner, having lost the possibility of injunctive relief, should be better assured of obtaining monetary relief. To this end we recommend legislation authorizing all agencies to acquire interests in patents and to settle patent claims and legislation allowing patent suits against the Government in the district courts as well as in the Court of Claims.

In the technical data and copyright areas our basic conclusion is that greater, but not necessarily complete, uniformity among agency policies and regulations is needed. To this end, we recommend interagency effort to formulate statements of Government-wide policies along the lines of those in the patents area. To facilitate this effort, we recommend the repeal of certain legislation which we feel hampers the flexibility of some agencies and thus inhibits the development of truly Government-wide policies.

We also make one other major recommendation in the technical data area. We believe that persons who submit valuable information and data to the Government, such as information submitted with proposals, should have a remedy against the Government for damages suffered because of the misuse of such information by the Government. Thus we recommend legislation granting such a remedy.

CHAPTER 2

Patents

In this chapter we consider two general aspects to Government policy regarding patents or patentable inventions: rights to inventions made under or during the course of Government contracts and the use by or for the Government of inventions covered by private patents.

RIGHTS IN INVENTIONS MADE UNDER GOVERNMENT CONTRACTS

The Government invests some $15 billion per year in research and development programs.[1] A great deal of this is carried on under contracts or grants. During the course of such programs, some 9,000 inventions per year are made by contractors or grantees.[2]

This activity has necessitated the development of policies respecting the disposition of rights in such inventions. Should the Government take all rights to an invention arising under its contract? Or should the contractor/inventor be allowed to retain the commercial rights in the invention, subject to a license in the Government for free use of the invention for Governmental purposes? These are the two generally recognized extremes. In between, a multitude of combinations could be devised. The policy ultimately chosen can have a number of important effects. One is on the probability that the particular invention will be developed to the point of commercial utilization. Another is on the willingness of some organizations to enter into Government contracts, thus affecting the quality or cost of the research effort. Further, patent policy may affect the maintenance of competitive markets. Finally, the costs and practicality of administration of the policy chosen must be considered.

Background

Before examining in detail these factors and our conclusions as to the proper policy that should be followed, it is necessary to explore briefly the nature of patent rights and certain fundamental facts of the invention process.

THE NATURE OF PATENT RIGHTS

Article I, Section 8 of the Constitution empowers Congress "to promote the progress of . . . the useful arts, by securing for limited times to . . . inventors the exclusive right to their . . . discoveries." The present patent system has developed in accordance with this authority.

Congress has provided that the "grant" of a patent shall provide that "for the term of seventeen years" the patentee shall have the "right to exclude others from making, using, or selling the invention throughout the United States." [3]

Applications for patents must normally be made by the "inventor" of the invention to be patented, and patents are normally issued to the "inventor." [4] The inventor or patentee can, however, contract away part or all of his rights to others. A myriad of combinations

[1] U.S. Federal Council for Science and Technology, *Annual Report on Government Patent Policy*, at 43 (1969–70).
[2] *Ibid.* at 44.
[3] 35 U.S.C. § 154 (1970).
[4] *See generally*, 35 U.S.C. §§ 111–22 (1970).

of rights can be sold, licensed, or otherwise disposed of by a patentee. For example, he might issue exclusive or nonexclusive licenses, free or for a royalty, or licenses limited to the use of the invention but not permitting its manufacture or sale. This flexibility of a patentee to dispose of his rights is important in any study of Government patent policy, since it involves the disposition of the patent rights of the inventor (normally, under Government contracts, an employee of a contractor who has agreed to assign his rights to inventions to his employer).

THE NATURE OF THE INVENTIVE PROCESS

Not every invention or discovery made can be patented. In accordance with 35 U.S.C. § 101 the invention must be "new and useful." However, it should be emphasized that though an invention is patentable, it may still be far from having been developed to the point where it can be moved into the stream of commerce. Considerable expense and investment are normally necessary to move an invention beyond its patentable stage to a point where it is commercially viable and, hence, available to all. A great deal of engineering effort may be necessary before an item can be produced commercially. And a marketing apparatus and effort will be necessary to make the product's availability known. In some cases the costs of making the invention may be only a small proportion of the total cost of developing the invention into a product useful to the general public. It has been estimated that the cost of bringing the typical invention to the marketplace is ten times the cost of making the invention.[5]

Underlying the patent system are three fundamental assumptions. First, it is believed that the patent system promotes the making of inventions. Second, it is believed that the system provides the necessary incentives to develop inventions commercially once they are made. Finally, it is believed that the public disclosure required by the patent law promotes scientific and technological knowledge.

Of these three assumed benefits, only one would appear to be significantly affected by Government patent policy—the commercial development of inventions. Public disclosure of inventions made under Government contracts can take place under the contract terms no matter what policy is chosen. The effect on the incentive to invent would also appear minor since the Government, in paying for research and development work, has supplied much of the incentive for invention. In addition, there are many motivations other than the patent system which lead to invention.

On the other hand, Government patent policy can directly affect the degree to which the patent system promotes the development of inventions, once made, to the point of commercial utilization. The exclusivity of the patent system plays an important role in spurring the development of inventions, although there are undoubtedly cases where a particular invention might be commercialized just as quickly without any exclusivity. Effective patent policy must take advantage of the fact that development will normally be promoted by exclusivity; at the same time, it must provide for others to exploit an invention if exclusivity does not produce the desired result of utilization on reasonable terms.[6] We believe that without exclusivity many Government-sponsored inventions would lie dormant, thus benefiting no one. Entrepreneurs would be unwilling to invest in the development of an invention if others could take advantage of their efforts by producing the same product without the initial expenses involved in the creation of markets or developing and demonstrating that the item can be produced economically.

A major point to be kept in mind while weighing alternative Government patent policies is that the patent will be of little benefit to the public if the Government takes the commercial rights but fails to take such additional steps as would be likely to promote the further development of the invention to a com-

[5] U.S. Dept. of Commerce, *Technological Innovation: Environment and Management*, at 8–9. *See also* the Patent Management Subcommittee Report on practice of granting limited exclusive licenses in U.S. Federal Council for Science and Technology, *supra* note 1 at 111.

[6] For documentation as to the benefits of generally allowing exclusivity to promote utilization, *see* IV *Government Patent Policy Study* made by Harbridge House, Inc., for the U.S. Federal Council for Science and Technology, Committee on Government Patent Policy (hereinafter Harbridge House).

mercially usable state. If the Government does not plan either to finance continued development of an item itself or to grant exclusivity of some degree to others, then, in many cases, the possibility for further exploitation of the invention will be significantly reduced.

The Present Policy and Its Evolution

POLICY PRIOR TO THE PRESIDENTIAL POLICY STATEMENT OF 1963

It was not until World War II that inventions developed under contracts became a matter of specific congressional concern. Until that time (and even up to the present in the case of most agencies), this was a matter left to administrative control. After World War II Congress began to take an interest in this area. This interest is reflected in a number of statutes establishing policies for specific agencies or specific programs within agencies. Congress has not yet, however, established a unified policy in this area. Rather, legislation has been piecemeal and lacks consistency.

One of the earliest instances in which Congress set a patent policy was in the establishment of the National Science Foundation in 1950. At that time, Congress went no further than to provide that each contract of the Foundation should "contain provisions governing the disposition of inventions produced thereunder in a manner calculated to protect the public interest and the equities of the individual or organization with which the contract or other arrangement is executed." [7] The first detailed statement of patent policy came as part of the Atomic Energy Act of 1954.[8] This act provides that title to inventions in the field of atomic energy made under AEC contracts vests in the Government.[9] However, the Commission is given the authority to waive these rights in appropriate circumstances. Since the technology and developments in the field of atomic energy had been largely financed by the Government from the outset, Congress felt that the granting of rights to contractors was not necessary to ensure exploitation and development of the inventions. A similar statutory scheme, applicable to all fields of technology, was included in the legislation creating NASA in 1958.[10]

One factor underlying much patent policy legislation is the idea that allowing contractors to retain patent rights in inventions developed under Government contracts is a "give-away." This concept explains the language included in a number of acts related to specific research and development programs that have been construed by some agencies as requiring the taking of title in patents by the Government. As an example of the language commonly employed, the Arms Control and Disarmament Act provides:

> All research within the United States contracted for, sponsored, cosponsored, or authorized under authority of this Act, shall be provided for in such manner that all information as to uses, products, processes, patents, and other developments resulting from such research developed by Government expenditure will (with such exceptions and limitations, if any, as the Director may find to be necessary in the public interest) be available to the general public. This subsection shall not be so construed as to deprive the owner of any background patent relating thereto of such rights as he may have thereunder.[11]

While, as some would argue, the Government may be "giving something away" if it does not exercise its bargaining power to take full title in inventions made under its contracts, the acquisition of full rights by the Government will do the taxpaying public little good without a program of further development. In very few instances does the Government actually provide the additional investment necessary to move inventions into public use.[12] Likewise, there has been little effort to

[7] 42 U.S.C. § 1871(a) (1970).
[8] 42 U.S.C. § 2011 (1970).
[9] 42 U.S.C. § 2182 (1970).

[10] *National Aeronautics and Space Act of 1958*, 42 U.S.C. § 1257 (1970).

[11] 22 U.S.C. § 2572 (1970). Other similar provisions include 7 U.S.C. §§ 427(i), 1624(a) (1970); 15 U.S.C. § 1395(c) (1970); 30 U.S.C. §§ 216(a)(2), 666 (1970); 40 U.S.C. app. § 302(e) (1970); 42 U.S.C. §§ 1954(b), 1961(c)(3), 3253(c) (1970); 50 U.S.C. § 167(b) (1970).

[12] Commonly cited examples of such efforts include TVA work in the fertilizer field and the Department of Agriculture's marketing studies with respect to potato flakes and frozen orange juice, but such efforts are a rarity. *See* Harbridge House, *supra* note 6, at IV–123–124.

promote the exploitation of Government-held patents by the issuance of exclusive licenses or other means designed to take advantage of the main reason for granting these patents in the first place. There have been some recent moves in that direction, discussed more fully below. Such movement may be hampered by a lack of clear-cut statutory authority for each agency to grant exclusive licenses.[13]

Legislation with regard to the allocation of patent rights is far from complete. For instance, no legislation controlling Department of Defense policy in this area has ever been enacted. As a result, DOD and other agencies without statutory coverage developed their patent policies independent of legislative constraints. But administrative approaches prior to 1963 proved as varied as the legislative. DOD followed the so-called "license" approach, obtaining only a nonexclusive license for governmental purposes in patentable inventions developed under its contracts. The contractor was allowed to retain exclusive commercial rights. Other Government agencies not subject to statutory provisions, such as the Federal Aviation Administration and the Public Health Service, took full rights in patentable inventions.[14]

THE PRESIDENTIAL POLICY STATEMENT

Recommendation 1. Implement the revised Presidential Statement of Government Patent Policy promptly and uniformly.

In 1963, the first attempt was made to establish a degree of uniformity in Government patent policy. In that year President Kennedy issued a Statement of Government Patent Policy.[15] This statement, with recent amendments, has provided the framework for Government patent policy. The Armed Services Procurement Regulation patent provisions, for instance, are closely aligned to this policy statement, as are the recently proposed provisions of the Federal Procurement Regulations.

While the Presidential statement did not affect statutory requirements, it was worded to accommodate such legislation as there was. The Presidential statement struck a balance between the "license" and "title" approaches. The statement rejected the concept of a single presumption of ownership, wherein the Government or the contractor acquires title in all the inventions resulting from contract performance. Instead, criteria were provided by which all departments and agencies (not otherwise governed by statute) should allocate patent rights between themselves and contractors.

Under the Kennedy formula, initial determination of patent rights is usually made at the time of contracting. Normally, the Government takes exclusive patent rights if the principal purpose of the contract (1) is to develop products for use by the general public, or (2) is directly related to public health or welfare, or (3) is for work in a field of technology basically developed by the Government and exclusive rights might lead to contractor dominance of the field, or (4) is for the operation of a Government-owned facility. In other cases, the contractor may retain exclusive patent rights at the time of contracting if the subject matter of the contract is directly related to an area where the contractor has an established commercial business. When the contractor does not obtain exclusive patent rights at the time of contracting, disposition of patent rights is considered on a case-by-case basis, after the inventions have been identified and reported to the Government. The main criteria governing this disposition of rights concern the nature of the invention and the plans and intentions of the contractor to market the invention.

When the contractor retains exclusive patent rights, the Government reserves a royalty-free license to practice the invention for any governmental use. The Government also reserves the right to require the contractor to license others to protect the public interest in the health area and to make the invention accessible if the contractor fails to take effective steps to commercialize or license the invention. These are commonly referred to as "march-in rights."

President Nixon, in August 1971, issued a

[13] *See* the Memorandum of the Assistant Attorney General, Office of Legal Counsel, dated Sept. 18, 1967; U.S. Federal Council for Science and Technology, *supra* note 1 at 120–23.

[14] For a history of the development of Government patent policy generally, *see* R. Nash and J. Lasken, *Patents and Technical Data*, Government Contracts Monograph 10.

[15] Presidential Memorandum and Statement of Government Patent Policy, 28 *Fed. Reg.* 10943 (1963).

new Memorandum and Statement (reproduced in Appendix C) which is substantially in accord with the 1963 statement except that several revisions to encourage utilization have been made.[16] He reaffirmed the need for flexible, Government-wide policies designed to protect the public interest. The Nixon revisions, based on a study of patent policies by the Federal Council for Science and Technology, attribute the degree of commercial utilization of Government-sponsored inventions, commercial competition, and participation of industry in Government research and development to several important factors. These include the mission of the contracting agency; the purpose and nature of the contract; the commercial applicability and market potential of the invention; the extent to which the invention is developed by the contracting agency; the promotional activities of the contracting agency; the commercial orientation of the contractor; the extent of his privately financed research in the related technology; and the size, nature, and research orientation of the pertinent industry.

One group of revisions to the Presidential policy concerns the granting of greater rights to contractors in identified inventions, even though at the outset the Government acquired principal rights. The Kennedy statement provided that such greater rights could be given only if "the invention . . . is not a primary object of the contract." This was changed as a result of the problems experienced by agencies such as the Department of Health, Education, and Welfare and the National Aeronautics and Space Administration under the previous policy. Another change allows after-the-fact granting of greater rights where "the Government's contribution to the invention is small compared to that of the contractor." This change appears to be designed to assist in those cases where firms may be reluctant to enter into research contracts for fear of jeopardizing their background positions. Lastly, new language was added providing that where the invention is not a primary object of the contract, greater rights may also be granted to the contractor under specified criteria. According to the Federal Council for Science and Technology these criteria are "less stringent" and "would create the greatest likelihood that the invention would be developed and put into commercial use." [17]

The second major change places emphasis on licensing of Government-owned inventions. The General Services Administration is charged with developing regulations to promote the availability of and development of Government-owned inventions. For the first time, exclusive licensing is specifically mentioned as one means of accomplishing this. It will take several years to evaluate the effectiveness of this policy in promoting utilization.

Based on our assessment of current law and practice, we have concluded that any substantial changes in the law and policies in this area should await further assessment of the actual experience under the revised Presidential Statement of Government Patent Policy. We do believe that some minor changes are needed, and that continued emphasis should be placed on executive agency implementation, with policy review by the Committee on Government Patent Policy established under the Federal Council for Science and Technology.

Need to Evaluate the Presidential Policy

The recent changes to the Presidential policy were designed to overcome several shortcomings in that policy. Whether, in practice, these changes will fulfill their purpose remains to be seen, but we feel it is premature to disturb this latest effort by the President to achieve a more workable patent policy. Much thought and expertise have gone into the drafting of the Presidential policy. This should not be dismissed lightly. Any major departures in the patent rights area should be deferred until the revised policy has been evaluated by the Federal Council for Science and Technology in the light of actual agency experience. This evaluation should be made in such a way as to take into account and evaluate the factors discussed below.

Need for Prompt and Uniform Implementation of the Presidential Policy

In order to allow an adequate evaluation of the Presidential policy, it is important that it

[16] Presidential Memorandum and Statement of Government Patent Policy, 36 *Fed. Reg.* 16887 (1971).

[17] U.S. Federal Council for Science and Technology, *supra* note 1, at 155.

be promptly and uniformly implemented by the agencies. At the time of preparation of this report, most agencies had not published regulations or revised their regulations in accordance with the Presidential policy. We urge that they do so. Efforts are underway to develop uniform regulations for use by most civilian agencies through the Federal Procurement Regulations. This is a step in the right direction.

Some agencies cannot, because of statutory provisions, adhere completely to the Presidential policy. In most such cases, these agencies are required to follow a so-called "title policy." [18] To allow truly Government-wide implementation of the Presidential policy and any future modifications of it, we believe that inconsistent legislation should be appropriately amended or repealed.[19]

Exclusive Licensing

Recommendation 2. Enact legislation to make clear the authority of all agencies to issue exclusive licenses under patents held by them.

One of the potentially most significant aspects of the revised Presidential policy is the new emphasis on exclusive licensing. As discussed previously, it appears that there is some confusion as to the exact scope of the authority of the individual agencies and the General Services Administration to grant exclusive licenses. We believe uncertainty in this area could interfere with the effectiveness of the exclusive licensing program. Accordingly, we favor legislation granting agencies clear-cut authority to issue exclusive licenses.

Section 12 of the draft bill at Appendix A to this report could serve as a model for such legislation. However, that section is drafted in broad terms without any guidelines limiting the authority granted. We wish to emphasize that this does not mean that we either oppose or favor the inclusion of statutory guidelines. Since our study efforts did not encompass this question, we are not in a position to take a meaningful position. Our main point is simply that clear statutory authority to grant exclusive licenses is needed.

March-In Rights Under the Presidential Policy

Recommendation 3. Supplement the Presidential policy by the adoption of uniform procedures for application of the rights reserved to the Government under the policy.

There is one area of the Presidential statement that could use additional and immediate supplementing—the procedures for the adminstration of its march-in rights provisions. Based on figures assembled by the Federal Council for Science and Technology it does not appear, at least through 1970, that the march-in rights retained by the Government have ever been exercised.[20] This could be accounted for by a variety of explanations, one of which is that before the early 1970's there were few, if any, inventions old enough to be subject to march-in provisions as required by the Presidential policy. In the coming years, this will no longer be the case. Moreover, the apparent trend toward increased research in nonmilitary areas, coupled with the increased opportunities under the revised policy for civilian agency contractors to obtain greater rights in inventions, could lead to greater need for the exercise of the Government's march-in rights. That is, more inventions of direct commercial value may be made in the future. The new emphasis on cancer, automobile safety, and environmental research exemplifies what appears to be a reordering of priorities toward the civilian sector of the Government.[21]

The Presidential policy supplies no real guidance as to the mechanics of implementing its march-in rights provisions. Many of the civilian agencies, with minimal staffing and expertise in the patent law area, will be left to devise their own procedures. This could lead

[18] One statute, the Solid Waste Disposal Act, requires adherence to the *1963* statement. 42 U.S.C. § 3253(c) (1970).

[19] Section 14 of the draft legislation at Appendix A could be used as a guide as to the legislative action necessary. However, some of the provisions amended or repealed in section 14 are of sufficient flexibility to allow adherence to the Presidential policy and, hence, would not have to be amended in order to allow uniform implementation of the Presidential policy as it presently reads.

[20] U.S. Federal Council for Science and Technology, *supra* note 1 at 94–95.

[21] Statistics prepared by the Federal Council for Science and Technology show that generally the total funds obligated for R&D by the civilian agencies has been rising and that DOD's share of the total dollars obligated for R&D has been decreasing. *Ibid.*

to, at worst, no implementation and, at best, inconsistent implementation. Efforts should be undertaken immediately to develop regulations and procedures to be followed by all agencies in implementing the march-in provisions of the Presidential policy.

Possible Weaknesses of the Presidential Policy

Reservations have been expressed as to whether the Presidential policy is the optimum policy. A system which generally allows contractors or inventors to obtain commercial rights subject to a strengthened march-in rights procedure under the control of a central board may hold greater promise of fulfilling the goals of patent policy. However, these reservations should await the test of actual experience.

Experience may prove the Government should not routinely take principal rights in all of the situations listed in section 1(a) of the Presidential policy. This is particularly true with respect to contracts which have as a principal purpose exploration into fields which directly concern the public health, safety, or welfare. It is not clear why the incentives needed for further development of products in these fields are any different than those needed in others,[22] although the need for safeguards in these areas is clear.

The Presidential policy relies on deferred determinations and the granting of greater rights in identified inventions. Reliance on deferred determinations and after-the-fact disposition of patent rights has several potential shortcomings, particularly as a greater share of the Government's research funding goes into research contracts falling within section 1(a) of the Presidential policy, which requires the Government to take principal rights at the outset. These shortcomings include deferred utilization, increased administrative costs, and a lessening in the willingness of some firms to participate in Government research work.

The uncertainty of ownership involved in a deferred determination policy may discourage some particularly competent contractors from participating in Government programs. A contractor whose privately-financed background position might be jeopardized by newly-generated inventions made under a contract might decline to enter into such a contract if he were unsure of obtaining exclusive rights in the inventions. His refusal to participate would probably result in the use of a less qualified contractor at a greater cost. Admittedly such cases would be relatively isolated and rare. It is also true that the Presidential policy attempts to overcome this problem somewhat by allowing the waiver of section 1(a) in exceptional circumstances. We believe that experience under the Presidential policy should be noted with particular care in evaluating the overall efficacy of the policy.

More importantly, the long processing periods inherent in a deferred determination policy will often delay prompt development and utilization of Government-sponsored inventions, since a participating contractor would wish to establish his rights before investing his risk capital.[23] Utilization could also be adversely affected by the administrative burden of petitioning the Government for exclusive commercial rights and the probable requirement that the contractor file patent applications to protect the property rights during the petition period. These tasks may destroy contractor interest in inventions that appear economically marginal on first review.

Finally, increased administrative costs to both the contractor and the Government for the drafting, submission, and review of petitions on a case-by-case basis may prove out of proportion to the results achieved by placing reliance on after-the-fact determinations.

The cost of administering an exclusive licensing program may prove high. Where a patent has a commercial potential, a costly and time-consuming proceeding would have to be held to determine which company or companies would be granted rights in the invention. It seems certain that a hearing with appropriate notice, as is outlined in the proposed GSA licensing regulations, would be required. It is questionable whether many agencies have sufficient manpower to carry on active licensing programs. In many cases the licensee, if any, will be the original contractor/developer

[22] For an example of the problems which can be created, *see* U.S. Comptroller General, Report B-164031(2), *Problem Areas Affecting Usefulness of Results of Government-Sponsored Research in Medicinal Chemistry*, Aug. 12, 1968. *See also* Harbridge House, *supra* note 6.

[23] Harbridge House, *supra* note 6, at II-47-60.

since he will have a jump on others in terms of the technical know-how behind the invention.[24]

An Alternate Approach

If evaluation of experience under the revised Presidential policy indicates a need for further policy revisions, we urge consideration of an alternative approach generally allowing contractors to obtain commercial rights but subjecting these rights to a strengthened "march-in" procedure. Such an approach was developed in detail and recommended by our Study Groups and staff during the study phase of our activities.

The alternate approach involves the repeal of all existing legislation concerning the disposition of rights in inventions made under Government contracts. This legislation would be replaced by a statute of Government-wide application. We believe uniformity is practical and desirable. Since this alternate policy is not compatible with current legislation, repeal of that legislation would be necessary. New positive legislation would be needed, as it would be difficult to implement the alternate approach on a strictly administrative basis.

In presenting this alternate approach, we recognize the dilemma involved. The path to comprehensive patent policy legislation is fraught with obstacles. Experience indicates that a broad patent statute is extremely difficult to enact, as shown by unsuccessful efforts in past years.

We have not proposed a time limit for testing the efficacy of the Presidential policy. Wide differences of opinion as to how well it is working may make assessment difficult.

The primary purposes of the statutory alternative are to establish (1) a stronger policy of promoting the commercial exploitation of patentable inventions arising under Government contracts; (2) greater uniformity in Government agency execution of this policy; and (3) a special board to administer the Government's march-in rights. Enactment of a general statute would require the repeal of existing statutory provisions applicable to the Atomic Energy Commission, the National Aeronautics and Space Administration, and several other Government agencies. These existing provisions reflect a desire to prevent monopoly control or undue private enrichment in the use of inventions made possible by public expenditures. We believe that a new general statute, if enacted, should take explicit account of such concern.

The terms of the legislation should strike a reasonable balance between the public and private equities involved and recognize the multiple values embodied in the public interest. The public will benefit from a patent policy which not only promotes commercial applications of the patents, but also insures maximum public benefits from the expenditure of public funds.

The alternate approach reflects reservations which have been expressed with the requirement of the Presidential policy that the Government take principal rights in each of the four classes of situations listed in section 1(a). The alternative would allow the contractor or inventor commercial rights at the outset except in two situations where it appears that the granting of commercial rights to contractors would not promote or be necessary to promote utilization. The first such situation is where it is the intention of the Government to fund the inventions made under a contract to the point of commercial application. Here there is no real need or equity in allowing the contractor to obtain commercial rights. Secondly, if the contract is with an educational or other nonprofit organization utilization would not be fostered by granting the contractor title unless it was determined that inventions likely to flow from a given contract will be promoted in a manner consistent with the objectives of utilization and maintenance of competition.

Another situation under the Presidential policy where the Government normally takes title at the time of contracting is where it is expected that use of inventions will be required by Federal regulation, as might be the case, for example with research into improved antipollution devices for automobiles. In such cases, there would be no need for patent incentives to ensure utilization. It is unlikely

[24] A few agencies have already initiated exclusive licensing programs. One of these is HEW. Under its program the only exclusive license issued to date went to the developing contractor. See *Drug Research Report*, vol. 14, no. 15, Apr. 14, 1971.

that the inventions that may fall out of a particular research effort will later be required for use by regulation. Accordingly, under the alternative policy, this would not be the basis for the Government to take commercial rights in inventions. Instead the Government "march-in" rights would apply in such situations. The "march-in" rights procedures under the alternate policy are developed more fully below.

In all cases, the Government would retain, as it presently does, a royalty-free, nonexclusive license for use of the invention for governmental purposes. In return for allowing contractors to generally obtain exclusive commercial rights; and in lieu of a policy placing primary reliance on deferred or after-the-fact determinations and exclusive licensing, the alternate policy would establish a strengthened system of march-in rights, including, possibly, the recovery of governmental investment, to safeguard the public interest. Safeguards would be built into the policy to ensure that utilization does occur, that it occurs on reasonable terms, and that the public's equity in the invention is recognized.

As part of the alternate approach, a central agency would be established and designated the "Government Patent Review Board," to administer the march-in rights retained by the Government. The Government, through the Board, would retain the right to require compulsory licensing of inventions made under its contracts (1) after the contractor had been given a reasonable opportunity to develop the invention commercially and had failed to do so, and (2) where he had developed the invention, but refused to either sell or license it on reasonable terms. The current Presidential policy would apply to inventions necessary to fulfill health or safety needs or required for use by governmental regulations. Thus, there would be no time limit on the exercise of the Government's march-in rights in such cases.

The Board would also be empowered to revoke all rights of the contractor if he (1) failed to disclose an invention promptly, (2) supplied materially false information concerning the invention, or (3) used the patent on the invention in such a way as to violate the antitrust laws.

Consideration could be given to developing a mechanism to prevent unconscionable profits on inventions made under Government contracts. The Board could be empowered to require payments to the United States from the contractor out of any profits on an invention so as to recognize the relative equities of the public and the contractor. However, there are many difficult problems to be worked out in developing such a mechanism, and there are no such provisions in the draft legislation at Appendix A.

Initially, the Board's workload would be minimal since it would be some time before patents subject to the Board's jurisdiction would begin to be issued. To fill this initial void, the Board could be assigned responsibility for the development of implementing rules and regulations under such legislation as is enacted to implement the alternate approach. The Board could take the lead in coordinating efforts to develop uniform contractual clauses and procedures. Possibly, also, the Board could be assigned responsibilities in the related area of Government employee inventions, since many of the policy considerations and the need for "march-in" rights appear to be analogous. As this phase of patent policy, presently governed by Executive Orders 10096 [25] and 10930,[26] is beyond the scope of our charter, we have not conducted any studies in this area.

Consideration was given to the placement of the Board within the framework of an existing agency such as the Department of Commerce. Due to the rather narrow scope of its functions and its primarily quasi-judicial function, this was felt impractical.

USE OF PATENTED INVENTIONS BY OR FOR THE GOVERNMENT

A second major area of concern with respect to Government patent policy centers on the infringement of privately held patents by the Government or its contractors or subcontractors. For example, the Government may award a contract for the design and production of a piece of electronic equipment. The most effective way of designing and producing the equip-

[25] 3 CFR, 1949–53 Comp., at 292.

[26] 3 CFR, 1959–63 Comp., at 456. Executive Orders 10096 and 10930 are included in the notes to 35 U.S.C. ch. 27 (1970).

ment may require the use of a particular item or process covered by a patent belonging to a third party who has licensed neither the Government nor the contractor.

Background

LEGAL REMEDIES FOR "INFRINGEMENT" BY OR FOR THE GOVERNMENT

Normally, a patent owner may sue for damages *and* to enjoin the infringement of his patents by others. However, where a patent is being used "by or for" the Government, the patent holder's only remedy in most cases is suit against the United States in the Court of Claims for money damages. A suit directly against an infringing Government contractor either for money damages or injunctive relief is not available if the patented invention is being used by the contractor with the "authorization and consent" of the Government. This result obtains from the provisions of 28 U.S.C. § 1498(a), which reads, in part, as follows:

> Whenever an invention described in and covered by a patent of the United States is used or manufactured by or for the United States without license of the owner thereof or lawful right to use or manufacture the same, the owner's remedy shall be by action against the United States in the Court of Claims for the recovery of his reasonable and entire compensation for such use and manufacture.
>
> For the purposes of this section, the use or manufacture of an invention described in and covered by a patent of the United States by a contractor, a subcontractor, or any person, firm, or corporation for the Government and with the authorization or consent of the Government, shall be construed as use or manufacture for the United States.

There are, in addition, a few other statutes of limited application which provide judicial remedies for misuse of patents by the Government. These include the Invention Secrecy Act,[27] the Atomic Energy Act of 1954,[28] the Foreign Assistance Act,[29] and the Tennessee Valley Authority Act.[30] These provisions do not significantly impact on the development of our primary recommendations.

The basic philosophy of 28 U.S.C. § 1498(a) is that Governmental programs should not be interrupted or delayed by injunctions granted in patent infringement actions. Money damages are considered an adequate remedy in such cases.

The history of 28 U.S.C., § 1498 illustrates this underlying philosophy. In 1910, legislation was passed which for the first time waived the Government's sovereign immunity with respect to patented inventions "used by the United States." [31] In 1911, the Supreme Court, interpreting this Act, refused to enjoin the manufacture of patented guns by the Army in its own arsenals.[32] However, in 1918, the Supreme Court ruled that the Act did not provide Government contractors with immunity from suits to enjoin their infringements.[33] As a direct result of this decision, legislation was enacted which provided an exclusive remedy of suit in the Court of Claims to recover "reasonable and entire compensation" when a patented invention was "used or manufactured by or for the United States" without license.[34]

The next major development in the evolution of 28 U.S.C. § 1498(a) was the addition of language making the statute applicable to infringement by the contractor only where the use of the invention was with the "authorization and consent" of the Government. This language first appeared in the Royalty Adjustment Act of 1942 [35] and was incorporated into title 28 in 1951.[36]

THE GRANTING OF AUTHORIZATION AND CONSENT

The granting of authorization and consent precludes injunctive action against Government contractors for patent infringements. It has been the policy of most Government agencies to include a rather broad authorization and consent provision in contracts calling for

[27] 35 U.S.C. § 183 (1970).
[28] 42 U.S.C. § 2187 (1970).
[29] 22 U.S.C. § 2356 (1970).
[30] 16 U.S.C. § 831(r) (1970).
[31] Act of June 25, 1910, ch. 422, 36 Stat. 851.
[32] *Crozier* v. *Krupp*, 224 U.S. 290 (1911).
[33] *Cramp & Sons* v. *Curtis Turbine Co.*, 246 U.S. 28 (1918).
[34] Act of July 1, 1918, ch. 114, 40 Stat. 705.
[35] Ch. 634, 56 Stat. 1013.
[36] Act of Oct. 31, 1951, ch. 655, sec. 50(c), 65 Stat. 727.

research and development work. DOD, for instance, uses the following provision, which is also used by NASA [37] and the Department of Transportation: [38]

> Authorization and Consent (Jan. 1961)
>
> The Government hereby gives its authorization and consent for all use and manufacture of any invention described in and covered by a patent of the United States in the performance of this contract or any part thereof or any amendment hereto or any subcontract hereunder (including any lower-tier subcontract).[39]

A somewhat more limited clause is used in supply contracts. The DOD clause reads as follows:

> Authorization and Consent (Mar. 1964)
>
> The Government hereby gives it authorization and consent (without prejudice to any rights of indemnification) for all use and manufacture, in the performance of this contract or any part hereto or any amendment hereto or any subcontract hereunder (including any lower-tier subcontract), of any invention described in and covered by a patent of the United States (i) embodied in the structure or composition of any article the delivery of which is accepted by the Government under this contract, or (ii) utilized in the machinery, tools, or methods the use of which necessarily results from compliance by the Contractor or the using subcontractor with (a) specifications or written provisions now or hereafter forming a part of this contract, or (b) specific written instructions given by the Contracting Officer directing the manner of performance. The entire liability to the Government for infringement of a patent of the United States shall be determined solely by the provisions of the indemnity clauses, if any, included in this contract or any subcontract hereunder (including any lower-tier subcontract), and the Government assumes liability for all other infringement to the extent of the authorization and consent hereinabove granted.[40]

[37] NASA PR 9.103.
[38] DOTPR 12-9.6106-2.
[39] ASPR 9-102.2.
[40] ASPR 9-102.1.

A similar clause is also used by NASA [41] and DOT.[42]

As indicated earlier, even if authorization and consent is not given by way of the above clauses, it may still be implied. Numerous factors, such as knowledge by the contracting officer or other Government official of the use of a patented invention by the contractor and the lack of objection to such use, have been described as indicating that the Government's authorization and consent was given by implication.[43]

The Comptroller General has ruled that an agency cannot expressly withhold authorization and consent with respect to particular procurements or patents.[44] This ruling was made in response to a protest over the inclusion of a provision in a request for proposals of the Atomic Energy Commission which specifically withdrew the Government's authorization and consent to infringe upon two privately held patents. One was a product patent and one was a process patent.

The Comptroller General reasoned that the inclusion of such a clause would require proposers to include "contingent costs in their bid prices for fear of having to defend infringement suits which would not occur but for the subject clause, and of having to bear the consequences of possible contract termination due to injunction." [45] However, the decision was not based on policy grounds. Rather, it was concluded that, as a matter of law, a contracting officer has no authority, except in limited situations, to withhold authorization and consent. The AEC clauses were deemed "legally ineffective." [46] This conclusion was based on a detailed analysis of the history of 28 U.S.C. § 1498.

The Comptroller General ruled that authorization and consent could not be withheld as to any product patent where the specifications called for such item to be embodied in the final item, or as to patents covering processes unless "conditioned by language to the effect that the withholding of consent to its use applies only

[41] NASA PR 9.103.
[42] DOTPR 12-9.6105-1.
[43] R. Nash and J. Lasken, *Patents and Technical Data*, Government Contracts Monograph No. 10, The George Washington University (1967), at 87-88.
[44] 46 Comp. Gen. 227 (1966).
[45] *Ibid.* at 242.
[46] *Ibid.*

if . . . such use is not economically or reasonably necessary to manufacture the article specified in the contract." [47]

INDEMNIFICATION

Even where authorization and consent is granted, the Government may still wish to require the contractor to indemnify it for any liability the Government incurs pursuant to 28 U.S.C. § 1498. While 28 U.S.C. § 1498 bars injunctive action, it is not interpreted by the Government as preventing the shifting of ultimate financial liability. For this purpose, patent indemnity clauses are included in many Government contracts.

Practices vary somewhat, but indemnification is generally not required in research and development contracts, though it is normally obtained with respect to supply contracts. Where a contract contains a mix of R&D and supply requirements, indemnity may be used. The AEC provides the most complete set of instructions for tailoring the patent indemnity provisions to accommodate a mix of R&D and supplies.[48] Contracts of the military departments for weapons systems usually do not include patent indemnity clauses, even though standard commercial components may be involved. At one time the ASPR included an indemnity clause which was limited to standard commercial items. This clause was so difficult to administer that it was deleted from the ASPR.

The ASPR differs from most other regulations in that it specifically negates the applicability of Uniform Commercial Code-type implied warranties against patent infringement. The "Authorization and Consent" clause of ASPR 9–102.1, in part, states:

> The entire liability to the Government for infringement of a patent of the United States shall be determined solely by the provisions of the indemnity clauses, if any, included in this contract or any subcontract hereunder (including any lower-tier subcontract), and the Government assumes liability for all other infringement to the extent of the authorization and consent hereinabove granted.

Section 2–312 of the Uniform Commercial Code, in part, states:

> (3) Unless otherwise agreed a seller who is a merchant regularly dealing in goods of the kind warrants that the goods shall be delivered free of the rightful claim of any third person by way of infringement or the like but a buyer who furnishes specifications to the seller must hold the seller harmless against any such claim which arises out of compliance with the specifications.

The Department of Justice has given some indication that it would rely on commercial warranties alone or as a supplement to express contractual warranty or indemnity provisions, in order to attempt to bring contractors before the Court of Claims as third party indemnitors in patent suits against the Government.[49]

There is evidence that in some cases, despite the inclusion of indemnity clauses in contracts, contractors have avoided liability for infringement. The cost to the Government of bringing suit against uncooperative contractor/indemnitors may result in their avoiding full indemnification.[50]

ADMINISTRATIVE SETTLEMENTS

There are some alternative methods of limited scope available by which a patent owner can receive compensation for the use of his patents without resorting to suit under 28 U.S.C. § 1498. The AEC and NASA have, by statute, special boards which may grant compensation for patent infringement in some cases.[51] An administrative remedy is available from the military departments, which rely on

[47] *Ibid.*

[48] AECPR 9–9.5010.

[49] Expression of such intent is found in the following language in a letter from the Civil Division to an electronics manufacturer in connection with *Technitrol, Inc.* v. *U.S.*, F.2d 1362 (Ct. Cl., 1971), which stated: ". . . Even where there may be no express indemnity obligation, the Government in some situations may take the position that there is an implied indemnity under the Uniform Commercial Code or other applicable laws . . ."

[50] ASPR 9–408 provides, " . . . settlement of claims involving payment for past infringement shall not be made without the consent of, and equitable contribution by, each indemnifying contractor involved, unless such settlement is determined to be in the best interests of the Government and is coordinated with the Department of Justice with a view to preserving any rights of the Government against the contractors involved. If consent of and equitable contribution by the contractors are obtained, the settlement need not be coordinated with the Department of Justice."

[51] 42 U.S.C. § 2187 (1970), AEC; and 42 U.S.C. § 2457 (1970), NASA.

10 U.S.C. § 2386 for their authority in this area. NASA and the AEC also have similar authority in this regard, though not quite as clearcut as that of DOD.[52] Finally, NASA has developed a procedure known as "Preprocurement Licensing," though this has rarely been used.

As indicated above, an administrative claim procedure is not available to a patentee with respect to all Government procurements. In many instances, a patentee is required to sue in the Court of Claims in order to obtain redress for the unauthorized use of his patent by the Government. The General Services Administration expends millions of dollars on supplies and services each year. Yet, no authority has been vested in GSA to negotiate or settle, prior to suit, any alleged patent infringement arising in its procurements, regardless of the merits. As a result, administrative claims procedures are not universal and are limited by statute and practical application to but a few sectors of Government procurement. Some of the more significant of these are discussed next.

DOD Administrative Claim Procedures

The Department of Defense administrative claim procedure is an informal procedure for processing an administrative claim for patent infringement against the military agencies. This procedure, while broad enough in scope to encompass licensing prior to procurement, in practice involves settlement for past infringement, with or without a license for further infringement.

The existing statutes are silent as to what essentials must be present to constitute a "claim." 35 U.S.C. § 286 (1970) provides that running of the six year statute of limitations in the U.S. Court of Claims will be stopped if a "written claim" has been received by an agency. Therefore, DOD has adopted a set of rules [53] to govern action in the receipt, investigation, and settlement of such claims. The rules for presentation of a claim are minimal and can be met by the patentee without the need of legal counsel.

Upon receipt of a claim, the agency begins what in effect is an *ex parte* proceeding, the extent of which may be dependent upon whether patent indemnification is involved. The agency may then initiate an extensive investigation into the merits of the allegation including an infringement study, a patent validity study, if warranted, and other appropriate investigations, including a review of contract records for determinations of license rights in the Government.

If infringement is clearly establishable, the validity of the patent reasonably certain, and the amount involved reasonably determinable and available from existing appropriations, the administrative claim procedure may result in satisfactory settlement. In 1970, the Air Force disposed of 39 patent claims by denial or settlement. Of these, seven were settled. It took an average of two years and five months to reach each settlement. In addition to the 39 disposals, another 26 potential claims were disposed of in 1970 because the claimant failed to complete his claim or for other reasons.[54]

One aspect of the administrative settlement process that is worthy of note is that in many cases where a claim is made against the Government for the unauthorized use of an invention by a Government contractor, the contractor may bear ultimate liability via an indemnity clause. Hence, after a tentative settlement agreement between the patent owner and the Government has been reached, the Government has to determine whether the indemnitor/contractor or contractors will pay their proportionate shares. If they will not, the Government may decide to deny the claim, rendering the entire process fruitless. This leaves the patent owner with two alternatives. He can accept the agreed-upon sum less the indemnitor's portion (which may be the major portion), or he can file suit. However, a Government refusal to settle is rarely based solely on the refusal of the contractor/indemnitor to agree to the settlement.[55]

[52] 42 U.S.C. § 2201(g) (1970), AEC; 42 U.S.C. § 2473(b)(3) (1970), NASA.

[53] ASPR 9-404. These procedures are used extensively. Task Force 2 of our Study Group 6 found that 240 claims were pending in the Department of Defense during May 1971. *See* Task Force No. 2 Report to our Study Group 6, at C-5.

[54] *See* Task Force No. 2 Report to our Study Group 6, at C-6.

[55] For instance, the Task Force No. 2 Report to our Study Group 6 reported, at B-18, that of approximately 80 administrative claims reviewed by the Defense Supply Agency, only one was denied solely on the basis of refusal of the indemnitor to contribute what was considered to be equitable. This unpublished report is part of the Commission's files.

Patent Compensation Board

A second alternative to litigation to enforce the patent rights of an individual is the Patent Compensation Board of the Atomic Energy Commission. Obviously, this procedure is of limited use. Under the Atomic Energy Act of 1954, the Commission may declare certain patents to be affected with the public interest and thereby provide for the compulsory licensing of such patents in the atomic energy field.[56] The procedure also covers claims for awards for use of an invention in the atomic energy field even though not declared affected with the public interest. The proceedings before the Patent Compensation Board therefore are not solely in the nature of a patent infringement procedure, but rather are for the grant of an award. The questions of infringement and validity are presented and do enter into the consideration of such an award. The proceedings entail the filing of formal briefs and the taking of testimony with cross-examination. Due to the nature of the proceedings, much time, effort, and presumably money are expended by both Government and patentee to reach a satisfactory accord.

"Preprocurement Licensing"

Another alternative is the preprocurement licensing procedures of the National Aeronautics and Space Administration.[57] Briefly stated, this procedure provides that if a privately-owned patent which will be infringed by a specific procurement meets certain requirements of enforceability and commercial acceptance, NASA may take a license under the patent, effective only for the identified procurement, and consider the royalty in evaluating competing bids. In the event an unlicensed bidder is awarded the contract, the patent owner will receive the royalty payment from NASA.[58] An expedited procedure for obtaining patent licenses before the infringing acts occur is required by this policy. This differs from the policies of other agencies, where privately-held patents are ignored in procurement award and reliance is placed on the consideration of infringement claims many years later as the normal method of compensating patentees.

The preprocurement licensing procedure, while favorably accepted by industry, has received little actual use by NASA because of the R&D nature of NASA procurement.[59] Preprocurement licensing has been considered for adoption by other agencies, but has not been accepted either because of the lack of statutory authority to purchase licenses in patents, the lack of trained patent personnel to evaluate infringements, the probable burdens involved in this expedited procedure, or the effect of this procedure on the use of patent indemnity provisions.[60]

The Underlying Considerations and Issues Involved

Two factors must be considered in arriving at a sound policy in this area. First is the extent to which the Government or its contractors should be free to avoid the normal consequences of patent infringement and, in particular, injunctive relief against infringement. The second is whether policies which discount the rights of patent owners will tend to discourage invention, especially invention related to Governmental needs.

Allowing injunctive relief against Government contractors could disrupt Government programs. Where a patent is vital to the performance of the contract, it would tend to limit competition to the patentee or those whom he chooses to license. In some cases the Government would be forced to use a high-cost producer rather than a low-cost producer simply because the former controlled a patent vital to only one subsystem of the entire item. We believe these are real and important considerations that form a backdrop to any recommended policy.

[56] 42 U.S.C. § 2183(a) (1970).

[57] NASA PR 9.102 (Rev. 4, 1970 Ed.).

[58] For the GAO's reaction to and comments on the NASA policy, *see* 46 Comp. Gen. 206 (1966), and Comp. Gen. Dec. B136916 (Apr. 15, 1968, and May 28, 1970). For a detailed discussion of the background to the development of NASA's policy, *see* Mossinghoff and Allnutt, "Patent Infringement in Government Procurement: A Remedy Without a Right?," 42 *Notre Dame Law Review* 5 (1966).

[59] NASA's revision to its preprocurement licensing policy limited its applicability in the research and development area to those R&D contracts wherein the delivery of hardware or the use of a specific process is contemplated at the time the proposals are solicited (NASA PRD No. 70–14, Nov. 2, 1970).

[60] *See* ASPR Case No. 66–196 and 68–148 and Comp. Gen. Dec. B162385 (Nov. 20, 1967).

We are less impressed with the arguments that failure to recognize private patent rights will make private parties unwilling to risk their own funds, time, and effort in the development of products to fulfill a governmental need. While there may be such an effect, it is highly problematical. In the first place, the immediate effect of the particular policy chosen is not on future invention, but on the rights of current patentees. Certain policies would improve their bargaining positions vis-a-vis the Government or its contractors or potential contractors. Others will weaken their positions. In any case, it is a fact that the invention under dispute has already been made.

The question that remains, then, is to what extent Government policy in this area can influence future invention and innovation. We believe that the possible patent protection a company will obtain with respect to inventions it might develop from its own research and development effort aimed exclusively at the Government market is, at most, but one factor out of many bearing on the decision to engage in the research. If the research also has potential commercial application, this factor becomes even more diluted. Further, where the particular company or division of the company is already directly involved in Government contracting or subcontracting, it would seem that patent protection would become an even more minor factor.

The fact that we discount the argument that Government policy in this area plays a significant role in the incentives for development of inventions does not mean that we reject completely the idea that it has some effect. We merely wish to emphasize that this effect is insufficient to overcome the need for maintaining an atmosphere where Government procurement can proceed without costly interruptions. However, we see no sound reason why an atmosphere cannot be created which would give greater assurance to patent holders that they will be compensated for their efforts and not put at a disadvantage by having to compete with persons who make use of their patents without bearing, through royalties, the costs of developing them.

Appendix B of this part includes draft legislation which would accomplish the legislative recommendations that follow.

AUTHORIZATION AND CONSENT

Recommendation 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.

We see a need to continue the anti-injunctive aspects of 28 U.S.C. § 1498. In fact, the law should be strengthened to make it clear that authorization and consent is automatically given, with the proviso that it may be withdrawn as to specifically identified patents. We would make authorization and consent automatic in order to eliminate any doubts regarding the interpretation of these provisions given by the Comptroller General.[61] Making consent automatic except where specifically withdrawn should eliminate uncertainties in some cases as to whether there is authorization and consent. Such doubts can lead to additional contingent costs in bids.

We would, however, make it clear that agencies could specifically withdraw authorization and consent as to patents identified at the time of contracting. There are a few circumstances when this would be useful and, in any case, in the course of specifically identifying the patent, the possible effects of withdrawing authorization and consent would become clear. We reject the concept that agencies should be allowed to withdraw authorization and consent as to broad classes of contracts or items (such as supply contracts for standard commercial items). Such a policy could have substantial anticompetitive effects which would not be visible in many cases. This would be especially true where the technical specifications are such that the use of a patented invention is necessary if a responsive bid is to be submitted.

PATENT INDEMNITY

Recommendation 5. Amend agency regulations and clauses to provide that all contractual warranties against patent infringement be provided by specific contractual language and not by implication.

Agencies should take steps similar to those

[61] 46 Comp. Gen. 277 (1966).

of DOD to preclude the reading of implied warranties into their contracts. Government procurement regulations and clauses should be amended to provide that all patent indemnification should be provided by specific contractual language and not by implication. Such language would tend to minimize the inclusion of contingencies for patent indemnity in bids in situations where the Government does not desire indemnity.

ADMINISTRATIVE SETTLEMENT OF PATENT CLAIMS AND ACQUISITION OF PATENT RIGHTS

Recommendation 6. Authorize all agencies to settle patent infringement claims out of available appropriations prior to the filing of suit.

Recommendation 7. Grant all agencies express statutory authority to acquire patents, applications for patents, and licenses or other interests thereunder.

Another way to facilitate appropriate monetary relief for the use of patented inventions by or for the Government is to widen administrative authority to settle claims for such use. Only the Department of Defense has clear authority in this area. We have concluded that this should be rectified and that there is a need for authority in all agencies to settle claims that could be brought under 28 U.S.C. § 1498. The granting of such authority would be a significant measure in ensuring the equitable treatment of patent owners.

Agencies should also have clear authority to acquire patents or rights thereunder. This would allow agencies to follow procedures similar to NASA's "preprocurement licensing" approach rather than relying on after-the-fact suits or settlement.

DISTRICT COURT JURISDICTION IN ACTIONS UNDER 28 U.S.C. § 1498

Recommendation 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.

We find no sound reason for precluding the United States District Courts from jurisdiction over patent suits under 28 U.S.C. § 1498 where the amount in controversy is under $10,000. The Tucker Act has generally given the district courts jurisdiction, concurrent with that of the Court of Claims, in suits against the Government where the amount in controversy is under $10,000.[62] We see no reason why a different standard should prevail with respect to patent litigation involving the United States. Inasmuch as we are recommending other changes in 28 U.S.C. § 1498, we believe an alignment of practice in this area with generally prevailing practice is worthwhile. It should, in a small way, better promote the possibilities of patent holders obtaining relief at a minimum cost.

[62] In Part G, Legal and Administrative Remedies, we recommend raising the dollar level of Tucker Act jurisdiction with respect to contract matters. If that recommendation is adopted, we would also favor an increase in the jurisdictional amount for patent cases.

CHAPTER 3

Technical Data

To this point this part has concentrated on Government patent policy. In lieu of patent protection or where it is not available, there are other means by which persons attempt to protect their privately developed technological innovations and information related to their methods of production and doing business. One way is to keep them secret by restricting the access of others to them.

While one may maintain secrecy, he generally has no legal right, as does a patent holder, to complain if others duplicate his work or copy his innovations. However, a doctrine of law has developed known as the law of "trade secrets" which provides relief to the holder of a "trade secret" against those who have used improper means to obtain his secret. For example, if A's competitor obtained information on a secret process by breaking into A's plant and stealing A's data on the process, A could bring an action in court for damages and to enjoin the use of this information. As one moves away from such blatant examples, the question of what constitutes an "improper means" becomes difficult to answer. One obvious area is the misuse of data that was supplied upon an agreement that it would only be used for specific purposes.

Many companies have a vital interest in ensuring that data they have developed concerning products and processes does not fall into the hands of competitors. Where the data affords them a competitive advantage over their rivals, it can be of utmost importance. The interest of contractors in maintaining data as a trade secret collides with the needs of the Government when it orders goods or services from a contractor which may embody the items or processes to which such confidential data pertains. As stated in ASPR, "It is apparent that there is no necessary correlation between the Government's need for technical data and its contractors' economic interest therein." [1]

Data problems do not stem only from the Government-contractor relationship. Often the real problems and potential inequities result from contractor-subcontractor relationships, since they may be actual or potential competitors even though they are also engaged in the performance of a Government contract.

While we studied data practices and policies in detail, our recommendations are rather limited in scope. We found this to be a complex and evolving area, not subject to ready resolution. What is basically needed is a knowledge on the part of the parties of the underlying considerations involved and the ability to structure particular contract provisions to the the needs of the situation. Well trained personnel are needed to cope with difficult concepts and problems involved. Our recommendations in Volume I concerning personnel training and education will help to bring this about.

Two major areas have evoked controversy and discussion in the technical data area over the years. First are the various issues concerning data rights and data requirements in connection with data ordered under Government contracts. Second is the treatment of data submitted with proposals. These two facets of data policy are discussed separately below.

DATA UNDER GOVERNMENT CONTRACTS

The Government's policy with respect to data required under Government contracts involves

[1] ASPR 9-202.1(c).

two separate but interrelated questions: the quantity and types of data to be ordered, or "data requirements"; and, the rights of the parties to ordered data, or "data rights." This chapter covers only data rights,[2] but it should be recognized that a data requirements policy minimizing the amount of data ordered could greatly ease the problems pertaining to rights in data. Generally, data problems do not arise unless the data ordered is of a type that might reveal "trade secrets." Hence, differences between the parties normally arise only where detailed engineering and manufacturing drawings and information are required. If the contract calls only for data suitable to allow maintenance and normal repair, the contract provisions regarding the rights in data are normally of little consequence.

Background

DEFINITION

As used in this report, "technical data" means information, in any recorded form, of a scientific or technical nature.[3] For the purposes of our discussion, technical data does not include financial, administrative, cost and pricing, or management data, or other information incidental to contract administration.

WHY THE GOVERNMENT NEEDS DATA

The Government may need to acquire data under contract for its own direct purposes, to achieve lower costs in procurement by obtaining competition, to inform the public, or to make new products and processes available to the public.

The Government has extensive needs, which may well exceed those of commercial customers, for many kinds of technical data. Millions of separate pieces of equipment and parts, of commercial and noncommercial types, must be acquired, operated, and maintained, often at points remote from the source of supply. Various kinds of technical data are needed for training personnel, overhaul and repair, cataloging, standardization, inspection and quality control, packaging, and logistics operations. Data resulting from research and development contracts must be obtained, organized, and disseminated to many different users. Finally, when competition among the Government's suppliers is to be obtained to encourage economy in Government procurement, the Government must make technical data available in various forms.

The Government's requirements for technical data vary considerably from agency to agency. To illustrate, DOD is both R&D and supply-oriented while NASA is primarily R&D oriented. As a result, DOD has a substantial interest in data for reprocurement, while NASA's interest in data focuses on reliability and quality control rather than reprocurement. Looking at a different aspect, DOD uses data essentially for its own direct purposes, and is generally not concerned with developing data, items, or processes primarily for the general public. In contrast, NASA and other agencies such as the Department of Transportation acquire data not only for their own direct purposes (as in space exploration and air traffic control respectively), but also with the intent that the public benefit directly. They acquire data relating to the development of aircraft and mass transportation systems with the intent that improved items and systems become readily available to the public. The various other agencies, each with its own mission or missions, use data in varying ways.

CONTRACTORS' INTEREST IN PROTECTING TECHNICAL DATA

Commercial organizations have an economic interest in technical data (particularly data disclosing details of design or manufacture) which they have developed at their own expense. Such data is closely guarded because its disclosure to competitors could jeopardize the competitive advantage gained through develop-

[2] See Part A for a discussion of data requirements.

[3] As stated at ASPR 9–201 (Rev. 7, 1969 ed.) technical data "may, for example, document research, experimental, developmental, or engineering work; or be usable or used to define a design or process or to procure, produce, support, maintain, or operate material. The data may be graphic or pictorial delineations in media such as drawings or photographs; text in specifications or related performance or design type documents; in machine forms such as punched cards, magnetic tape, computer memory printouts, or may be retained in computer memory. Examples of technical data include research and engineering data, engineering drawings and associated lists, specifications, standards, process sheets, manuals, technical reports, catalog item identifications, and related information. . . ."

ing the data. As long as the data is not available to others, an originating contractor may be the sole source or, at least, competitively advantaged, in providing the product or service to which the data is related.

The willingness of many prospective contractors and suppliers to accept Government contracts is dependent on the willingness of the Government to protect information resulting from private development. Most contracts can be performed without involving patent rights, but there is a greater likelihood the contract will involve the use of technical data which has previously been developed by the contractor at his own expense and maintained as proprietary information. Since disclosure without limitations on use destroys its competitive value, it is important to the contractor that the type and quantity of such data to be delivered be limited, that there be contractual limitations placed on the use thereof, and that effective protective measures exist to assure its integrity. The data owner's desire to maintain the competitive value of his data and the Government's desire to enhance its procurement ability are the opposing considerations which lead to problems.

LEGISLATIVE BACKGROUND

There is limited statutory coverage of matters relating to technical data.

- *Acquisition of "Proprietary Data" and "Trade Secrets."* Similar to the situation in the case of patent rights, only a limited number of agencies have been specifically authorized to acquire rights in trade secrets, either on a general or a special basis. These include the Department of Defense,[4] the Department of the Interior,[5] and the Environmental Protection Agency.[6] However, most other agencies have not been given express authority in this regard, though authority probably could be implied.

- *The Taking of Rights in Data Developed Under Government Contracts.* A variety of statutes require that information developed under contracts of specific agencies or programs of that agency be made available to the public. These were noted in Chapter 2 at footnote 11. However, most agencies have not been given any legislative guidance in this area.

- *Judicial Remedies.* Unless an action can be framed under 28 U.S.C. § 1491 or 1346, which confer jurisdiction in the Court of Claims and United States District Courts for actions sounding in contract, there is generally no remedy for the violation of "trade secrets" by the Government (although Government employees divulging such secrets could be held criminally accountable under 18 U.S.C. § 1905).[7] On the other hand, while the holder of a trade secret may not have a remedy against the Government except on a contract basis under 28 U.S.C. § 1491 or 1346, he may have rights against a Government contractor who is using his "trade secret." Since there is no statutory provision comparable to the anti-injunctive provisions of 28 U.S.C. § 1498, it would seem that a Government contractor could be enjoined from using another's improperly obtained "trade secrets."

- *Administrative Remedies.* Except for a remedy under the Foreign Assistance Act [8] and to a limited extent under the Invention Secrecy Act,[9] there do not appear to be any statutes expressly providing an administrative remedy for trade secret violations. Some relief has been obtained from the General Accounting Office under 31 U.S.C. § 74. However, none of the executive agencies (with the possible exceptions of DOD,[10] NASA,[11] and the AEC [12]) have express authority to settle such claims.

Remedies for violations of "trade secrets" are discussed more fully in Part 2 of this chapter.

AGENCY POLICIES AND PRACTICES

The general lack of statutory coverage and the lack of administrative attempts to bring

[4] 10 U.S.C. § 2386 (1970).
[5] 16 U.S.C. § 778(e) (1970).
[6] 42 U.S.C. 1857b-1(b)(4) (1970).

[7] A few specific exceptions are found at 22 U.S.C. § 2356(a) (1970), 10 U.S.C. § 2273(b) (1970), 42 U.S.C. § 2223 (1970), and 35 U.S.C. §§ 181–88 (1970). *See also* the discussion at pp. 131–132, *infra*.
[8] 22 U.S.C. § 2356 (1970).
[9] 35 U.S.C. §§ 181–88 (1970).
[10] 10 U.S.C. § 2386 (1970).
[11] 42 U.S.C. § 2458 (1970).
[12] 42 U.S.C. § 2187(b)(3) (1970).

uniformity in this area have resulted in a diversity of approaches by the various agencies. The discussions below focus on the required clauses for use in research and development and other contracts where the data is required as an incidental aspect of the contract. Agency policies respecting contracts where the production of data is the primary aim of the contract (e.g., films or historical works) are not discussed here.

National Aeronautics and Space Administration

In NASA's R&D contracts, the contractor is permitted to withhold data concerning standard commercial items and proprietary data concerning items developed at private expense and not sold or offered for sale, if, in lieu thereof, adequate identification of the item concerned in a "form, fit, and function" format is delivered to NASA.[13] This is substantially different from the DOD approach discussed below. Unlike a DOD contractor, a NASA contractor may not place restrictive markings on the data he delivers. His option, instead, is to withhold delivery of proprietary data. Such withholdings sometimes result in what are known as "swiss cheese" drawings.

Department of Defense

The Department of Defense until 1964 followed an approach similar to that now used by NASA. In 1964, DOD altered its data rights policy substantially, since it found it was not getting the full data packages needed.

DOD clauses now require that all data ordered under the contract be delivered to the Government. However, the rights of the Government in the data vary depending on the type of data involved. In general, the Government takes "unlimited rights" in most data. But where engineering or manufacturing-type data is called for which pertains to "items, components, or processes developed at private expense" the Government may only have "limited rights." In addition, agreements may be made as to whether specific data will be supplied with limited or unlimited rights. "Limited rights" data is supplied with restrictive markings stating that the data is not to be used by or for the Government for manufacturing purposes and is not to be disclosed, with certain exceptions, to persons outside the Government.[14]

Atomic Energy Commission

The AEC uses a standard "Drawings, Designs, Specifications" clause which is only one paragraph long and which would appear, on the surface, to give the Government full rights in all data relating to the work under the contract.[15] However, according to AEC regulations, this clause is not intended to cover "background secret processes, technical information, and know-how" and sample clauses are provided, if such information is desired.[16]

Department of Transportation

The DOT standard "Rights in Data—Unlimited" clause grants the Government full rights in data specified to be delivered under the contract.[17] However, the regulations do provide that "in particular situations (e.g., where the contractor contends that certain data is 'proprietary')" the contracting officer, after consulting with patent counsel, may alter the clause.

Department of the Interior—Office of Saline Water

The Office of Saline Water has a prescribed data clause [18] similar to NASA's in that it allows contractors to withhold "proprietary data," provided that the contractor identifies the source of the data and, in the case of standard commercial items to be included in the final product, provides form, fit, and function type information. Unlike most other data clauses, the clause requires that the data be in such form as to allow others to make and

[13] *See* NASA PR 9.203-1 (Rights in Data Clause).

[14] *See* ASPR 9-203(b) (Rights in Technical Data Clause).

[15] AECPR 9-7.5006-13 (1971).

[16] AECPR 9-9.5008-7 (1971).

[17] DOTPR 12-9.6302.

[18] 41 CFR 14R-9.202.

use the product or process being developed under the contract; i.e., manufacturing data is generally required. Another unique feature is a requirement that the contractor must agree to license others to use, for water desalination purposes, any "proprietary data" relating to products or processes being developed under the contract (except that data related to items developed at private expense need not be licensed).

Problems in Acquisition and Use of Data

Recommendation 9. Amend or repeal statutes limiting agency flexibility concerning rights in technical data.

Recommendation 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.

Recommendation 11. Authorize agencies to acquire information and data.

Most of the issues arising from the Government's acquisition and use of data are interrelated. Some of these interrelationships concern the quality of that data to be protected by the Government, the system by which protection is afforded, the manner by which notice of protectable status is given, the system for verifying that data claimed to be protectable meets the definition, and the remedies for misuse of protectable data. Thus, an inadequate system for safeguarding protectable data adversely affects a contractor's willingness to accede to the Government's requirements for data and the willingness of some firms to participate in Government procurement.

The complexity of issues involved has led to a proliferation of approaches, as reflected by the regulations of the various Government agencies. As noted above, AEC, NASA, and DOD have basic differences in their approach to important data issues. Since there are no Government-wide policies on the subject of data, each Government agency has been free to develop its own policy. Complete uniformity is probably neither achievable nor desirable, but we believe greater uniformity should be sought.

NEED FOR GREATER UNIFORMITY

After examining the data rights policies of the various agencies, we have concluded that it is not practical at this time to establish any single, Government-wide, data policy by legislation. The varying needs, capabilities, and missions of the agencies appear to militate against the creation of a single policy. Yet, the great diversity of relatively intricate clauses and regulations governing this area can obviously work hardships on contractors. Accordingly, we believe greater uniformity is within reach. While a single data clause might be impossible, perhaps standard clauses could be developed from which agencies could select the ones best suited to their needs.

Accordingly, we have concluded that the time has come for the development of a Government-wide policy on technical data. The Federal Council for Science and Technology in coordination with the Office of Federal Procurement Policy,[19] should be responsible for developing such a statement and for evaluating its implementation. In view of the work that the Federal Council for Science and Technology has done in the related patents area, the Council is the natural body to turn to for the coordination of efforts in the technical data area. We recognize that major improvements will not occur overnight, but believe, based on developments in the patents area, that out of such an effort will eventually evolve greater understanding of the problems and issues and greater agreement as to how they should be resolved.

To facilitate this effort any statutes limiting flexibility in this area should be appropriately amended.

Section 14 of the draft legislation at Appendix A contains a series of amendments which would accomplish Recommendation 9. How-

[19] Our recommendation for such an office is in Part A.

ever, since those amendments also impact on patent rights policy, additional drafting effort would be needed if it were desired to change only those aspects of the statutes impacting on data rights policy.

SUBCONTRACTOR DATA

Numerous issues would confront those developing a Government-wide data policy. We call attention to one area in particular. There have been numerous complaints over the years by subcontractors of overreaching by prime contractors with respect to subcontractor data. Not surprisingly, prime contractors have denied this. We believe that whatever may be the merits of this controversy, attention should be given to this facet of data policy. Consideration should be given to whether it is administratively feasible for Government agencies to exert through appropriate contract provisions greater pressure on prime contractors to respect the rights of their subcontractors. At present, some agencies, for example DOD, do allow subcontractors to submit "limited rights" data directly to the Government. Consideration should be given to whether this policy should be extended and in what ways it might be strengthened.

AUTHORITY TO ACQUIRE TECHNICAL DATA

All agencies should be authorized by legislation to acquire rights or interests in technical data and information. Although agencies probably have such power inherently, the issue is confused because a few agencies have been given such authority expressly. To eliminate any confusion, we see a need to grant such authority Government-wide.

Section 6 of the draft legislation at Appendix B would serve to accomplish our Recommendation 11.

DATA SUBMITTED WITH PROPOSALS AND/OR IN CONFIDENCE

One way in which new ideas and innovations are transmitted to the Government is through the submission of proposals to it, either solicited or unsolicited. Information of a technical nature may also be supplied in a number of ways other than as part of a proposal. As discussed more fully in Part B on Research and Development, it is important that the lines of communication between the Government and those with innovative ideas be kept open.

Where valuable data is supplied to the Government as part of a proposal or other related types of communications, contractors will often place legends containing restrictive limitations on such data allowing it to be used only for evaluation purposes. Some agencies have now adopted regulations prescribing standard legends and establishing policies with respect to the manner in which they will use such data. While there are differences in these policies, in general these efforts appear laudatory and are to be encouraged. However, many agencies have no regulations covering the treatment of data submitted with proposals.

Need for Greater Uniformity

Recommendation 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.

We have reviewed agency policies in this area, but cannot supply any set policies. Varying agency missions, organizations, and capabilities may require different attitudes toward the use of data submitted with proposals. Hence uniform legislation would not appear useful. The executive agencies should be free to develop their own policies in this area.

While we conclude that a Government-wide legislative statement is not feasible, we do believe that the development of Government-wide guidelines and, perhaps, uniform alternate policies would be helpful. To this end, we recommend that the Federal Council for Science and Technology in coordination with

the Office of Federal Procurement Policy undertake an effort to develop a uniform policy statement relating to the treatment of data submitted with proposals or related communications. Follow-on studies of the implementation of such a statement and its effects should then be conducted. We believe that, just as has occurred in the patents area, such a statement with follow-on studies could lead eventually to a much greater understanding of the issues involved and a greater agreement as to how these issues should be resolved. The result of such efforts should be to facilitate the flow of information to the Government.

Remedies

Recommendation 13. Establish a remedy for the misuse of information supplied to the Government in confidence.

We also see a need for an additional ingredient to facilitate the flow of information to those agencies that wish to encourage it. A remedy for the misuse of data that is supplied in confidence is needed.

Despite established policies and regulations, the possibility remains that through oversight, or otherwise, use or exposure may be made of data that is contrary to stated regulations. Yet, there is no clear-cut judicial remedy available to a person supplying information in confidence to the Government to obtain relief for the breach of that confidence. The lack of such a remedy has a deterrent effect, albeit a difficult one to ascertain and probably in the majority of cases of minor consequence, on the flow of technical information to the Government. Because we believe that it would conform to fundamental notions of fairness, and in view of the beneficial effect it might have on the flow of information to the Government, we recommend the creation of a remedy for Government misuse of data supplied in confidence.

Under current law, unless a breach of contract action can be framed under 28 U.S.C. § 1346 or 1491, normally not a real possibility with regard to the submission of proposals, no judicial remedy for the violation of "trade secrets" by the Government exists. There are a few isolated statutes of rather limited scope that would allow such suits, but the basic statute authorizing actions against the Government for its tortious actions, the Federal Tort Claims Act,[20] has generally been construed as not allowing suits based on trade secret grounds.[21] While 18 U.S.C. § 1905 does establish criminal penalties against Government personnel who unlawfully disclose confidential data, this does not aid the damaged party.[22]

To accomplish our recommendation, proposed legislation is provided in Section 6 of the bill at Appendix B to this part. It should be noted that this bill, as drafted, covers a broader range of Governmental misuse than simply the misuse of data submitted with proposals. An action might be brought under it, for instance, for the misuse of data supplied to a regulatory agency for a limited purpose. In this regard, the draft legislation is not unlike the criminal provisions of 18 U.S.C. § 1905, which are not limited to contract-related breaches of confidence.

One reason we have proposed a broad statute is that, as a purely technical drafting matter, it has been found extremely difficult to develop wording that would limit the remedy only to contract-related data submissions. Not all technical submissions are necessarily supplied as "proposals." More importantly, it is felt that the principles set forth in the draft should apply to all dealings by the Government. If a Government agency misuses data which was, in the language of our proposed legislation, "submitted to or obtained by" it "in confidence and under conditions limiting its use for specific purposes," no sound reason is seen why

[20] 28 U.S.C. §§ 1346(b), 2680 (1970).

[21] *See generally*, Harris, "Trade Secrets as They Affect the Government," 18 *Business Lawyer*, 613 (1963). *Consider Alkiebolaget Bofors* v. *U.S.*, 194 F.2d 145 (1951).

[22] 18 U.S.C. § 1905 reads as follows: "Whoever, being an officer or employee of the United States or of any department or agency thereof, publishes, divulges, discloses, or makes known in any manner or to any extent not authorized by law any information coming to him in the course of his employment or official duties or by reason of any examination or investigation made by, or return, report or record made to or filed with, such department or agency or officer or employee thereof, which information concerns or relates to the trade secrets, processes, operations, style of work, or apparatus, or to the identity, confidential statistical data, amount or source of any income, profits, losses, or expenditures of any person, firm, partnership, corporation, or association; or permits any income return or copy thereof or any book containing any abstract or particulars thereof to be seen or examined by any person except as provided by law; shall be fined not more than $1,000, or imprisoned not more than one year, or both; and shall be removed from office or employment."

the Government should not be liable for any damages flowing from such misuse.

In connection with the creation of this remedy, Government agencies should be given the authority to settle claims prior to suit being instituted.

It is to be emphasized that we do not believe that this proposal will open flood gates to litigation against the Government. In the case of proposals, for instance, it will be within the power of the agencies to establish by regulation their policies toward data submitted with proposals and to indicate how they plan to use such data. Presumably, then, such agency regulations would establish the parameters of the agency's potential liability. A standard marking for such data could be prescribed, as several agencies now do. Data marked otherwise could be rejected. Similarly, regulations could be adopted as to other data submitted in confidence. Hence, the agencies could ensure that they have mechanisms to control their potential liability with respect to information flowing to them.

CHAPTER 4

Copyrights

The Constitution authorizes the Congress to establish a system granting authors exclusive rights in their writings for a limited time. Title 17 of the United States Code sets forth the conditions and procedures for obtaining such rights.

The owner of a copyright has the exclusive right, among others, "to print, reprint, publish, copy, and vend the copyrighted work." [1] This right generally extends 28 years with renewal possible.[2] And, as set forth at 17 U.S.C. § 5, a variety of items such as books, maps, films, works of art, and photographs, to name only a few, may be copyrighted.

Legislative Background

As in the case of patents, there is no single statute governing the question of who is to obtain copyrights in works produced under Government contracts. But many of the same statutes cited in the discussion of patents also affect copyright policy. Thus, some statutes might be interpreted as barring certain Government agencies in some cases from allowing contractors to claim copyrights in material generated under their contracts.

In the treatment of private copyrights, 28 U.S.C. § 1498(b) establishes a framework similar to that of 28 U.S.C. § 1498(a) with respect to patents, except that § 1498(b) grants agency heads authority to settle, prior to suit, claims that might be brought under that statute. Only a few agencies have been given express authority to acquire interests in copyrights independent of the settlement of a claim. And 17 U.S.C. § 8 generally prohibits the copyright of Government publications. Hence, with limited exceptions, agencies cannot copyright their own works. This contrasts with the situation in the patents area in that patent rights may be obtained by the Government in its inventions.

[1] 17 U.S.C. § 1(a) (1970).
[2] 17 U.S.C. § 24 (1970).

Issues and Underlying Considerations

Recommendation 14. Amend or repeal statutes limiting agency flexibility in dealing with the publication of works developed under Government contracts.

Recommendation 15. Enact legislation giving all agencies authority to acquire private copyrights or interests therein.

The ultimate aim of any Government policy with respect to the granting or limiting of copyrights in works developed under Government contracts should be to disseminate to the public the material involved. As in the case of patents, depending on the follow-on efforts contemplated by the agency, it may be necessary to grant exclusivity in order to get publication and dissemination of the work. Obviously publishers will not generally be interested in investing in the marketing and promotion of works that others could then copy at a reduced cost.

There are variations in law and economic realities which differentiate copyright problems from patent problems so that a simple analogy with patents policy is not realistic. It must be recognized that the anticompetitive effects that may flow from allowing contrac-

tors to obtain copyrights are of much less significance since the copyright prevents only the copying of the work but does not control the use of the ideas expressed in the work. Unlike patents, which protect ideas, copyrights merely protect the manner in which an idea is expressed, but not the idea itself. Likewise, while it is theoretically possible that a key patent or patents could give one a clear advantage in a whole industry, the same is not true as to copyrighted works.

The key concept with which we are concerned is whether contractors should be allowed the right to publish, with copyrights, works produced under Government contracts or grants. The particular contract language chosen and related agency policies will, in many cases, have a direct effect on the extent of the dissemination of the work to the public.

Assuming there is no legislation dictating policy, several possible means are available to achieve dissemination. The Government Printing Office (GPO) is one choice, but has many drawbacks, depending on the type of work involved. The GPO is primarily a printer and not a publisher. It does not carry out promotional and marketing efforts to any major extent. Moreover, if part of the effort involves design and art work and other like considerations, the GPO version may be inadequate. If the work is in a multimedia form such as a textbook with accompanying slides and recordings, GPO is illequipped to produce the work.

Another alternative is to allow the contractor to take copyrights. In this case, the Government could take a license for its own purposes and/or restrict the contractor's rights to less than the statutory period.

A third alternative might be to solicit proposals on a work from various publishers rather than leaving it to the contractor, but there are many unanswered legal questions concerning the use of this alternative.

It is clear that such a variety of works are involved that any single policy to govern all situations is not realistically possible. In some instances, the preparation of a specific work by a Government contractor or grantee may be the primary object of the contract or grant. In other cases, a work may be prepared as a by-product of a research and development contract. Moreover, the subject matter of the material may require differing copyright policies in order to achieve publication and dissemination. Educational materials and texts involve different considerations than specialized scientific works.

Section 14 of the draft legislation found at Appendix A contains a series of amendments which would accomplish Recommendation 14. Since these amendments also impact on other areas, additional drafting effort would be needed if it were desired to change only those aspects of the statutes impacting on the copyrights area.

Section 6 of the draft legislation at Appendix B would serve to accomplish Recommendation 15.

Administrative Policies

Recommendation 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.

During the 1950's, most Government agencies began to allow grantees or contractors copyrights in works produced with Government financing where such works were a by-product of the contract or grant. However, they would not do so where the work was the primary object of the contract.

More recently several agencies have developed policies allowing private publication and copyright of works produced as a primary object of their contracts or grants. Included among these are the Office of Education and the National Science Foundation. The Department of Defense will also, under some circumstances, allow private publication with copyright.[3]

Most agencies at a minimum allow copyrights in works that are a by-product of their contracts. The policy regarding works which are the primary object of the contracts is less clear cut. According to representatives of the publishing industry, some agencies still refuse to allow private publication on a copyrighted basis of works produced under their

[3] See ASPR 9-204.1.

sponsorship.[4] But unless suitable in-house efforts are undertaken, such material may lie dormant.

Despite the variety of approaches now found in the copyright area, little effort has been made on the administrative level to bring about uniformity.[5] Nothing comparable to the Presidential Statement of Government Patent Policy and the related follow-up activities has occurred in the copyright area. The various agencies have developed their policies or failed to develop policies without any central guidance.

The time is not ripe for the development of a Government-wide statutory policy with respect to the copyright and publication of works developed under Government contracts. We believe that administrative flexibility to deal with a complex situation is needed. Legislation now on the books which hampers this should be repealed (Recommendations 14 and 15).

Although positive legislation is not practical at this time, there is a definite need for a more uniform administrative policy. A statement, similar to that issued by Presidents Kennedy and Nixon in the patents area, setting forth the general considerations involved and establishing policies for various classes of situations, would be helpful. Such a statement with follow-on review of its effects could minimize diversity and possibly lead to a legislative standard. It would also have the beneficial effect, even if completely uniform policies and practices cannot be established, of making clear the aims and considerations which should underlie agency policies. Those agencies which have refused, probably because of limited and isolated experience with publication problems, to recognize the need for private publication would be provided a framework for reviewing and modifying their policies in light of clearly established guidelines. Accordingly, we conclude that an interagency task force should be constituted under the lead of the Office of Federal Procurement Policy to aid in the development of such a statement and to monitor its implementation.

Legislation should be enacted making it clear that agencies have the authority to acquire private copyrights or interests thereunder. We see no reason why only the Department of Defense should have clear authority in this area.[6] We take no position on the need to amend 17 U.S.C. § 8 since this appears to relate mainly to works prepared by Government employees.

[4] Statement prepared by Curtis G. Benjamin for the Commission on Government Procurement at a public meeting sponsored by Study Group 6 on July 30, 1971.

[5] BOB (now OMB) letter dated Dec. 3, 1964, to the Registrar of Copyrights does provide some rather flexible and broad copyright policies which could be used by executive agencies.

[6] 10 U.S.C. § 2386 (1970).

CHAPTER 5

Summary

Even though our recommendations encompass a number of separate areas, several common themes run through them.

One of our goals has been to suggest improvements that would better encourage the utilization of the innovative and creative efforts that flow out of Government contracting. Thus the thrust of our recommendations concerning rights in inventions made under Government contracts is to promote a system that will encourage further development of such inventions. Likewise, it is our belief that out of an attempt to develop more uniform policies in the publication and copyright areas will emerge a system better structured to encourage the publication and dissemination of creative efforts.

A second theme that runs through many of our recommendations is the need to give adequate recognition in the procurement process to private innovative efforts, consistent with the goal of maintaining a competitive and economical procurement climate. Our recommendation to maintain the anti-injunctive aspects of the law as it pertains to the use by Government contractors of private patents, while at the same time making changes to give greater assurance to private patent owners that they will obtain adequate monetary compensation for the use of their inventions, is designed to meet this goal. Similarly, our recommendations for the development of a more uniform, Government-wide policy for the treatment of data submitted with proposals and for the creation of a remedy for misuse of data are designed to enhance this goal.

A final common theme that runs through a number of our recommendations is the need for greater, albeit not always complete, uniformity. Indeed, this is a theme that has run through much of this Commission's work in all facets of the procurement process. Parochial differences in agency approaches to similar problems increase the complexity, and thus the costs, of the total procurement process, and offer little in exchange. Our recommendation for prompt and uniform implementation of the Presidential policy encompasses our conclusion that the repeal of certain inconsistent legislation may be needed and reflects our view that greater uniformity is both practical and desirable. We have recommended that interagency attempts be made to establish more uniform policies on technical data and copyrights. We recognize that there are legitimate reasons why some agencies might wish to take a DOD-type approach to rights-in-data while others might wish to follow a NASA-type approach. Nonetheless, we see no reason why standardized NASA-type, DOD-type, or other approaches, with alternate standard clauses, could not be developed.

In short, it is our belief that our recommendations will facilitate and serve the policy, proclaimed by the Congress when it created this Commission, of promoting economy, efficiency, and effectiveness in procurement.

APPENDIX A

Draft Patent Policy Legislation

This appendix is in two parts—a draft bill and a sectional analysis of that bill. The draft bill would implement the alternative system developed during our studies of the disposition of rights in inventions made under Government contracts. We recommend prompt implementation of the revised Presidential patent policy and set forth this draft legislation only for the purpose of clearly identifying the alternative we considered. This alternative should be evaluated if experience under the Presidential policy suggests the need for new policy.

It should also be noted that section 12 of the Act could serve as a model for immediate legislation granting the agencies authority to issue exclusive licenses in patents as recommended by the Commission. In addition, the technical amendments in section 14, with some possible exceptions, include the legislation which should be repealed in order to allow uniform implementation of the Presidential policy.

A Bill

To establish a uniform national policy concerning property rights in inventions made through the expenditure of public funds for the performance of research and development work for the Government, and for other related purposes.

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

SEC. 1. This Act may be cited as the "Government Sponsored Inventions Act of 197 ."

SEC. 2. It is the policy and objective of Congress to promote the utilization of inventions made under Government contracts, to encourage maximum participation by private persons in the research and development efforts of the Government, to ensure that inventions made under Government contracts are used in a manner to promote free competition and enterprise, and to minimize the costs of administering Government policies in this area.

SEC. 3. As used in this Act—

(a) The term "Government agency" means an "executive agency" as defined by section 105 of title 5, United States Code, and the military departments as defined by section 102 of title 5, United States Code.

(b) The term "agency head" means the head of any Government agency, except that (1) the Secretary of Defense shall be head of the Department of Defense and of each of the military departments and (2) in the case of any independent establishment control over which is exercised by more than one individual, such term means the body exercising such control.

(c) The term "contract" means any contract, grant, agreement, commitment, under-

standing, or other arrangement entered into between any Government agency and any person where a purpose of the contract is the conduct of experimental, developmental, or research work. Such term includes any assignment, substitution of parties, or subcontract of any tier entered into or executed for the conduct of experimental, developmental, or research work in connection with the performance of that contract.

(d) The term "contractor" means any person and any public or private corporation, partnership, firm, association, institution, or other entity that is a party to the contract.

(e) The term "invention" means any invention, discovery, innovation, or improvement which, without regard to the patentability thereof, falls within the classes of patentable subject matter defined in title 35, United States Code.

(f) The term "inventor" means any person, other than a contractor, who has made an invention under a contract but who has not agreed to assign his rights in such invention to the contractor.

(g) The term "disclosure" means a written statement sufficiently complete as to technical detail to convey to one skilled in the art to which the invention pertains a clear understanding of the nature, purpose, operation, and, as the case may be, physical, chemical, or electrical characteristics of the invention.

(h) The terms "made under the contract" or "made under a contract" when used in relation to any invention mean the conception or first actual reduction to practice of such invention in the course of any work under the contract or under a contract, respectively.

(i) The term "practical application" means to manufacture in the case of a composition or product, to practice in the case of a process, or to operate in the case of a machine or system, and, in each case, under such conditions as to establish that the invention is being worked and that its benefits are available to the public either on reasonable terms or through reasonable licensing arrangements.

(j) The term "principal rights" when used in relation to any invention, means all rights to and interest in such invention with the exception of rights reserved either to the Government or to the contractor or inventor, as the case may be, under section 6.

(k) The term "contracting activities" means entering into contracts.

(l) The term "Board" means the Government Patent Review Board.

SEC. 4. (a) There is hereby established as an independent establishment within the executive branch of the Government the Government Patent Review Board.

(b) The Board shall be composed of three members to be appointed by the President, with the advice and consent of the Senate, one of whom will be designated Chairman by the President. The Chairman shall be the chief executive officer of the Board. It shall be his duty to preside at all meetings of the Board, to represent the Board in all matters relating to legislation and legislative reports, except that any member may present his own or minority view or supplemental reports, to represent the Board in all matters requiring conferences or communications with other Governmental officers, departments, or agencies, and generally to coordinate and organize the work of the Board in such manner as to promote prompt and efficient disposition of all matters within the jurisdiction of the Board. In the case of a vacancy in the office of the Chairman of the Board, or the absence or inability of the Chairman to serve, the Board may temporarily designate one of its members to act as Chairman until the cause or circumstance requiring such designations shall have been eliminated or corrected. In the event of a failure to agree upon a temporary chairman as described above the senior member in terms of service of the Board shall be the temporary chairman, or, if equal in seniority, that member with the longest term of office remaining.

(c) The members first appointed shall continue in office for the terms of two, four, and six years, respectively, from the date of this Act, the term of each to be designated by the President. Thereafter their successors shall be appointed for terms of six years, but may continue to serve beyond said terms until their successors take office; except that they shall not continue to serve beyond the expiration of the next session of Congress subsequent to the expiration of said fixed term of office and

except that any person chosen to fill a vacancy shall be appointed only for the unexpired term of the member whom he succeeds.

(d) Members of the Board shall receive compensation at the rate specified for Level V positions in the Executive Schedule, and for this purpose section 5316 of title 5, United States Code, is amended by adding at the end thereof the following: "(131) Members of the Government Patent Review Board."

(e) The Board shall have authority, subject to the civil service and classification laws, to appoint such personnel, including hearing examiners, as are necessary in the exercise of its functions.

(f) The Board is authorized to make such expenditures and enter into such contracts as are necessary in the exercise of its functions.

(g) The Board shall have an official seal which shall be judicially noticed.

(h) (1) The Board shall have the authority to delegate, by published order or rule, any of its functions to a division of the Board, an individual Board member, a hearing examiner, or an employee or employee board, including functions with respect to hearing, determining, ordering, certifying, reporting, or otherwise acting as to any work, business, or matter: Provided, however, that nothing herein shall be deemed to supersede the provisions of section 556 of title 5, United States Code.

(2) With respect to the delegation of any of its functions, as provided in (1) above, the Board shall retain a discretionary right to review the action of any such division of the Board, individual Board member, hearing examiner, employee, or employee Board, upon its own initiative or upon petition of a party to or an intervenor in such action, within such time and in such manner as the Board shall by rule prescribe: Provided, however, that any single Board member may bring any such action before the Board for review.

(i) The Board may perform any and all acts, make rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions.

(j) The Board or any member thereof is authorized to require by subpoena the attendance of witnesses and production of books, records, correspondence, memorandums, papers, or other documents. In the case of contumacy or refusal to obey a subpoena 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 of the Board, shall have jurisdiction to issue to such person an order requiring such person to appear before the Board or a member or hearing examiner thereof, to produce evidence or to give testimony, or both. Any failure of any such person to obey any such order of the court may be punished by the court as a contempt thereof.

(k) The Board shall submit an annual report of its activities to Congress.

(l) Any department or agency of the Government is authorized to provide for the Board such services as the Board requests on such basis, reimbursable or otherwise, as may be agreed upon between the department or agency and the Chairman of the Board.

(m) The Board is authorized to perform such functions as may be delegated to it by the President.

(n) There are hereby authorized to be appropriated to the Board such sums as may be necessary to carry out the provisions of this Act.

SEC. 5. (a) The President shall issue such rules and regulations as may be necessary or desirable to carry out and effectuate the policies and provisions of this Act.

(b) The agency head of each Government agency engaged in contracting activities shall issue regulations, in conformance with any rules or regulations prescribed by the President, to carry out and effectuate the policies and provisions of this Act.

SEC. 6. (a) Each contract entered into by a Government agency shall contain provisions effective to—

(1) require the prompt disclosure by the contractor or inventor to that agency of any invention made under the contract;

(2) provide for the manner of and a time limit on the exercise by the contractor or in-

ventor of any option that may be available pursuant to section 7(b) of this Act;

(3) reserve to the United States rights in each such invention in conformity with the provisions of section 7 of this Act;

(4) reserve to the United States, in addition to any rights required to be reserved by section 7 of this Act, an irrevocable, nonexclusive, nontransferable, royalty-free license for the practice of each such invention throughout the world, by or on behalf of the United States, for Federal Government purposes; provided that agency heads may reserve rights for the practice of such inventions by State and local governments.

(5) reserve to the contractor or inventor rights in each such invention in conformity with the provisions of section 7 of this Act;

(6) provide, whenever principal rights in any such invention are acquired by the United States, and the agency head does not elect to secure a patent in a foreign country, appropriate means whereby the contractor or inventor may acquire such foreign rights subject to the rights reserved in the United States in accordance with paragraph (2) above;

(7) provide, whenever principal rights in any such invention are acquired by the contractor or inventor, and the contractor or inventor does not elect to secure a patent in a foreign country, appropriate means whereby the United States may acquire such foreign rights;

(8) provide, in the event a patent application is filed or caused to be filed by the contractor or inventor or any invention made under a contract, appropriate means whereby the patent applicant shall be required to include within the specification of such application and any patent issuing thereon, a statement specifying that the invention described therein is subject to the provisions of this Act;

(9) provide such provisions as might be useful to effectuate section 8 of this Act; and

(10) provide, wherever principal rights to any invention made under the contract are acquired by any person other than the Government agency on behalf of the United States, the right to require the owner of such rights to provide written reports at reasonable intervals, when requested by the Government agency or the Board, on the commercial use that is being made or is intended to be made of such invention.

(b) Notwithstanding the fact that an inventor is not a party to a contract, such inventor shall be bound by contract terms which implement this Act.

SEC. 7. (a) Each Government agency shall acquire on behalf of the United States, at the time of entering into a contract, principal rights in any invention made under the contract if:

(1) it is determined by the agency head with the approval of the Board that it is the intention of the Government to take such steps as are necessary to achieve practical application of inventions made under the contract, or

(2) the contract is with an educational or other nonprofit organization unless the agency head determines that there is a sufficient basis to believe that reasonable steps will be taken such as will promote the policies and objectives of this Act.

(b) In all other cases not covered by (a), the contractor or inventor shall be given the option to acquire the principal rights in any invention made under the contract. Such rights, however, shall be subject to the limitations set forth in (c) below. Said option shall be exercised at the time of disclosure of the invention or within such time thereafter as may be provided in the contract. The Government shall obtain principal rights with respect to any invention for which this option is not exercised.

(c) (1) Upon the application of any person or any agency head, the Board is authorized to grant such rights as it deems proper to such person, to order the contractor or inventor to grant to such person such rights as it deems proper, and to modify or diminish the rights of the contractor or inventor in such ways as it deems proper in any inventions made under a contract in which the principal rights have been given to the contractor or inventor if the Board determines that (i) three years have elapsed since the issuance of the patent covering such invention and the invention has not been brought to practical application or that reasonable steps have not been

taken to bring the invention to practical application; (ii) such action is necessary to fulfill health or safety needs, or (iii) the invention is required to be used by governmental regulation. Provided, however, that upon application of the contractor or inventor the Board is authorized to extend the three year period during which such grants, orders, modifications, or diminishments may not be made and, in the case of inventions (i) necessary to fulfill health or safety needs or (ii) required to be used by Government regulations, to set a period during which such grants, orders, modifications, or diminishments may not be made. Such extensions or setting of periods may also be granted to proposed contractors or inventors employed thereby as to specific classes of inventions upon application of the agency involved, prior to the making of the contract.

(2) As part of any final determination by the Board granting, or ordering the applicant to be granted, rights in any invention or modifying or diminishing the rights of the contractor or inventor, the Board shall include a finding as to whether or not such invention is necessary to fulfill health or safety needs or required to be used by Governmental regulations. In any such case where a finding has been made that the invention is related to the fields of public health or safety or required to be used by Governmental regulations, no court shall issue any order enjoining or restricting the use and practice of such invention by the applicant (or such other persons who might come within the scope of the benefits conferred by a Board determination) until such time as the court, in accordance with Section 9(a), has fully reviewed the Board's determination or has determined that the Board's finding that the invention is necessary to fulfill health or safety needs or is required to be used by Governmental regulations was erroneous. Further, in any such case, any such order of any court which was issued previously to the Board's determination shall be vacated and shall not be reinstated until such time as a court of competent jurisdiction, in accordance with Section 9(a), has fully reviewed the Board's determination or has determined that the Board's finding that the invention is necessary to fulfill health or safety needs or is required to be used by Governmental regulations was erroneous. Nothing herein, however, shall be construed as preventing the contractor or inventor from recovering reasonable royalties for such use or practice of his invention.

(3) The following criteria shall guide the actions of the Board under subsection (c)(1) above:

(i) Achievement of the earliest practicable utilization of inventions in commercial practice.

(ii) Encouragement, through the normal incentives of the patent system, of private investment in the commercial utilization of inventions.

(iii) Fostering effective competition in the commercial development and exploitation of inventions.

(iv) Insuring against nonutilization of inventions and excessive charges for the use of such inventions.

(v) The relative equities of the public, the inventor, the contractor, or assignees or licensees of the contractor or inventor, if any, as measured by the investments necessary to bring the invention to the point of practical application. In connection with (v) the following should be considered: (a) the relative contributions of the Government and the contractor or inventor or their assignees or licensees, if any, as measured by the investments necessary to bring the invention to the market place; (b) the mission of the program funding the contract from which the invention arose; (c) the type of invention and the magnitude of the problem it solves; (d) the scope of the patent claim; (e) the contractor's or inventor's background position; (f) the Government funding of background technology; (g) the scope of the market served; (h) the profit margin in relation to other similar inventions; (i) the feasibility and likely benefit of competition in the market served; and (j) such other considerations as the Board deems pertinent.

SEC. 8. Notwithstanding any other provisions of this Act, all rights in any invention made under a contract shall become the exclusive property of the United States upon a determination by the Board at the request of an agency head, upon the application of any person, or upon its own initiative that (i) the

contractor or inventor failed to render a prompt disclosure of such invention to the Government agency; or (ii) in any suit, action, or proceeding brought before a properly constituted authority authorized to hear such matters, there was a final determination that the patent covering such invention has been used in violation of the antitrust laws; or (iii) any information or reports furnished by the contractor or inventor under this Act or under regulations issued in implementation thereof contained a material false representation or omission; or (iv) the statement furnished pursuant to section 11 of this Act was false.

SEC. 9. (a) Except as provided in (c) below, proceedings of the Board pursuant to section 7(c) and section 8 shall be subject to the provisions of subchapter II of chapter 5 of title 5, United States Code, and chapter 7 of title 5, United States Code. Any order, decision, or determination of the Board pursuant to sections 7(c) and 8 shall be determined on the record after an opportunity for a hearing; Provided, however, that a hearing on the record is not required with respect to the agency applications respecting proposed contractors referred to in section 7(c)(1). Any action commenced for the judicial review of a Board decision under said subsections shall be brought within sixty days after notification of such decision.

(b) Determinations or decisions made as to whether a contract falls within the provisions of subsection (a) of section 7 shall be final and are not subject to chapter 7 of title 5, United States Code, or to subchapter II of chapter 5 of title 5, United States Code.

(c) Determinations of the Board on agency applications concerning proposed contractors as provided for in section 7(c)(1) shall be final and are not subject to chapter 7 of title 5, United States Code, or to subchapter II of chapter 5 of title 5, United States Code.

SEC. 10. Each agency head may delegate any authority conferred upon him by this Act to any officer, official, or other employee of the agency.

SEC. 11. Before any United States patent, not assigned to the United States, is issued on any invention, the applicant therefor shall be required to submit a statement to the Commissioner of Patents under rules promulgated by him declaring whether or not the invention was made under a contract with any Government agency or in the course of employment with the United States.

SEC. 12. (a) Each agency head, with the aid of the Attorney General when necessary, is authorized to take all suitable and necessary steps to protect and enforce the rights of the United States in any invention.

(b) Government-owned inventions shall be made available and their utilization fostered through dedication to the public, publication, or licensing on an exclusive or nonexclusive basis as appropriate. A Government-owned invention shall not be construed to include any invention in which a contractor or inventor has obtained principal rights pursuant to this Act. Exclusive or nonexclusive licenses for use of an invention either domestically or in foreign countries may be granted under such terms as the agency head may determine to be in the public interest, and may be granted for the unexpired term of the patent or for a more limited period of time and may be granted with or without payment of royalties to the United States.

(c) The grantee of any exclusive rights in any invention covered by a United States patent owned by the United States shall have the right to bring suit for patent infringement in the United States courts to enforce such rights without joining the United States as a party in such suit.

SEC. 13. If any provision of this Act, or the application of such provision to any person or circumstance, is held invalid, the remainder of this Act or the application of such provisions to persons or circumstances other than those as to which it is held invalid, shall not be affected thereby.

SEC. 14. (a) Section 10(a) of the Act of June 29, 1935, as added by title 1 of the Act of August 14, 1946 (60 Stat. 1085) is amended by striking out the following: "Any contracts made pursuant to this authority shall contain requirements making the results of research and investigations available to the public through dedication, assignment to the Govern-

ment, or such other means as the Secretary shall determine." [1]

(b) Section 205(a) of the Act of August 14, 1946 (60 Stat. 1090, as amended) is amended by striking out the following language: "Any contract made pursuant to this section shall contain requirements making the result of such research and investigations available to the public by such means as the Secretary of Agriculture shall determine." [2]

(c) Section 501(c) of the Federal Coal Mine Health and Safety Act of 1969 (P. L. 91–173; 83 Stat. 742) is amended by striking out the following language thereof: "No research, demonstrations, or experiments shall be carried out, contracted for, sponsored, cosponsored, or authorized under authority of this Act, unless all information, uses, products, processes, patents, and other developments resulting from such research, demonstrations, or experiments will (with such exception and limitation, if any, as the Secretary or the Secretary of Health, Education, and Welfare may find to be necessary in the public interest) be available to the general public." [3]

(d) Section 106(c) of the National Traffic and Motor Vehicle Safety Act of 1966 (P. L. 89–563; 80 Stat. 721) is repealed.[4]

(e) Section 12 of the National Science Foundation Act of 1950 (P. L. 90–407; 82 Stat. 360) is repealed.[5]

(f) Section 152 of the Atomic Energy Act of 1954 (P. L. 83–703; 68 Stat. 943) is repealed.[6]

(g) The National Aeronautics and Space Act of 1958 (P. L. 85–568; 72 Stat. 426; as amended) is amended by—

(1) repealing section 305 thereof; Provided, however, that subsections (c), (d), and (e) of said section 305 shall continue to be effective with respect to any application for patents in which the written statement referred to in subsection (c) of said section 305 has been filed or requested to be filed by the Commissioner of Patents prior to the effective date of this Act; [7]

(2) striking out the following language in subsection 306(a) thereof: (A) "(as defined by section 305)" and (B) "the Inventions and Contributions Board, established under section 305 of this Act" and inserting in lieu thereof the following language: "an Inventions and Contributions Board which shall be established by the Administrator within the Administration"; [8]

(3) inserting at the end of section 203 thereof the following new subsection: "(c) For the purposes of chapter 17 of title 35 of the United States Code the Administration shall be considered a defense agency of the United States." [9] and

(4) striking out the following from section 203 thereof: "(including patents and rights thereunder)".[10]

(h) Section 6 of the Coal Research and Development Act of 1960 (P. L. 86–599; 74 Stat. 337) is repealed.[11]

(i) Section 4 of Helium Act Amendments of 1960 (P. L. 86–777; 74 Stat. 920) is amended by striking out the following language thereof: "Provided, however, that all research contracted for, sponsored, cosponsored, or authorized under authority of this Act shall be provided for in such a manner that all information, uses, products, processes, patents, and other developments resulting from such research developed by Government expenditure will (with such exceptions and limitations, if any, as the Secretary may find to be necessary in the interest of national defense) be available to the general public: And provided further, that nothing contained herein shall be construed as to deprive the owner of any background patent relating thereto to such rights as he may have thereunder." [12]

(j) Subsection (b) of section 4 of the Saline Water Conversion Act of 1961 (P. L. 87–295; 75 Stat. 628) is repealed.[13]

(k) Section 32 of the Arms Control and Disarmament Act of 1961 (P. L. 87–297; 75 Stat. 634) is repealed.[14]

[1] Amends 7 U.S.C. 742i(a).
[2] Amends 7 U.S.C. 1624(a).
[3] Amends 30 U.S.C. 951(c).
[4] Amends 15 U.S.C. 1395(c).
[5] Amends 42 U.S.C. 1871(a).
[6] Amends 42 U.S.C. 2182.
[7] Amends 42 U.S.C. 2457.
[8] Amends 42 U.S.C. 2458.
[9] Amends 42 U.S.C. 2473.
[10] Amends 42 U.S.C. 2473.
[11] Amends 30 U.S.C. 666.
[12] Amends 50 U.S.C. 167b.
[13] Amends 42 U.S.C. 1954(b).
[14] Amends 22 U.S.C. 2572.

(l) Section 303 of the Water Resources Act of 1964 (P. L. 88–379; 78 Stat. 332) is repealed.[15]

(m) Subsection (e) of section 302 of the Appalachian Regional Development Act of 1965 (P. L. 89–4; 79 Stat. 5; as amended) is repealed.[16]

(n) Subsection (c) of section 204 of the Solid Waste Disposal Act (P. L. 89–272; 79 Stat. 997) is repealed.[17]

[15] Amends 42 U.S.C. 1961c–3.
[16] Amends 40 U.S.C. App. 302(e).
[17] Amends 42 U.S.C. 3253 (c).

(o) Section 216 of title 38, United States Code, is amended by deleting subsection (a) (2) thereof and by redesignating subsection (a)(3) thereof as "(a)(2)".[18]

SEC. 15. This Act shall take effect on the first day of the seventh month beginning after the date of enactment of this Act, except that section 4 shall take effect immediately and regulations implementing this Act may be issued prior to such day.

[18] Amends 38 U.S.C. 216 (a) (2).

Sectional Analysis of the Draft Bill

Section 1

Section 1 provides that the Act may be known as the "Government Sponsored Inventions Act of 197 ."

Section 2

Section 2 states the objectives of and policies behind this legislation—promoting maximum utilization of patents made under Government contracts, ensuring that such patents are not used in an anti-competitive manner, encouraging maximum participation in the research and development efforts of the Federal Government, and minimizing administrative cost.

Section 3

Section 3 contains the definitional provisions applicable to the Act.

Section 3(a) defines the term "Government agency" in a broad manner to include, by reference to 5 U.S.C. 105, the executive departments, Government corporations, and independent establishments, and the military departments.

Section 3(b) defines the term "agency head" to mean the head of any Government agency or, in the case of independent establishments such as commissions, the body controlling the agency. However, for purposes of this Act, the Secretary of Defense is to be considered the head of the military departments.

Section 3(c) defines the term "contract" in such a way as to include grants. For the purposes of this Act, it is not believed there is a rational basis for distinguishing between the two. Inventions made under Federal funding are to be treated in the same manner whatever the nature or label given to the instrument providing the funds for the work leading to the invention.

It is also to be noted that the term "contract" as used in this draft legislation is limited to contracts where a purpose of the contract is the conduct of experimental, developmental, or research work.

Section 3(d) defines the term "contractor" to include persons and corporations, partnerships, firms, associations, institutions, and other entities that are parties to a contract.

Section 3(e) defines the term "invention" to include any invention, discovery, innovation, or improvement, without regard to the patentability thereof, which falls within the classes of patentable subject matter defined in title 35 of the United States Code. This definition requires the contractor to report those items which appear to be within the general classes of patentable subject matter, without regard to the fact that the item may not be patentable for technical legal reasons.

Section 3(f) defines the term "inventor" as

a person, other than a contractor, who has made an invention under a Government contract but who has not agreed to assign his rights in such invention to the contractor. This definition combined with other provisions in the Act is designed to make it clear that this legislation is not intended to upset the relative rights of contractors and their employees. While in most cases contractor employees do, as part of their employment contract, assign rights in inventions made as part of their work, there are some cases where this may not be true. This Act is designed to ensure that such situations would be recognized and not disturbed. Accordingly, in many places throughout the Act a reference is made to the "contractor or inventor." Also section 6(b) of the Act provides that an inventor shall be bound by contract terms implementing this Act even though he is not a party to the contract.

Section 3(g) defines the term "disclosure" to require a written statement sufficiently complete to convey to one skilled in the art to which the invention pertains a clear understanding of the nature, purpose, operation, and characteristics of the invention.

Section 3(h) defines the terms "made under the contract" or "made under a contract" to mean inventions conceived or first actually reduced to practice in the course of any work under a contract. The precise definitions of "conceived" or "first actually reduced to practice" are left to the courts and the implementing regulations and clauses. This definition does not make background inventions subject to this Act.

Section 3(i) defines the term "practical application" to mean the manufacture, practice, or operation of an invention, as the case may be, under such conditions as to establish that the invention is being worked. Moreover, even if an invention is being worked it will not be considered as having "practical application" unless its benefits are available to the public either on reasonable terms or through reasonable licensing arrangements.

Section 3(j) defines the term "principal rights" when used in relation to any invention to mean all rights to and interest in such invention with the exception of rights reserved either to the Government or to the contractor or inventor, as the case may be, under section 6 of the Act.

Section 3(k) defines the term "contracting activities" to mean entering into contracts. This term, when combined with the definition of "contracts", serves to limit the agencies required to issue implementing regulations under section 5(b) of the Act.

Section 3(l) defines the term "Board" to mean the Government Patent Review Board which is established by section 4 of the Act.

Section 4

Section 4(a) establishes the Government Patent Review Board as an independent establishment within the executive branch. Section 4(b) provides that the Board shall be composed of three members appointed by the President with the advice and consent of the Senate. By section 4(c) they are to have six year terms, and are to be paid, in accordance with section 4(d), at the rate specified for Level V positions in the Executive Schedule. Section 4(e) authorizes the appointment of personnel by the Board, and section 4(f) authorizes the Board to make necessary expenditures and contracts. Section 4(g) authorizes the Board to have an official seal. Section 4(h) authorizes the Board to delegate its functions to individual members, hearing examiners, or members of its staff, subject to the right of any individual Board member to bring any action before the Board for review. Section 4(i) is another general authorizing provision allowing the Board to perform such acts, make such rules and regulations, and issue such orders, not inconsistent with the Act, as may be necessary in the execution of the Board's functions. Section 4(j) authorizes the Board to issue subpoenas and to apply to the courts for the enforcement of the same. Section 4(k) requires the Board to submit an annual report of its activities to Congress. Section 4(l) authorizes other agencies to provide services to the Board on a reimbursable or nonreimbursable basis as may be agreed. Section 4(m) authorizes the Board to perform such functions as may be delegated to it by the President. This is included to ensure that the Board may take over functions that may be assigned to it in patent areas not strictly falling under

this Act. For example, it is possible that at some future date certain functions with respect to employee inventions might be assigned to the Board. Section 4(n) authorizes appropriations for the Board.

Section 5

Section 5 requires that those agencies that engage in research and development contracting issue regulations to implement this Act. Moreover, the President is to issue such regulations as he considers necessary or desirable to effectuate the policies and provisions of this Act. The agency regulations would have to conform to any Presidential regulations.

It is contemplated that the agency regulations would be included as a part of the normal procurement regulations of the agencies; although to the extent this Act also covers grant situations, implementation in procurement regulations alone may not always be sufficient. It is expected that the Presidential regulations would require or encourage uniformity in the implementing regulations and contractual language of the agencies. For instance, the President might order that the basic implementing regulations be included in the ASPR and the FPR and that all agencies conform to one or the other of these as is applicable.

In addition, it is expected that the President would delegate primary responsibility to the Government Patent Review Board for the development of rules and regulations to implement this Act.

Section 6(a)

Section 6(a) requires that all contracts of the type covered by this Act include provisions necessary to effectuate the provisions of the Act. Many of the required provisions would have as their purpose the precise establishment of rights as set forth in sections 7 and 8 of the Act. Certain paragraphs of section 6(a), however, are independent of sections 7 and 8. These are discussed below.

Section 6(a)(1) requires that a clause be included requiring prompt disclosure of any invention made under the contract. Failure to make a prompt disclosure can lead to a revocation of all rights in the invention pursuant to section 8. The purpose of this is to discourage contractors from trying to avoid disclosure so as to make use of the inventions either as a trade secret or by attempting to obtain patent rights on it without acknowledging the fact that it was made under Government contract. Section 10 of the Act also requires that a statement be made in connection with any patent application whether or not the invention was made under the Government contract. Section 6(a)(8) also requires a clause compelling similar action.

Section 6(a)(4) provides that the United States will receive at a minimum an irrevocable, nonexclusive, nontransferable, royalty-free license for the practice of each invention made under a Government contract throughout the world, by or on behalf of the United States, for Federal Government purposes. Agency heads are given authority, however, to expand the license to include State and local governmental practice of the invention.

Sections 6(a)(6) and (7) allow the Government or the contractor, as the case may be, to file for patent rights in foreign countries if the other party does not desire to do so. This follows the recent amendment of the Presidential Statement of Government Patent Policy. It is intended to provide for a disposition of foreign rights where the owner of the principal rights does not elect to protect the invention in foreign countries.

Section 6(a)(8) requires contractor patent applications to include a statement as to whether the invention is subject to this Act. This is intended to ensure that inventions made under Government contracts are readily identifiable. It supplements other provisions in this Act designed to accomplish similar ends.

Section 6(a)(10) is designed to ensure that the contract will contain provisions adequate to require reporting and other information by the contractor necessary to effectuate this Act. Section 8 of the Act provides that the submission of any false material statement could lead to the revoking of the contractor's rights in the patent.

Section 6(b)

As discussed previously, section 6(b) provides that an inventor, even though not a

party to a contract, is bound by contractual provisions which implement this Act. This, of course, because of the definition of "invention" in section 3(f), would only have application where the inventor had not agreed to assign his rights in inventions made by him to his contractor/employer.

Section 7(a)

Section 7(a) specifies the situations in which the Government will take principal rights in any inventions made under a contract. These are limited to two situations. First are those situations in which the purpose of the Government is to fund any invention to the point of practical application. In such case, of course, there is no need to allow contractors to obtain principal rights in order to achieve utilization. The other circumstance in which the Government would take the principal rights initially is where the contract is with a nonprofit organization unless the agency head determines that there is a sufficient basis to believe that reasonable steps will be taken such as will promote the policies and objectives of this Act. Since most universities or nonprofit organizations lack a marketing and manufacturing capability, there is little to be gained by allowing them to obtain rights in inventions they develop under Government contracts. In such circumstances the invention would merely go idle. It is believed that there is a better likelihood that the agencies will have programs to encourage use of inventions. On the other hand, where such a nonprofit organization does have a program for bringing inventions to commercial use, then no reason is seen for not taking advantage of this capability.

Section 7(b)

Subject to the license to be granted the Government and to the limitations in sections 7(c) and 8, the Act provides that contractors will be given the option to acquire principal rights in inventions made under a contract in all cases not covered by section 7(a) at the time the contract is entered into. Section 7(b) also provides that where the contractor does not exercise his option, the Government will receive principal rights in the invention.

Section 7(c)

Section 7(c)(1) is designed to guard against cases where the contractor has failed to take steps to bring the invention to the point where it is available to the public on reasonable terms, where the invention is necessary to fulfill health or safety needs, or where the use of the invention is required by regulations. The Government Patent Review Board is authorized, at any time three years after the patent has been issued (or at any time after the issuance of the patent in the case of inventions necessary to fulfill health or safety needs or when use of the invention is required by regulation), to license or require the licensing of the patent to persons filing applications with the Board on such terms as it deems proper and to otherwise modify and diminish the rights of the contractor. In addition, section 7(c)(3) establishes various criteria to be considered by the Board in making its determinations under section 7(c)(1).

It is recognized that the existence of the provisions at section 7(c)(1) tend to diminish somewhat the incentives for contractors to risk capital to develop an invention. This is especially true where the three-year time limit is unrealistic. Accordingly, section 7(c) also grants the Board authority to extend the period during which Board action may not be taken under section 7(c) or to set a period in the case of inventions necessary to fulfill health or safety needs or required to be used by regulation. The Board in considering such requests is to be guided by the criteria set forth in section 7(c)(3).

It is also recognized that there may be cases where companies with a strong background position in a particular area would refuse to enter into contracts where their commercial rights in inventions are not clear. In such cases, the Government may be forced to go to a less qualified contractor and to pay a higher price since the less qualified contractor will incur costs in attempting to develop the necessary background understanding. To avoid this problem, the Board is authorized, after application by an agency, to extend the exclusive period as to classes of inventions. It might be noted that the Board's decision in such cases, unlike most others of the Board, would be final pursuant to section 9(c) of the Act and would

not be subject to the Administrative Procedure Act. This is because such decisions are intimately related to the contracting process itself, and to the orderly functioning of agency procurement activities.

Section 7(c)(2) requires the Board to include a finding as to whether an invention is necessary to fulfill health or safety needs or is required for use for governmental regulations as part of its final disposition of cases before it. Where a positive finding is made, a contractor whose rights had been diminished by the Board would be barred from obtaining injunctive relief against the use of the invention until such time as the Board's decision is fully reviewed and reversed by a court of competent jurisdiction. This section is designed to prevent a contractor who has been initially given principal rights to inventions necessary to fulfill health or safety needs or required for use by governmental regulations from delaying the use of those inventions by others through delaying tactics in court. In large part, it is believed the primary thrust of this provision is to reinforce the general reluctance of the courts to grant injunctive relief in situations involving inventions needed for public health and safety.

Section 8

Section 8 provides for the revoking, by the Board, of the patent rights of a contractor in an invention made under a Government contract under four circumstances. First, it applies where the contractor fails to render a prompt disclosure of an invention made under a Government contract. Second, it applies where he has made material false reports about such an invention. Third, it applies where the patent on the invention has been used in a manner that violates the antitrust laws. And finally, it applies where the statement required by section 11 was false. These safeguards are intended to prevent abuses by contractors and unconscionable use of inventions partly financed by the Government.

Under this section, the Board can act upon an application of an agency head, a private person, or upon its own initiative. The purpose of granting this authority only to the Board, and not also to the courts, is to place a control mechanism over the revoking of contractor rights. If, for instance, this Act had merely provided that the occurrence of any of the four listed events would result in a forfeiture, one could readily foresee this issue being raised in patent litigation between private parties. A difficult question would then arise as to whether the district courts could make independent determinations on these matters.

Section 9

Section 9(a) provides that Board proceedings under section 7(c) and 8 are subject to the Administrative Procedure Act and judicial review. An exception is made, however, as discussed previously, for Board decisions regarding agency requests to extend the exclusive period for proposed contractors. In addition, Board approvals of the use of a "title" clause under section 7(a)(1) are not covered by section 9(a).

Section 9(a) also specifies that the Board actions which are subject to the Administrative Procedure Act are to be conducted on the record and with hearings. The APA, itself, does not require hearings, but merely provides procedures where another act requires hearings. Section 9(a) also limits requests for judicial review to a sixty day period so that uncertainties regarding patent rights will not unduly delay the development and utilization of inventions.

Section 9(b) grants finality to Board decisions under section 7(a). Likewise, section 9(c) makes clear that Board decisions on agency applications regarding proposed contracts under section 7(c)(1) are final.

Section 10

Section 10 provides that agency heads may delegate their authorities under this Act.

Section 11

Section 11 requires that applicants for patents file a statement as to whether or not the invention was developed under a Government contract or during the course of their employment with the Government. This will aid in

providing a system of easy identification of patents on inventions in which the Government holds an interest.

Section 12

Section 12 provides greater flexibility to the agencies than is currently possible in the promotion of Government-owned patents. Most importantly it clarifies the authority of the agencies to grant exclusive licenses, with or without royalties and for the whole or any part of the unexpired term of the patent. It also provides the necessary authority for Government agencies and grantees of patent rights to act to protect their respective rights. This is needed if a program including exclusive licensing is to succeed.

The language proposed here is merely intended as one way of arriving at the goal of clear cut authority for the issuance of exclusive licenses. No objections are seen to possibly developing more extensive statutory guidelines as to the use of the authority granted or to, perhaps, limiting some aspects of the authority.

Section 13

Section 13 is a standard severability provision.

Section 14

Section 14 contains a series of technical amendments repealing various provisions governing the disposition of rights in inventions made under Government contracts which are in conflict with the provisions of this Act. Many of these also impact on policy in the copyrights and technical data areas. A number of these are simply statements that the results of particular research will be made available to the public. Since such language has sometimes been interpreted to require a "title policy" it must be amended. Likewise the repeal of the nonpatent aspects of these statutes is needed to allow flexible but more uniform Government-wide policies with respect to data and copyrights.

Section 15

Section 15 delays the effective date of the Act for about 6 or 7 months after its enactment depending on the time of the month it is enacted. Its purpose is to allow time for the agencies to make appropriate revisions to their clauses and regulations. However, it does allow the setting up of the Board immediately and for the commencement of efforts to develop implementing rules and regulations.

APPENDIX B

Draft Patent Infringement, Technical Data, and Copyright Legislation

This appendix is in two parts—a draft bill and a sectional analysis of that bill. The draft bill would implement the Commission's recommendations for legislative changes in the patent infringement, technical data, and copyright areas, except that it does not include the amendment or repeal of legislation impacting on agency policies on rights in technical data and publishable material. Section 14 of the draft bill at Appendix A includes a series of amendments which would, as a by-product, accomplish the necessary amendments and repeals. However, since the amendments at section 14 also affect patent policy, additional drafting effort would be needed to limit their scope to data and copyright policies.

A Bill

To amend section 1498 of title 28, United States Code, and for other related purposes.

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

SEC. 1. The first paragraph of section 1498(a) of title 28, United States Code, is amended by striking out the following: "in the Court of Claims".

SEC. 2. The second paragraph of section 1498(a) of title 28, United States Code, is amended by adding at the end thereof the following:

"Except where expressly withheld as to specific patents, the authorization of the Government is hereby granted to each contractor, subcontractor, or any person, firm, or corporation to use or manufacture any invention described in and covered by a patent of the United States in providing property and/or services for the United States."

SEC. 3. The first paragraph of subsection (b) of section 1498 of title 28, United States Code, is amended (a) by striking out the words "*And provided further*" and the remainder of that proviso and by striking out the colon (:) which appears after the word "used" and substituting therefor a period (.) and (b) by striking out the words "in the Court of Claims".

SEC. 4. Subsection (d) of section 1498 of title 28, United States Code, is amended by striking out the words "in the Court of Claims".

SEC. 5. (a) Title 28, United States Code, is amended by adding the following new section in chapter 91 thereof:

"§1508. Misuse of Information. The United States shall be liable for any damages to the owner of information for the misuse of such information where such information was submitted to or obtained by the Government in confidence and under conditions

limiting its use for specific purposes. This liability shall apply whether or not the information was supplied or obtained pursuant to contract. Provided, however, that the United States shall not be liable under this section if such information has at any time been released by the owner thereof to others on a non-confidential basis or if such information is otherwise known to the public or the Government."

(b) The analysis of chapter 91 of title 28, United States Code, is amended by adding the following:

"1508. Misuse of Information."

SEC. 6. Every agency of the United States Government, including corporations owned or controlled by the United States Government, is hereby authorized in the performance of functions vested in the agency to acquire any of the following described property or any license or interest therein—copyrights, patents, applications for patents, and information and data in any form.

SEC. 7. Before an action against the United States has been instituted under subsection (a) or (b) of section 1498 of title 28, United States Code, or under section 1508 of title 28, United States Code, the head of an agency of the United States, including corporations owned or controlled by the United States Government, may settle or compromise, out of available funds, any claim that might be brought under said sections.

SEC. 8. (a) Section 2386 of title 10, United States Code, is repealed; and the analysis of chapter 141 of said title is amended by striking out the following: "2386. Copyrights, patents, designs, etc.; acquisition."

(b) The last paragraph of section 1491 of title 28, United States Code, is amended to read as follows:

"Except as regards actions brought under section 1498 of this title, nothing herein shall be construed to give the Court of Claims jurisdiction in suits against, or founded on actions of, the Tennessee Valley Authority, nor to amend or modify the provisions of the Tennessee Valley Authority Act of 1933, as amended, with respect to suits by or against the Authority."

(c) Section 183 of title 35, United States Code, is amended by striking out from the sixth sentence thereof the following: "in the Court of Claims or in the District Court of the United States for the district in which such claimant is a resident" and by striking out from the seventh sentence thereof the following: "in the Court of Claims".

(d) Subsection (b) of section 2273 of title 10, United States Code, is repealed; and subsection (a) of said section 2273 is amended by striking out "(a)".

(e) Section 7210 of title 10, United States Code, is repealed; and the analysis to chapter 631 of title 10, United States Code, is amended by striking out the following:

"7210. Purchase of patents, patent applications, and licenses."

(f) Section 606 of the Act of September 4, 1961 (P. L. 87–195; 75 Stat. 440) is amended by deleting subsections (a) and (b) thereof and by striking out the following: "(c)".[1]

(g) Section 2 of the Act of August 20, 1937 (50 Stat. 733; as amended) is amended by striking out the following: ", including patent rights,".[2]

(h) Section 2 of the Act of May 18, 1938 (52 Stat. 404) is amended by striking out the following: ", including patent rights,".[3]

(i) Section 6 of the Act of July 7, 1960 (P. L. 86–599; 74 Stat. 337) is repealed.[4]

(j) Paragraph (3) of subsection (b) of section 203 of the National Aeronautics and Space Act of 1958 (P. L. 85–568; 72 Stat. 429, as amended by the Act of May 13, 1959 (P. L. 86–20; 72 Stat. 21)) is amended by striking out the following : "(including patents)".[5]

(k) Section 19 of the Tennessee Valley Authority Act of 1933 (48 Stat. 68) is amended to read as follows:

"The Corporation, as an instrumentality and agency of the Government of the United States for the purpose of executing its constitutional powers, shall have access to the Patent Office of the United States for the purpose of studying, ascertaining, and copy-

[1] Amends 22 U.S.C. 2356.
[2] Amends 16 U.S.C. 832a(d).
[3] Amends 16 U.S.C. 833a(d).
[4] Repeals 30 U.S.C. 666.
[5] Amends 42 U.S.C. 2473(b) (3).

ing (not including access to pending applications for patents) necessary to enable the Corporation to use and employ the most efficacious and economical process for the production of fixed nitrogen, or any essential ingredient of fertilizer, or any method of improving and cheapening the production of hydroelectric power. The Commissioner of Patents shall furnish to the Corporation, at its request and without payment of fees, copies of documents on file in his office." [6]

[6] Amends 16 U.S.C. 831(r).

Sectional Analysis of the Draft Bill

Section 1

Section 1 amends 28 U.S.C. 1498 (a) to allow suits to be brought under it both in the Court of Claims and in the district courts in cases under $10,000. This has been accomplished by deleting the reference to the Court of Claims in that portion of the section stating that the patent owner's "exclusive remedy" shall be in the Court of Claims. The deletion of this language would still leave the Court of Claims with jurisdiction under 28 U.S.C. 1491 which grants it jurisdiction in connection with claims "founded . . . upon any Act of Congress . . ." Likewise, the district courts would have concurrent jurisdiction in cases under $10,000 pursuant to 28 U.S.C. 1346 (a)(2).

Section 2

Section 2 amends 28 U.S.C. 1498 so that the authorization and consent of the Government is automatically granted except where it is specifically withheld. This is to make it clear injunctions will not lie except where an agency has specifically withheld authorization and consent as to a specific patent.

Since another section of this Act makes it clear that the Government agencies may acquire patents or licenses in patents, it is very unlikely that this authority will be used except in rare cases. Presumably, the Government would normally attempt to negotiate a license rather than withhold authorization and consent as to a specific patent. But there might be a few cases where it is clear that use of the patent would be required, that the patent is valid, and that the owner is willing to and has licensed the patent to others on reasonable terms. In such cases, withholding authorization and consent would not result in anticompetitive effects and might be considered the best course of action by the Government officials involved.

Section 3

Section 3 deals with the copyright portion of 28 U.S.C. 1498. Its only effect is to delete provisions authorizing the settlement of copyright claims by Government agencies prior to the initiation of suit under 28 U.S.C. 1498. This authority is substantially reenacted in section 7 of this Act, which section also authorizes for the first time, on a Government-wide basis, the settlement of claims for the unauthorized use of patents by the Government. Section 7 also provides for settlement of claims for misuse of information. This aspect of the statute is explained more fully below. As a matter of technique it was felt desirable to place these related settlement authorities in one section. Accordingly, section 3 makes appropriate amendments to 28 U.S.C. 1498 (b).

Section 3 also amends 28 U.S.C. 1498 (b) to give the district courts concurrent jurisdiction with the Court of Claims in copyright cases of under $10,000. The same considerations that went into the similar change in 28 U.S.C. 1498(a) apply here.

Section 4

Section 4 merely amends 28 U.S.C. 1498(d) to give the district courts concurrent jurisdiction in cases under $10,000. 28 U.S.C. 1498 (d) deals with certificates of plant variety. This amendment does no more than to conform this subsection to the amendments made to subsections (a) and (b) in this regard.

Section 5

Section 5 creates a remedy against the Government for misuse of information. The United States would be subject to liability for damages to the owner of information for the misuse of such information where it was submitted to or obtained by the Government in confidence and under conditions limiting its use for specific purposes. The remedy is a broad one and is not limited to information submitted pursuant to contract. Indeed, in such cases there probably is an adequate remedy for breach of contract. The United States would not be liable, however, if the information had at any time been released by the owner to others on a nonconfidential basis or if such information is otherwise known to the public or the Government. These latter qualifications are intended to conform this section to the general common law rules of trade secrets.

Section 6

Section 6 makes clear that all agencies are authorized to acquire patents, applications for patents, copyrights, information, and interests therein. At present only a few agencies have a clear statement of such authority. While arguably such authority is inherent, it is the purpose of this section to eliminate any doubt on this point.

Section 7

Section 7 authorizes agencies to settle, prior to the initiation of formal legal action by the patent owner (at which time the Department of Justice would take control), claims that could be brought under 28 U.S.C. 1498(a) and (b) and under the new section 28 U.S.C. 1508 created by section 5 of this Act. As indicated earlier, the settlement of copyright claims under 28 U.S.C. 1498(b) is already authorized, and this section merely combines it with the other authorities that are being established. The authority to settle patent claims under 28 U.S.C. 1498(a) is new. At present only a few agencies have such authority, but it is considered desirable to extend such authority to all agencies.

Section 8

Section 8 contains a series of technical repealers of legislation which is either inconsistent with the principles of the proposed act or which would be redundant thereto.

APPENDIX C

Memorandum and Statement of Government Patent Policy Issued by President Nixon on August 23, 1971

(Published in the Federal Register, Vol. 36, No. 166, August 26, 1971)

MEMORANDUM FOR HEADS OF EXECUTIVE DEPARTMENTS AND AGENCIES

On October 10, 1963, President Kennedy forwarded to the Heads of the Executive Departments and Agencies a Memorandum and Statement of Government Patent Policy for their guidance in determining the disposition of rights to inventions made under Government-sponsored grants and contracts. On the basis of the knowledge and experience then available, this Statement first established Government-wide objectives and criteria, within existing legislative constraints, for the allocation of rights to inventions between the Government and its contractors.

It was recognized that actual experience under the Policy could indicate the need for revision or modification. Accordingly, a Patent Advisory Panel was established under the Federal Council for Science and Technology for the purpose of assisting the agencies in implementing the Policy, acquiring data on the agencies' operations under the Policy, and making recommendations regarding the utilization of Government-owned patents. In December 1965, the Federal Council established the Committee on Government Patent Policy to assess how this Policy was working in practice, and to acquire and analyze additional information that could contribute to the reaffirmation or modification of the Policy.

The efforts of both the Committee and Panel have provided increased knowledge of the effects of Government patent policy on the public interest. More specifically, the studies and experience over the past seven years have indicated that:

(a) A single presumption of ownership of patent rights to Government-sponsored inventions either in the Government or in its contractors is not a satisfactory basis for Government patent policy, and that a flexible, Government-wide policy best serves the public interest;

(b) The commercial utilization of Government-sponsored inventions, the participation of industry in Government research and development programs, and commercial competition can be influenced by the following factors: the mission of the contracting agency; the purpose and nature of the contract; the commercial applicability and market potential of the invention; the extent to which the invention is developed by the contracting agency; the promotional activities of the contracting agency; the commercial orientation of the contractor and the extent of his privately financed research in the related technology; and the size, nature and research orientation of the pertinent industry;

(c) In general, the above factors are reflected in the basic principles of the 1963 Presidential Policy Statement.

Based on the results of the studies and ex-

perience gained under the 1963 Policy Statement certain improvements in the Policy have been recommended which would provide (1) agency heads with additional authority to permit contractors to obtain greater rights to inventions where necessary to achieve utilization or where equitable circumstances would justify such allocation of rights, (2) additional guidance to the agencies in promoting the utilization of Government-sponsored inventions, (3) clarification of the rights of States and municipal governments in inventions in which the Federal Government acquires a license, and (4) a more definitive data base for evaluating the administration and effectiveness of the Policy and the feasibility and desirability of further refinement or modification of the Policy.

I have approved the above recommendations and have attached a revised Statement of Government Patent Policy for your guidance. As with the 1963 Policy Statement, the Federal Council shall make a continuing effort to record, monitor and evaluate the effects of this Policy Statement. A Committee on Government Patent Policy, operating under the aegis of the Federal Council for Science and Technology, shall assist the Federal Council in these matters.

This memorandum and statement of policy shall be published in the Federal Register.

RICHARD M. NIXON

STATEMENT OF GOVERNMENT PATENT POLICY

Basic Considerations

A. The Government expends large sums for the conduct of research and development which results in a considerable number of inventions and discoveries.

B. The inventions in scientific and technological fields resulting from work performed under Government contracts constitute a valuable national resource.

C. The use and practice of these inventions and discoveries should stimulate inventors, meet the needs of the Government, recognize the equities of the contractor, and serve the public interest.

D. The public interest in a dynamic and efficient economy requires that efforts be made to encourage the expeditious development and civilian use of these inventions. Both the need for incentives to draw forth private initiatives to this end, and the need to promote healthy competition in industry must be weighed in the disposition of patent rights under Government contracts. Where exclusive rights are acquired by the contractor, he remains subject to the provisions of the antitrust laws.

E. The public interest is also served by sharing of benefits of Government-financed research and development with foreign countries to a degree consistent with our international programs and with the objectives of U.S. foreign policy.

F. There is growing importance attaching to the acquisition of foreign patent rights in furtherance of the interests of U.S. industry and the Government.

G. The prudent administration of Government research and development calls for a Government-wide policy on the disposition of inventions made under Government contracts reflecting common principles and objectives, to the extent consistent with the missions of the respective agencies. The policy must recognize the need for flexibility to accommodate special situations.

Policy

SEC. 1. The following basic policy is established for all Government agencies with respect to inventions or discoveries made in the course of or under any contract of any Government agency, subject to specific statutes governing the disposition of patent rights of certain Government agencies.

(a) Where

(1) a principal purpose of the contract is to create, develop or improve products, processes, or methods which are intended for commercial use (or which are otherwise intended to be made available for use) by the general public at home or abroad, or which will be

required for such use by governmental regulations; or

(2) a principal purpose of the contract is for exploration into fields which directly concern the public health, public safety, or public welfare; or

(3) the contract is in a field of science or technology in which there has been little significant experience outside of work funded by the Government, or where the Government has been the principal developer of the field, and the acquisition of exclusive rights at the time of contracting might confer on the contractor a preferred or dominant position; or

(4) the services of the contractor are

(i) for the operation of a Government-owned research or production facility; or

(ii) for coordinating and directing the work of others,

the Government shall normally acquire or reserve the right to acquire the principal or exclusive rights throughout the world in and to any inventions made in the course of or under the contract.

In exceptional circumstances the contractor may acquire greater rights than a nonexclusive license at the time of contracting where the head of the department or agency certifies that such action will best serve the public interest. Greater rights may also be acquired by the contractor after the invention has been identified where the head of the department or agency determines that the acquisition of such greater rights is consistent with the intent of this Section 1(a) and is either a necessary incentive to call forth private risk capital and expense to bring the invention to the point of practical application or that the Government's contribution to the invention is small compared to that of the contractor. Where an identified invention made in the course of or under the contract is not a primary object of the contract, greater rights may also be acquired by the contractor under the criteria of Section 1(c).

(b) In other situations, where the purpose of the contract is to build upon existing knowledge or technology, to develop information, products, processes, or methods for use by the Government, and the work called for by the contract is in a field of technology in which the contractor has acquired technical competence (demonstrated by factors such as know-how, experience, and patent position) directly related to an area in which the contractor has an established nongovernmental commercial position, the contractor shall normally acquire the principal or exclusive rights throughout the world in and to any resulting inventions.

(c) Where the commercial interests of the contractor are not sufficiently established to be covered by the criteria specified in Section 1(b) above, the determination of rights shall be made by the agency after the invention has been identified, in a manner deemed most likely to serve the public interest as expressed in this policy statement, taking particularly into account the intentions of the contractor to bring the invention to the point of commercial application and the guidelines of Section 1(a) hereof, provided that the agency may prescribe by regulation special situations where the public interest in the availability of the inventions would best be served by permitting the contractor to acquire at the time of contracting greater rights than a nonexclusive license.

(d) In the situations specified in Sections 1(b) and 1(c), when two or more potential contractors are judged to have presented proposals of equivalent merit, willingness to grant the Government principal or exclusive rights in resulting inventions will be an additional factor in the evaluation of the proposals.

(e) Where the principal or exclusive rights in an invention remain in the contractor, he should agree to provide written reports at reasonable intervals, when requested by the Government, on the commercial use that is being made or is intended to be made of inventions made under Government contracts.

(f) Where the principal or exclusive rights in an invention remain in the contractor, unless the contractor, his licensee, or his assignee has taken effective steps within three years after a patent issues on the invention to bring the invention to the point of practical application or has made the invention available for licensing royalty-free or on terms that are reasonable in the circumstances, or can show cause why he should retain the principal or exclusive rights for a further period of time, the Government shall have the right to require

the granting of a nonexclusive or exclusive license to a responsible applicant(s) on terms that are reasonable under the circumstances.

(g) Where the principal or exclusive rights to an invention are acquired by the contractor, the Government shall have the right to require the granting of a nonexclusive or exclusive license to a responsible applicant(s) on terms that are reasonable in the circumstances (i) to the extent that the invention is required for public use by governmental regulations, or (ii) as may be necessary to fulfill health or safety needs, or (iii) for other public purposes stipulated in the contract.

(h) Whenever the principal or exclusive rights in an invention remain in the contractor, the Government shall normally acquire, in addition to the rights set forth in Sections 1(e), 1(f), and 1(g),

(1) at least a nonexclusive, nontransferable, paid-up license to make, use, and sell the invention throughout the world by or on behalf of the Government of the United States (including any Government agency) and States and domestic municipal governments, unless the agency head determines that it would not be in the public interest to acquire the license for the States and domestic municipal governments; and

(2) the right to sublicense any foreign government pursuant to any existing or future treaty or agreement if the agency head determines it would be in the national interest to acquire this right; and

(3) the principal or exclusive rights to the invention in any country in which the contractor does not elect to secure a patent.

(i) Whenever the principal or exclusive rights in an invention are acquired by the Government, there may be reserved to the contractor a revocable or irrevocable nonexclusive royalty-free license for the practice of the invention throughout the world; an agency may reserve the right to revoke such license so that it might grant an exclusive license when it determines that some degree of exclusivity may be necessary to encourage further development and commercialization of the invention. Where the Government has a right to acquire the principal or exclusive rights to an invention and does not elect to secure a patent in a foreign country, the Government may permit the contractor to acquire such rights in any foreign country in which he elects to secure a patent, subject to the Government's right set forth in Section 1(h).

SEC. 2. Under regulations prescribed by the Administrator of General Services, Government-owned patents shall be made available and the technological advances covered thereby brought into being in the shortest time possible through dedication or licensing, either exclusive or nonexclusive, and shall be listed in official Government publications or otherwise.

SEC. 3. The Federal Council for Science and Technology in consultation with the Department of Justice shall prepare at least annually a report concerning the effectiveness of this policy, including recommendations for revision or modification as necessary in light of the practices and determinations of the agencies in the disposition of patent rights under their contracts. The Federal Council for Science and Technology shall continue to

(a) develop by mutual consultation and coordination with the agencies common guidelines for implementation of this policy, consistent with existing statutes, and to provide overall guidance as to disposition of inventions and patents in which the Government has any right or interest; and

(b) acquire data from the Government agencies on the disposition of patent rights to inventions resulting from Federally-financed research and development and on the use and practice of such inventions to serve as bases for policy review and development; and

(c) make recommendations for advancing the use and exploitation of Government-owned domestic and foreign patents. Each agency shall record the basis for its actions with respect to inventions and appropriate contracts under this statement.

SEC. 4. Definitions: As used in this policy statement, the stated terms in singular and plural are defined as follows for the purposes hereof:

(a) *Government agency*—includes any executive department, independent commission,

board, office, agency, administration, authority, Government corporation, or other Government establishment of the executive branch of the Government of the United States of America.

(b) *States*—means the States of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, American Samoa, Guam and the Trust Territory of the Pacific Islands.

(c) *Invention*, or *Invention or discovery*—includes any art, machine, manufacture, design, or composition of matter, or any new and useful improvement thereof, or any variety of plant, which is or may be patentable under the Patent Laws of the United States of America or any foreign country.

(d) *Contractor*—means any individual, partnership, public or private corporation, association, institution, or other entity which is a party to the contract.

(e) *Contract*—means any actual or proposed contract, agreement, grant, or other arrangement, or subcontract entered into with or for the benefit of the Government where a purpose of the contract is the conduct of experimental, development, or research work.

(f) *Made*—when used in relation to any invention or discovery means the conception or first actual reduction to practice of such invention in the course of or under the contract.

(g) *To the point of practical application*—means to manufacture in the case of a composition or product, to practice in the case of a process, or to operate in the case of a machine and under such conditions as to establish that the invention is being worked and that its benefits are reasonably acessible to the public.

APPENDIX D

Methodology

The recommendations in this report, though differing in some instances from those of our Study Group 6—Pre-Contract Planning, are based on the work and study performed by that Group during the study phase of our efforts. That Study Group established a special task subgroup on Patents and Proprietary Data, with Mr. Leonard Rawicz, Assistant General Counsel for Patent Matters, National Aeronautics and Space Administration, serving as coordinator. The subgroup, in turn, was further divided into three task forces—Task Force #1 on the allocation of rights to inventions made in the performance of Government research and development contracts, Task Force #2 on private patent rights in Government procurement, and Task Force #3 on data.

The membership of these task forces was as follows: [1]

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[1] The employment shown for each member is as of the date his task force submitted its report.

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Patent Counsel
NASA Manned Spacecraft Center

These task forces studied, met, debated, and ultimately submitted reports to Study Group 6 with their findings and recommendations. On the basis of these reports and a two-day public meeting held in Washington, D.C., on July 29–30, 1971, at which presentations were made by representatives of industry, the university community, Government agencies, professional societies, and publishing houses, Study Group 6 prepared and submitted recommendations in the patents and data areas to the Commission as part of its final report. An oral presentation of these was also made to the Commission.

After this presentation, the Study Group's recommendations were further considered by the Commission at several meetings. Thus our final conclusions and recommendations emerged. Though we have not adopted certain of the Study Group's recommendations, to varying degrees most of their recommendations are incorporated in ours.

APPENDIX E

List of Recommendations

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 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.

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.

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.

APPENDIX F

Acronyms

AEC	Atomic Energy Commission
APA	Administrative Procedure Act
ASPR	Armed Services Procurement Regulation
BOB	Bureau of the Budget
CFR	Code of Federal Regulations
DOD	Department of Defense
DOT	Department of Transportation
F.2d	Federal Reporter, Second Series
GAO	General Accounting Office
GPO	Government Printing Office
GSA	General Services Administration
NASA	National Aeronautics and Space Administration
NASA PR	National Aeronautics and Space Administration Procurement Regulations
NASA PRD	National Aeronautics and Space Administration Procurement Regulations Directive
OMB	Office of Management and Budget
P.L.	Public Law
R&D	Research and Development
U.S.C.	United States Code
U.S.P.Q.	United States Patent Quarterly

Part J—Other Statutory Considerations

CONTENTS

CHAPTER 1

Introduction

This part of our report focuses on the technical aspects of procurement statutes. Preceding parts discussed and made recommendations dealing essentially with the policy and substantive aspects of the statutes. This part proposes recommendations for modernizing and improving their form, volume, and organization.

The first step in our examination of procurement-related statutes involved the preparation of a *Preliminary Compilation of Laws Pertaining to Government Procurement,* October 1970. This was used during the initial phase of the Commission Studies. Next, with the help of a LITE (Legal Information Through Electronics) search conducted by the Air Force LITE System and a poll of the procurement agencies, the entire *United States Code* and the latest *Statutes at Large* were examined. Approximately 4,000 statutory provisions relating to procurement were identified. Brief digests of these statutes were then prepared and processed through computer facilities of the Air Force Systems Command to produce a *Table and Digest of Procurement-Related Laws,* June 1971, and a *Key-Word-In-Context Preliminary Index-Digest of Procurement-Related Laws,* July 1971. The most important of these provisions were then broken down into some 70 categories for further review and analysis.[1]

Based on our examination, several general observations are relevant. The existing procurement-related statutes take many forms. Some are permanent (such as the Federal Property and Administrative Services Act) and some are temporary (such as annual authorization and appropriation acts). Many expressly refer to procurement by itself; some to procurement and other functions; and others to broad programs, controls, or procedures affecting or affected by procurement. Some of the statutes apply to all or most Federal agencies and programs; others apply to one or only a few agencies or programs.

In one way or another procurement is affected or controlled by statutory provisions relating to:

Organization and charter acts
Program and project budgeting, authorizations, and appropriations
Contract and fund accountability and controls
Award and selection procedures
Contract types
Contract pricing, costs, and profits
Contract administration
Contract remedies
Social and economic goals
Conflicts of interest and contract integrity
Procurement regulations
National emergencies.

Our studies disclosed numerous problems in the procurement statutes. Some of the problems are substantive, while others are essentially technical and result from the great number and complexity of statutes, overlaps and duplication, ambiguities, conflicts, inconsistencies, and obsolescences as well as the uncoordinated distribution and organization of statutes.

To a large extent, these problems can be traced to the piecemeal evolution of procurement statutes, sporadic efforts to deal with

[1] Copies of our *Preliminary Compilation, Table and Digest,* and *Index Digest of the Procurement-Related Laws* are being filed with this report. Arrangements have been made with the Aeronautical Systems Division, Air Force Systems Command, Wright-Patterson Air Force Base, to retain the computer tapes indefinitely for use by the congressional committees and executive agencies in acting upon the statutory revisions recommended in this report.

specific and sometimes narrow procurement problems, and inadequate attention to the necessity for eliminating old statutes when new ones are enacted. For example, notwithstanding the general authority to negotiate contracts granted by the basic procurement acts, numerous special statutes provide the same authority for particular agencies or programs. Architect-engineer services are governed by a number of general and special statutes which conflict in fee limitations and solicitation requirements. One statute still on the books proscribes the procurement of ailanthus trees; another statute prohibits the reimbursement of Federal income taxes under AEC contracts.

Some 80 separate statutory provisions, with differences in wording and substance, govern access to the records of contractors and grantees. More than 110 different statutory provisions relate to experts and consultants; 90 of them are repeated every year in appropriation acts. The Davis-Bacon Act refers to advertised contracts and the Walsh-Healey Act to invitations for bids, and provisions were incorporated thereafter in the Davis-Bacon Act and the basic procurement acts to make it clear that negotiated as well as formally advertised contracts are covered.

Although the *United States Code* has a specific title 41 for "Public Contracts," many procurement laws are intermingled throughout the *Code* with statutes relating to programs and organic acts of many agencies. The net result is disorganization and disorientation.

The Commission's charter provided, among other things, for recommendations to modernize the procurement statutes and to identify "gaps, omissions, and inconsistencies." We have responded to this mandate (1) by examining the substantive and technical aspects of existing procurement and procurement-related statutes and (2) by making appropriate recommendations for changes.

Chapter 2 discusses the need for reorganization of the general procurement statutes under a single title of the *United States Code*. Chapter 3 examines the consolidation of several groups of related statutes. Chapter 4 identifies statutes limited to one or a few agencies which can affect efforts to develop and obtain greater Government-wide consistency in procurement policies. Chapter 5 covers statutes which appear to be redundant to the basic procurement acts or other provisions. Chapter 6 lists statutes mainly identified by the procurement agencies as obsolete and no longer required for their procurement operations. For the convenience of Congress and others, Chapter 7 lists all of the recommendations made in this report which call for legislative action for implementation or where legislative action would be expedient or otherwise preferable to action by the executive agencies.

The recommendations in this part are designed to supplement and accommodate the policy and substantive recommendations in other parts of this report. Thus, in recommending codification of the procurement statutes, we intend that the provisions to be included in a codification conform to those recommended elsewhere in this report, such as provisions to consolidate the Armed Services Procurement Act and the Federal Property and Administrative Services Act and to establish an Office of Federal Procurement Policy.

To provide background for our recommendations, an appendix to this part briefly describes the constitutional, common law, statutory, and regulatory framework in which Government procurement is conducted. The purpose is to convey a general sense of the legal environment, structure, and forces affecting the procurement process.

Additional information concerning the procurement statutes is presented in the final report of the Statutory Studies Group, March 1972. This sets forth the manner in which the study was conducted, analyzes the procurement statutes in detail, and makes specific suggestions including alternatives for dealing with many of the statutory problems identified. The details in the final report of the Statutory Studies Group should also prove useful in the program for revising the statutes which we recommend in Chapter 2.

CHAPTER 2

Codification—A Consolidated Procurement Title in the United States Code

Recommendation 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.

Congress establishes fundamental procurement policies through legislation and influences the development of procurement policies in agency regulations and procedures through less formal actions ranging from committee reports and investigations to individual inquiries and recommendations often based on constituent complaints or suggestions. These actions may shape Government-wide policies or they may affect only specified agencies or programs. The development of procurement policies is also affected by actions of the General Accounting Office (GAO) which serves as an arm of Congress in overseeing executive branch activities.

Many of the 4,000 statutory provisions relating to procurement are scattered throughout the *United States Code* together with nonprocurement laws. This uncoordinated distribution of the procurement statutes is detrimental to good procurement. It significantly impedes economy, efficiency, and effectiveness in the application of the statutes by the executive agencies, industry, and the courts; detracts from congressional and executive control over the procurement process; and frustrates a unified approach to the consideration of statutory changes.

The solution to this problem is the establishment of a program for developing the technical and formal changes needed to consolidate the procurement statutes to the extent appropriate in Title 41, Public Contracts, of the *United States Code.* Such a program might be conducted by the congressional Committees on Government Operations in coordination with the House Committee on the Judiciary. As an alternative, preliminary responsibility for the analytical studies and drafting required could be assigned to the Office of Federal Procurement Policy. The program could be accomplished in part by recodification action of the House Committee on the Judiciary, but in the main will require new legislation conforming to and incorporating the substantive changes in the statutes recommended in other parts of this report; for example, the recommendation for consolidation of the Armed Services Procurement Act (ASPA) and title III of the Federal Property and Administrative Services Act (FPASA).

Advantages of Consolidation

Apart from saving words, space, and printing costs—no mean achievement per se—consolidation would make it easier and quicker to find the law. Instead of saying the same thing five times for five agencies, consolidation provides a single statement for all and, in the process, offers an opportunity to resolve any differences and to include other agencies. Consolidation would reduce the possibility of error, save the time of contract administrators

and lawyers in and out of the Government, expedite the training and qualification of new employees, and promote common understanding and uniform interpretation and administration of the law.[1] This translates into cumulatively large savings in manpower, time, and costs for both the Government and its contractors. Consolidation also would facilitate the development of the Government-wide procurement regulatory system recommended in Part A, Chapter 4, of our report.

In addition, consolidation would provide greater assurance that when a statute is to be changed, all related laws will be identified and conformed. Correcting existing laws to conform to new legislation can be a formidable problem. Although Congress recognized that the FPASA affected or superseded many other laws, the task of identifying them in advance would have delayed its enactment. Nearly two years of research by the General Services Administration (GSA) was required to develop legislation to clean up the inconsistencies and overlaps.

While not immediate and dramatic, long-term cumulative benefits will be achieved by eliminating obsolete, duplicate, and inconsistent provisions; reducing the volume of statutes; and bringing procurement statutes together in one place in an orderly and logical arrangement. Better visibility and understanding of the statutes will lead to better control of procurement by Congress, better administration by the agencies, and better performance by contractors. Minimizing controversy and misunderstanding about the statutes also should promote better relations among Congress, Government agencies, and industry.

Inertia and Resistance to Change

We recognize that no matter how rough and jerry-built current statutes may be, present practitioners and users have learned to live with them. Many can cite statutes by chapter and verse and may not relish relearning a whole new script. Also, there is always the possibility that something significant will be lost in the process. Consolidation of the procurement statutes also means more work for a busy Congress, and it will raise numerous questions of congressional committee jurisdiction. It is therefore not lightly recommended just to be logically neat but only because, in our judgment, the clear practical benefits outweigh the transitional effort and travail.

We have not attempted to recommend what should be consolidated—or how it should be accomplished. The following discussion, however, suggests approaches to consolidation and offers an outline for a consolidated procurement statute.

United States Code, Title 41, Public Contracts

Title 41 of the United States Code now contains many general procurement laws, including the early general law requiring advertising, Revised Statute § 3709; the Buy American Act; a prohibition against contracts in excess of appropriations; the Assignment of Claims Act; the officials-not-to-benefit prohibition; the Walsh-Healey Act; blind-made products provisions; the Subcontractor Anti-Kickback Act; the Contract Settlement Act; title III of the Federal Property and Administrative Services Act; the Wunderlich Act; and Service Contract Labor Standards.

Title 41 itself is not "official" law but is prima facie evidence of the law,[2] and for all practical purposes it serves, so far as it goes, the need for a compendium of the procurement laws. Accordingly, the necessary framework and a good start for bringing all the procurement laws together in one place already exists. The problem therefore reduces itself to determining which of the procurement laws, now found in the other 48 titles of the *United States Code*, should be included in title 41.

This can be done in two ways. If the law is now in one of the unofficial titles of the *Code* (for example, the Miller Act, 40 U.S.C. § 270a), it can be moved to title 41 by recodification action of the House Committee on the Judiciary.[3] In this way, 41 U.S.C. §§ 201–205 were

[1] See *Report of California Code Commission, 1947–1948*, app. G, p. 28.

[2] 1 U.S.C. § 204 (1970).

[3] 1 U.S.C. § 202 (1970).

recodified by committee action as 40 U.S.C. §§ 471–475. However, *United States Code* titles 1, 3, 4, 5, 6, 9, 10, 13, 14, 17, 18, 23, 28, 32, 35, 37, 38, 39, and 44 are official law. If a procurement provision is in one of these titles (for example, the experts and consultants statute)[4] legislation will be required to move that provision to title 41. Obviously, it would be easier to consolidate the unofficial *Code* sections than the official sections of the *Code*. This may not be a significant factor since in most cases substantive changes would be necessary in conjunction with any consolidation and recodification.

Procurement-Related Laws

Our selection of "procurement-related" laws was empirical. Nearly all the statutes are procurement-related in the sense that they generate needs for procurement, establish the procedures for procurement, or provide the overall organizational framework, staffing, and funding controls for all Government operations. However, to give practical scope to "procurement-related," selection was limited to laws which had direct application to procurement or imposed general limitations or requirements relevant to recognized problems and difficulties in procurement.

On this basis, a judgment was made not to include such statutes as agency organic acts which are basic to procurement only in the sense that agencies must buy strictly in furtherance of their own missions (for example, the Department of Health, Education, and Welfare cannot buy tanks for the Army). On the other hand, the statute authorizing agencies to subpoena witnesses was included on the basis that, although applicable to all kinds of agency claims and proceedings, it is particularly pertinent to the handling of contract claims and appeals.

Criteria for Codification

From a strictly procurement point of view, it would be desirable to have all the procurement-related laws in one place. But this is neither fair nor practical. The average contract administrator or lawyer rarely needs to consult more than a central core of general procurement statutes plus those that may be of special application to his own agency or program. Professors Nash and Cibinic cite only 200 statutes in their comprehensive casebook, *Federal Procurement Law*.[5] And our *Preliminary Compilation of Laws Pertaining to Government Procurement*, containing 450 *Code* sections, was found generally adequate for the purpose of our statutory studies.

Moreover, putting 4,000 laws or sections in one volume would make it most unwieldy and the most significant general procurement statutes would be lost in a multiplicity of statutes of minor scope and importance. This would frustrate the prime objective of making it easier to find the law.

Finally, the convenience of other interests must be considered. Some statutes have many aspects and their location should take into account the primary need of different classes of users. The Davis-Bacon Act, for example, could with equal justice be allotted to *United States Code* Title 29, Labor; Title 41, Public Contracts; or Title 40, Public Works.

In the last analysis the test as to codification must be a pragmatic one—the greatest good for the greatest number; where will the law be found most readily by the most people with the most need? This accords with ancient and modern prescription:

> The matter of a code ought, therefore, to be disposed in the most natural order. But what is the most natural order? It is the order according to which the law will be most easily consulted—in which the text which applies to a given case would be easily found and its true meaning understood. The best method is that which gives the greatest facility in finding what is sought.[6]

The draftsman should carefully select the subjects to be covered and arrange them so that they can be found, understood, and referred to with the least effort. Finally the draftsman should consider not only who and

[4] 5 U.S.C. § 3109 (1970).

[5] Nash and Cibinic, *Federal Procurement Law*, 2d ed., 1969.

[6] *Jeremy Bentham Works, View of a Complete Code of Laws*, 1962, p. 161; see also, p. 193.

how many will use a provision, but how often they will use it.[7]

Discussions with statutory experts[8] generally confirm that apart from the logic of the *United States Code* titles themselves and the patterns reflected by the treatment of statutes in the existing *Code*, there are no established formal criteria for the handling of close questions as to where multifaceted statutes should be placed or when they should be broken down under several titles. Likewise, there are no established criteria with respect to whether statutes which have expired by their own terms should be eliminated or retained because of the possibility of pending claims or proceedings. It appears that the judgment in each case is to a great extent ad hoc, subjective, and practical—what will do the most good.

Working Rules

From the foregoing, the following corollaries or working rules have been developed for possible consideration in any follow-on program for recodification and consolidation of the procurement laws:

- General provisions relevant to other Government operations as well as procurement should not be considered for recodification except where predominantly applicable to procurement. Thus 5 U.S.C. § 304, providing for subpoenas in connection with all administrative claims, including contract claims, probably should not be recodified. On the other hand, 5 U.S.C. § 3109, providing for employment of experts and consultants by contract, should be recodified in title 41 because its use for contracts would seem to overshadow its use for direct hire. Obviously, this is a matter of subjective judgment.
- Provisions which specifically refer to contracts, procurement, etc., should be recodified in title 41 except as indicated below.
- Provisions limited to a specific agency or program should not be recodified in title 41. This is on the basis that the particular should control the general, that only people working with the agency or program will generally need to use them, and that they will make title 41 harder to use if codified there. However some of these provisions might be candidates for extension to other agencies and, in such event, would be appropriate for inclusion in title 41.
- Provisions which expressly refer to contracting or procurement but are so bound by wording and context to other provisions of a general statute of broad scope that they cannot be readily severed and understood except in juxtaposition with the other provisions of the statute, should not be recodified. However, in such cases, consideration should be given to the possibility of excising such provisions and making other changes, including cross-references, to qualify them for inclusion in title 41.

Specific Examples

In accordance with the foregoing criteria, the following general statutes could be considered for transfer to title 41.

Davis-Bacon Act, 40 U.S.C. §§ 276a–276a–7

Contract Work Hours and Safety Standards Act, 40 U.S.C. §§ 327–333

29 U.S.C. § 206(e), the section of the Fair Labor Standards Act which establishes minimum wages for workers on Government service contracts not governed by the Service Contract Act and which contains special provisions respecting Government linen supply contracts.

Miller Act, 40 U.S.C. §§ 270a-f

42 U.S.C. §§ 1891–1893. These provisions authorize the use of grants for research and development with nonprofit organizations whenever an agency is authorized to enter into contracts for that purpose. It also authorizes the transfer of title to equipment purchased by such institutions under either grants or contracts.

15 U.S.C. §§ 637(a), (d), (e), and 644 providing for placing of contracts with SBA to be subcontracted to small business con-

[7] Dickerson, *The Fundamentals of Legal Drafting*, 1965, p. 56.

[8] These included members of a Statutory Advisory Panel established by the Commission and a member of the editorial staff of the West Publishing Co., which publishes the *United States Code*.

cerns, development by DOD and GSA of small business contracting and subcontracting programs, publication of proposed procurements in the *Commerce Business Daily*, and small business set-aside programs

5 U.S.C. § 3109 which authorizes contracts with experts and consultants

50 U.S.C. §§ 1431–1435 which are the extraordinary relief provisions of Pub. L. 85–804

40 U.S.C. § 276c which is the payroll reporting provision of the Copeland Anti-Kickback Act.

These particular provisions are singled out here only because they are obvious examples of the types of provisions that could be consolidated in title 41. They are by no means exclusive. The exact parameters of the task will depend on the extent to which other legislation along the lines that we have recommended in this report is enacted. Many of our other recommendations, if followed, would serve as the building blocks for the consolidation of the procurement laws in title 41.

Outline of a Consolidated Procurement Statute

The possible ways for formulating a consolidated procurement statute are probably infinite. A schematic approach, with examples of the types of provisions appropriate for each section, is shown in the following outline. Existing and proposed statutory provisions are identified for descriptive purposes only.

CONSOLIDATED PROCUREMENT LAW SCHEMATIC

Organizational Structure

Interagency Boards and Authorities

Office of Federal Procurement Policy (proposed)

Cost Accounting Standards Board, 50 U.S.C. App. § 2168

Renegotiation Board, 50 U.S.C. App. §§ 1211–33

Basic Authority for All Agencies

Employ experts and consultants, 5 U.S.C. § 3109

Employ architects and engineers, 10 U.S.C. § 4540

Acquire patents, data, and copyrights, 10 U.S.C. § 2386, etc.

Grant rights in patents, data, and copyrights (proposed)

Provide Government property and facilities, for example, title IV, Pub. L. 92–204

Provide R&D facilities, 10 U.S.C. § 2353

Transfer R&D equipment to nonprofits, 42 U.S.C. § 1892

Sell facilities to contractor in possession (proposed)

Contract for basic and applied research, 10 U.S.C. § 2358

Contract for research and development for 5 years, 10 U.S.C. § 2352

Contract for services for 5 years, 10 U.S.C. § 2306(g)

Enter into grants in lieu of R&D contracts, 42 U.S.C. § 1891

Make advance payments, 10 U.S.C. § 2307

Formalize informal agreements, Pub. L. 85–804

Gifts, 50 U.S.C. § 1151

Regulations

Regulatory system (proposed)

Authority of agency heads generally, 5 U.S.C. § 301

Authority of DOD, 10 U.S.C. § 2202

Personnel

Interagency delegations and transfers, 10 U.S.C. § 2308

Program Authorizations and Appropriations

Authorizations

Authorizations required before appropriations for DOD vessels, missiles, aircraft, NASA programs, AEC programs, Pub. L. 86–149, § 412(f) as amended, 10 U.S.C. § 133 note, architect-engineer advance planning appropriation authorized, 31 U.S.C. § 723
Multiyear authorization (proposed)

Appropriations

Annual appropriations to be applied to expenses of year, 31 U.S.C. § 712a
No contract in excess or advance of appropriations unless authorized expressly, 31 U.S.C. § 627, 665(a), 41 U.S.C. § 11
Express appropriations required for buildings, 41 U.S.C. § 12
Express appropriations required for autos and aircraft, 31 U.S.C. § 638a
Full building contract authorization if partly funded, 40 U.S.C. § 261
No-year funds for military equipment, public works, R&D, and missiles, 31 U.S.C. § 649c
No-year funds for public works, 31 U.S.C. § 682
Multiyear funds or contract authority for supplies, services, leases, 10 year utilities, 40 U.S.C. § 481(a)(3), 5 year service contracts, 10 U.S.C. § 2306(g)
One-year contracts crossing fiscal years for DOD equipment and facilities, maintenance and repair, Pub. L. 91–668, § 807(f), DOD leases, Pub. L. 91–668, § 807(j), Army fuel, 31 U.S.C. § 668, metered services, 31 U.S.C. §668a, NASA equipment and facilities, repair and maintenance, Pub. L. 91–699

Appropriation Controls

Recording of obligations, 31 U.S.C. § 200(a)(1), (3), (4)
Apportionment of appropriations, 31 U.S.C. § 665(c)
Interdepartmental orders as obligations, 31 U.S.C. § 686
Transfer of appropriations for obligation, 10 U.S.C. § 2309
Transfer of appropriations for interdepartmental orders, 31 U.S.C. § 686(b)

Supply, Stock, and Industrial Funds

Industrial funds (proposed)
GSA funds, 40 U.S.C. §§ 756, 757
Naval procurement fund, Pub. L. 87–651
Naval stock fund, 31 U.S.C. § 644

Procurement Sources

In-house performance vs. contracting-out policy (numerous specific statutes)
Interdepartmental procurement and orders, 31 U.S.C. § 686
Debarring Pinkerton-type agencies, 5 U.S.C. § 3108

Contracting Procedures and Elements

Award and Selection Procedures

Policy on formal advertising, competitive procedures and sole-source negotiation, 10 U.S.C. § 2304, 41 U.S.C. § 252
Formal advertising procedures, 10 U.S.C. § 2305, 41 U.S.C. § 253
Competitive negotiation procedures; determination and findings; solicitations; discussions within competitive range; evaluation factors—order and sources (proposed)
Small purchases (proposed)
Publication in *Commerce Business Daily*, 15 U.S.C. § 637(e)
Multiyear contracts (proposed)

Contract Types

Determination and findings for cost-type contracts, 10 U.S.C. § 2306(c)

Prohibition of cost-plus-a-percentage-of-cost contracts, 10 U.S.C. § 2306(a)
Cost-plus-incentive-fee contracts required for foreign aid, 22 U.S.C. § 2351(b)(8)

Contract Administration

Advance and progress payments, 31 U.S.C. § 529
Assignment of contracts, 31 U.S.C. § 203, 41 U.S.C. § 15
Notice of subcontracts, 10 U.S.C. § 2306(e)
Access to records—agency and GAO, 10 U.S.C. §§ 2306(f), 2313
Remission of liquidated damages, 10 U.S.C. § 2312
Contract Settlement Act, 41 U.S.C. §§ 101–125
R&D vouchers, DOD, 10 U.S.C. § 2355
Adjustments for mistakes in bids, Pub. L. 85–804
Settling patent claims (proposed)
Settling breach of contract claims (proposed)

Cost, Fee, Profit, Price Limitations

Fees for R&D, architect-engineer, cost-plus-a-fixed-fee contracts, 10 U.S.C. § 2306(d)
Uniform cost accounting standards, Pub. L. 91–379, § 719
Independent research and development, bid and proposal costs, Pub. L. 91–441, § 203
Research cost sharing, Pub. L. 92–78, § 504
Advertising costs, DOD, Pub. L. 91–668, § 834
Cost or pricing data, 10 U.S.C. § 2306(f)
Profit policy (proposed)
Renegotiation, 50 U.S.C. App. § 1211
Vinson-Trammell Act, 10 U.S.C. § 2382
Advertising rules, 44 U.S.C. §§3702, 3703

Contract Financing and Payments

Assignment of claims, 31 U.S.C. § 203, 41 U.S.C. § 15
Advance payments, 31 U.S.C. § 529, 10 U.S.C. § 2307
Guaranteed loans, 50 U.S.C. App. § 2091

Bonds

Miller Act—mandatory bonds, 40 U.S.C. § 270a, waiver for cost-type contracts, 40 U.S.C. § 270e
Miller Act—discretionary bonds, 40 U.S.C. § 270a(c)
Bid bonds—authorized, 10 U.S.C. § 2381
Bid bonds—mandatory for printing, 44 U.S.C. § 511

Government Property

Authority to provide facilities—appropriation acts, e.g., title IV, Pub. L. 92–204
Authority to provide R&D facilities, 10 U.S.C. § 2353
Sale to contractor in possession (proposed)
National industrial reserve, 50 U.S.C. § 451
Wind tunnels, 50 U.S.C. § 512

Nuclear and Extrahazardous Risks

R&D indemnification authority, 10 U.S.C. § 2354
Authority under Pub. L. 85–804
Catastrophic accidents (proposed)

Patents, Data, and Copyrights

Patents: acquiring rights privately developed, 10 U.S.C. § 2386; authorization and consent, 28 U.S.C. § 1498; settle patent claims data, mandatory requirement, 22 U.S.C. § 2356; settle data infringement claims (proposed)

Subcontracts

Notification of subcontracts, 10 U.S.C. § 2306(e)
Subcontractor Anti-Kickback Act, 41 U.S.C. § 51
Cost or pricing data requirements, 10 U.S.C. § 2306(f)

Labor

Davis-Bacon Act, 40 U.S.C. § 276a
Contract Work Hours Safety and Standards Act, 40 U.S.C. § 327
Walsh-Healey Public Contracts Act, 41 U.S.C. § 35
Service Contract Act, 41 U.S.C. § 351
Copeland Anti-Kickback Act, 18 U.S.C. § 874, 40 U.S.C. § 276c
Convict Labor Act, 18 U.S.C. § 436
Fair Labor Standards Act, 29 U.S.C. § 201
Occupational Safety and Health Act, 29 U.S.C. § 651

National Policies Implemented Through Government Procurement

Small business, 15 U.S.C. § 631, 10 U.S.C. § 2301, 41 U.S.C. § 252(b)
Buy American, 41 U.S.C. § 10a–d; Berry Amendment, Appropriation Act, Pub. L. 92–204, § 724, 85 Stat. 716
U.S. flag vessel preference, 46 U.S.C. § 1241(b); 10 U.S.C. § 2631
Environmental control, 42 U.S.C. § 1857f
Disadvantaged contractors, SBA, § 8a, 15 U.S.C. § 637(a)
Distressed labor surplus areas—no price differential, 42 U.S.C. § 2641
Geographical distribution of contracts, 49 U.S.C. § 1638
Blind-made products, 41 U.S.C. §§ 46–48
Prison industries, 18 U.S.C. § 4124

Remedies

Bid and award protests (proposed)
Wunderlich Act, 41 U.S.C. § 321
Subpoena power (proposed)
Jurisdiction of Court of Claims and District Courts, 28 U.S.C. §§ 1491, 1331
Jurisdiction of agencies (proposed)
Small claims appeal boards (proposed)

Specific Contracts

Construction

Special provisions in ASPA, FPASA, 10 U.S.C. § 2304(c), 41 U.S.C. § 252(e)

Research and Development

Cost sharing (proposed)
Five-year term authority, 10 U.S.C. § 2352
R&D facilities, 10 U.S.C. § 2353
Granting title to equipment, 42 U.S.C. § 1892
R&D contract vouchers, DOD, 10 U.S.C. § 2355
R&D delegation of authority, 10 U.S.C. § 2356
Grants in lieu of contracts, 42 U.S.C. § 1891

Architect-Engineer Services

Authority to hire, 10 U.S.C. § 4540
Fees, 10 U.S.C. § 4540

Experts and Consultants

5 U.S.C. § 3109

Utilities

Ten-year contracts authorized, 40 U.S.C. § 481(a)(3)
Fire protection, 42 U.S.C. § 1856a

Small Purchases

10 U.S.C. § 2304(a)(3); 41 U.S.C. § 252(c)(3)
Thresholds for application of specific acts (proposed)

Major Systems

Military aircraft, 10 U.S.C. §§ 2271–9
Vessel construction, 10 U.S.C. §§ 7291–7308

Commercial Products

Cost or pricing data exemption, 10 U.S.C. § 2306(f)

Emergency and Mobilization

Mandatory orders, 10 U.S.C. §§ 4501, 9501; 50 U.S.C. App. § 468; 50 U.S.C. App. § 2071
Plant seizures, 10 U.S.C. §§ 4501, 9501; 50 U.S.C. § 468
Transportation facilities seizures, 10 U.S.C. §§ 4742, 9742
Material priorities, 50 U.S.C. App. § 2071
Suspension of procurement laws, Pub. L. 85–804
Extraordinary contractual authority, Pub. L. 85–804
Contract Settlement Act, 41 U.S.C. § 101
Strategic and critical materials, 50 U.S.C. § 98

Contract Integrity, Standards of Conduct

Contingent fees, 10 U.S.C. § 2306(f), 41 U.S.C. § 254(a)
Anti-gratuities, 10 U.S.C. § 2207
Officials not to benefit, 41 U.S.C. § 22; 18 U.S.C. § 431
Anti-kickback (subcontracts), 41 U.S.C. § 51
Anti-trust; report of violations, 10 U.S.C. § 2305(d); certification on road contracts, 23 U.S.C. § 112(d); collusive bidding, Maritime Administration contracts, 46 U.S.C. § 1224
Employees of NASA/DOD and contractors—annual reporting, 50 U.S.C. § 1436, 42 U.S.C. § 2462
Contractor employment of Navy and Marine Corps officers, 37 U.S.C. § 801(a)
Contracting with government employees, 33 U.S.C. § 725

Miscellaneous

Extraordinary contractual authority, Pub. L. 85–804
No container specifications, 10 U.S.C. § 2304(h)
Taxes; exemption from firearm and excise tax, 10 U.S.C. § 2385, 14 U.S.C. § 655, 26 U.S.C. § 4182(b)
Congressional surveillance; reports to Congress; military R&D contracts, 10 U.S.C. § 2357
Congressional advance notice for military advance planning over $150,000, 31 U.S.C. § 723a
Wind tunnel transfers to educational institutions, 50 U.S.C. § 512

Recodification Without Legislation

Recodification of most statutes would involve remedial legislation. However, a number of statutes could be recodified without legislation. For example, 41 U.S.C. § 254a relates to negotiated overhead rates for institutions. It was not enacted as part of the original FPASA and is applicable to DOD, NASA, and the Coast Guard as well as the nondefense agencies. Nevertheless, it was put in chapter 4 of title 41 of the *United States Code* covering the FPASA provisions, including 41 U.S.C. § 252 (a) which states that the chapter does not apply to DOD, NASA, and the Coast Guard. The present arrangement gives the misleading impression that the section does not govern DOD, NASA, and the Coast Guard. The House Committee on the Judiciary could take the necessary corrective action since it is responsible for editorial management of the *United States Code*.[9]

Similarly, 41 U.S.C. § 256a, providing for remission of liquidated damages, is misplaced under chapter 4 since it was specifically enacted in lieu of § 256 for the purpose of placing it outside the scope of FPASA and thereby making it applicable to agencies exempt from FPASA. See note to 41 U.S.C. § 256a.

[9] See 1 U.S.C. § 201 et seq.

CHAPTER 3

Consolidation of Specific Statutes

In Chapter 2, we considered the total universe of procurement-related laws, now scattered throughout the *United States Code*, and recommended a program for codifying the procurement statutes to the extent appropriate in one title of the *Code*. Here we identify specific constellations of related statutes, such as the labor laws, which could be condensed, simplified, and harmonized by consolidation. The following discussion deals in detail with this problem.

LABOR LAWS

A number of statutes govern the working conditions and pay of employees of Government contractors. These include the Davis-Bacon Act,[1] the Contract Work Hours and Safety Standards Act (CWHSSA),[2] the Copeland Anti-Kickback Act,[3] the Walsh-Healey Act,[4] the Service Contract Act,[5] the Fair Labor Standards Act in part,[6] the Occupational Safety and Health Act of 1970 in part,[7] and the Convict Labor Act.[8] These laws contain many complicated, ambiguous, overlapping, and inconsistent provisions, and responsibility for administration of these acts is fragmented among different agencies.[9] As a result they are inherently costly and inefficient because of the unnecessary time expended by Government administrators, contractors, and subcontractors in understanding and complying with the complex details.

In some cases (for example, CWHSSA, Walsh-Healey Act, Service Contract Act), the Secretary of Labor has been given broad discretionary powers to make rules and regulations allowing reasonable variances, tolerances, and exemptions,[10] and he has used this authority to resolve some of these gaps and inconsistencies.[11] However, the resolution of some inconsistencies at the administrative level does not accomplish the basic need to simplify this complex maze of statutes. Instead, it adds another layer of detail which must be dealt with.

A complete renovation of these laws would be helpful. Their substantive provisions could be combined in a single act which would take into account any necessary variations but which could provide consistent treatment of similar matters. The following paragraphs identify some of the existing differences in the labor statutes.

Geographic Coverage

The Davis-Bacon Act covers the States and the District of Columbia. The Service Con-

[1] 40 U.S.C. §§ 276a–276a–5 (1970).
[2] 40 U.S.C. §§ 327–333 (1970).
[3] 18 U.S.C. § 874 and 40 U.S.C. § 276c (1970).
[4] 41 U.S.C. §§ 35–45 (1970).
[5] 41 U.S.C. §§ 351–357 (1970).
[6] 29 U.S.C. § 206(e) (1970).
[7] The Occupational Safety and Health Act of 1970 is codified at 5 U.S.C. §§ 5108, 5314, 5315, 7902; 15 U.S.C. § 633; 18 U.S.C. § 1114; 29 U.S.C. §§ 553, 651–678; 42 U.S.C. § 3142–1; 49 U.S.C. § 1421 (1970).
[8] 18 U.S.C. § 436 (1970).
[9] *See*, for example, Crowley, *A Comparative Analysis of the Service Contract Act of 1965*, 4 Pub. Contract L.J. 25–79 (Apr. 1971).
[10] 40 U.S.C. § 331, 41 U.S.C. § 40, and 41 U.S.C. § 353 (1970). *See also* Reorganization Plan No. 14 of 1950, 5 U.S.C. App. (1970) at p. 534.
[11] For example, the CWHSSA, which covers certain aspects of both construction and service contracts, contains no exclusion for contracts under specific dollar amounts as do the Davis-Bacon and Service Contract acts. By regulation, the Secretary of Labor has excluded construction contracts under $2,000 and service contracts under $2,500 to bring the CWHSSA in line with the other two acts. 29 CFR 5.14(b)(3) and (4).

tract and Fair Labor Standards acts extend to possessions and territories. However, the CWHSSA, Copeland Anti-Kickback, and Walsh-Healey acts have no express geographic provisions.

Applicability

CONTRACTS OF UNITED STATES AGENCIES, DEPARTMENTS, INSTRUMENTALITIES, ETC.

The Walsh-Healey Act expressly applies to independent establishments, executive departments, United States instrumentalities, and corporations wholly owned by the United States,[12] while the Davis-Bacon Act applies to contracts to which the United States is a party.[13] Other acts also use still different provisions to designate which agency contracts are covered.[14]

The Davis-Bacon, Walsh-Healey, CWHSSA, and Service Contracts acts apply specifically to District of Columbia contracts,[15] but the Copeland Anti-Kickback Act, Convict Labor Act, and the applicable portion of the Fair Labor Standards Act do not mention the District of Columbia.

FEDERAL LOANS AND GRANTS

The Copeland Act by its own terms applies to grants and loans. The Davis-Bacon Act does not do so by its own terms. However, many grant statutes incorporate Davis-Bacon requirements by reference.

PUBLIC WORKS

See Part E for discussion of application of the Davis-Bacon and Copeland acts to public works.

FORMALLY ADVERTISED AND NEGOTIATED CONTRACTS

The language of the Davis-Bacon Act states that it applies to "advertised specifications"; [16] by addendum, however, its coverage is extended to negotiated contracts.[17] The FPASA and the ASPA redundantly make the Davis-Bacon and Walsh-Healy acts applicable to negotiated contracts.[18] The Walsh-Healey Act states that it applies to any contract,[19] but later refers to "invitations for bids." [20] The Service Contract Act sometimes refers to bids and sometimes to negotiated or advertised contracts.[21] The use of different and overlapping terms is confusing.

SUBCONTRACTS

The Davis-Bacon, Copeland Anti-Kickback, CWHSSA, and the Fair Labor Standards acts,[22] though using different language, all apply specifically to subcontracts. The Walsh-Healey and Convict Labor acts do not mention subcontracts.

TYPES OF WORK

The Davis-Bacon and Copeland Anti-Kickback acts both cover construction, but the former adds "including painting and decorating" [23] while the latter adds the words "prosecution" and "completion." [24]

Manufacturer or Regular Dealer

The Walsh-Healey Act requires a supply contractor to stipulate that he is a manufacturer or regular dealer.[25] The purpose is to avoid contracting with "bid brokers" or "fly-

[12] 41 U.S.C. § 35 (1970).
[13] 40 U.S.C. § 276a(a) (1970).
[14] For example, the CWHSSA at 40 U.S.C. § 329(a) (1970), the Service Contract Act at 41 U.S.C. § 351(a) (1970), the Copeland Anti-Kickback Act at 18 U.S.C. § 874 (1970), and the Convict Labor Act at 18 U.S.C. § 436 (1970).
[15] 40 U.S.C. § 276(a) (1970), 41 U.S.C. § 35 (1970), 40 U.S.C. § 329(a) (1970), and 41 U.S.C. § 351(a) (1970).
[16] 40 U.S.C. § 276a(a) (1970).
[17] 40 U.S.C. § 276a–7 (1970).
[18] 41 U.S.C. § 258 (1970); 10 U.S.C. § 2304(f) (1970).
[19] 41 U.S.C. § 35 (1970).
[20] 41 U.S.C. § 45 (1970).
[21] 41 U.S.C. § 351 (1970).
[22] 29 U.S.C. § 206(e) (1970).
[23] 40 U.S.C. § 276a(a) (1970).
[24] 18 U.S.C. § 874 (1970).
[25] 41 U.S.C. § 35(a) (1970).

by-night operators." There is no such express requirement for other contracts, though the same result may follow from the requirement for a determination of contractor responsibility under ASPA [26] and FPASA.[27]

Wages

AUTHORIZED REPRESENTATIVE

The Walsh-Healey and Service Contract acts in empowering the Secretary of Labor to determine minimum wages also give this authority to "his authorized representative." [28] The Davis-Bacon Act does not do so expressly.

OVERTIME

The CWHSSA (which covers contracts under the Davis-Bacon and Service Contract acts) and the Fair Labor Standards Act automatically allow work in excess of certain standard hours but require premium wage rates for such overtime work.[29] Under the Walsh-Healey Act, however, the Secretary of Labor must grant special permission to exceed the maximum number of hours.[30]

STRAIGHT TIME

The maximum hours for "straight pay" under the CWHSSA is an eight-hour "calendar" day, 40-hour workweek.[31] This language is very similar to that of the Walsh-Healey Act except that the latter speaks of "eight hours in any one day." [32] The use of "calendar day" in the CWHSSA and "any one day" in the Walsh-Healey Act might have the unintended result of different overtime treatment where a worker's shift is split between two "calendar days."

[26] *See* 10 U.S.C. § 2305(c) and 10 U.S.C. § 2304(g) (1970).
[27] *See* 41 U.S.C. § 253(b) (1970).
[28] 41 U.S.C. § 38 and 41 U.S.C. § 351(a) (1) (1970).
[29] 40 U.S.C. § 328(a) and 29 U.S.C. § 207(a)(1) (1970), respectively.
[30] 41 U.S.C. § 40 (1970).
[31] 40 U.S.C. § 328(a) (1970).
[32] 41 U.S.C. § 35(c) (1970).

FRINGE BENEFITS

The Davis-Bacon Act includes fringe benefits in its overall definition of "prevailing wages." [33] That act however excludes these fringe benefits from the basic rate of pay to which the overtime premium is applicable.[34] The Service Contract Act also defines fringe benefits and requires the contractor to pay prevailing fringe benefits [35] but excludes these from overtime compensation by incorporating by reference the Fair Labor Standards Act exclusions.[36] The Walsh-Healey Act however makes no mention of fringe benefits as being included in basic wages or excluded from overtime pay computations, but the Secretary of Labor has interpreted the basic prevailing rate under the Walsh-Healey Act to include all compensation and bonuses.[37]

PAY PERIODS

The Davis-Bacon Act requires a contractor to pay employees the full amount accrued not less than once a week,[38] but the Walsh-Healey and Service Contract acts have no such requirement.

NOTICE TO EMPLOYEES

The Davis-Bacon, Walsh-Healey, and Service Contract acts are not consistent in requiring notice to the employee of the compensation or scale of wages to be paid. The provisions of the Service Contract Act are the most flexible and give the contractor the choice of either delivering notice to the employee or posting such notice.[39] The Davis-Bacon Act requires that the scale of wages be posted in a prominent and easily accessible place at the site of work,[40] but the Walsh-Healey Act has no requirement for notice to the employee concerning the scale of wages to be paid.

[33] 40 U.S.C. § 276a(b) (2) (1970).
[34] 40 U.S.C. § 276a(b) (1970).
[35] 41 U.S.C. § 351(a) (2) (1970).
[36] 41 U.S.C. § 355 (1970).
[37] Speck, briefing paper No. 67–3 in the *Briefing Paper Collection*, vol. 1, 1963–1969, pp. 241–255.
[38] 40 U.S.C. § 276a(a) (1970).
[39] 41 U.S.C. § 351(a) (4) (1970).
[40] 40 U.S.C. § 276a(a) (1970).

PAY RECORDS

The CWHSSA [41] and the Copeland Anti-Kickback Act [42] require the contractor to furnish weekly a statement of wages paid each employee. However, the Fair Labor Standards Act requires that employers make, keep, and preserve records of people employed and the wages, hours, conditions, and practices of the employee.[43]

Solicitation and Contract Provisions

The Davis-Bacon,[44] CWHSSA,[45] Walsh-Healey,[46] and the Service Contract [47] acts call for provisions to be placed in solicitations or contracts. The Davis-Bacon Act requires that each contract include a contract termination provision.[48] Neither the Walsh-Healey or Service Contract acts require such a contract provision, although they both give the Government the right to cancel or terminate.[49] The Davis-Bacon, CWHSSA, Walsh-Healey, and Service Contract acts authorize the Government to withhold payments to the contractor, but only the Davis-Bacon Act [50] and the CWHSSA [51] require a contract provision to that effect. The CWHSSA and the Walsh-Healey Act contain liquidated damages provisions, but only the CWHSSA [52] requires a liquidated damages provision in the contract.

Administration Responsibility

The Davis-Bacon, CWHSSA, Walsh-Healey, and Service Contract acts contain different provisions as to who has authority to administer various requirements such as determination of wage underpayments, withholding of payment, determination of violations for purposes of debarment, and payment of underpaid employees with withheld funds. The Davis-Bacon Act specifies the contracting officer as the official determining the amount of the wage underpayment.[53] The CWHSSA is not as clear as to who makes this determination, merely stating that it will be "administratively determined," although a reasonable interpretation would be that the contracting agency is given this authority since, in the same sentence, the contracting agency is given the authority to withhold payments.[54] The Walsh-Healey Act gives the authority for wage underpayment determination to the Secretary of Labor,[55] although he is given wide discretion to delegate this authority.[56] The Service Contract Act gives authority for determination of wage underpayment to either the Secretary of Labor or the agency head.[57] The Davis-Bacon Act gives to the Comptroller General authority to determine violations for purposes of debarment.[58] However, the Walsh-Healey Act gives such authority to the Secretary of Labor [59] and the Service Contract Act gives the authority to either the Secretary of Labor or the contracting agency.[60] The Davis-Bacon Act [61] and CWHSSA [62] give authority to withhold payments from the contractor to the Comptroller General. The Walsh-Healey [63] and Service Contract [64] acts state that payment will be made on order of the Secretary of Labor.

Enforcement

DEBARMENT

The debarment provisions of the acts differ.[65] See Part G for discussion of this problem.

[41] 40 U.S.C. § 330(d) (1970).
[42] 40 U.S.C. § 276c (1970).
[43] 29 U.S.C. § 211(c) (1970).
[44] 40 U.S.C. § 276a(a) (1970).
[45] 40 U.S.C. § 328(b) (1970).
[46] 41 U.S.C. § 35 (1970).
[47] 41 U.S.C. § 351(a) (1970). The terms "advertised specifications" and "bid specifications" as discussed earlier are phrases normally associated with formally advertised contracts and should be avoided unless they are intended to be used in this specific sense. The term "contract solicitation" is a much broader term and could be used to denote solicitations used in both the formally advertised and the negotiated methods of procurement.
[48] 40 U.S.C. § 276a(a) (1970).
[49] 41 U.S.C. § 36 and 41 U.S.C. § 352(c) (1970), respectively.
[50] 40 U.S.C. § 276a(a) (1970).
[51] 40 U.S.C. § 328(b) (1970).
[52] 40 U.S.C. § 328(b) (1970).
[53] 40 U.S.C. § 276a(a) (1970).
[54] 40 U.S.C. § 330(a) (1970).
[55] 41 U.S.C. § 37 (1970).
[56] 41 U.S.C. § 38 (1970).
[57] 41 U.S.C. § 352(a) (1970).
[58] 40 U.S.C. § 276a-2(a) (1970).
[59] 41 U.S.C. § 37 (1970).
[60] 41 U.S.C. § 354(a) (1970).
[61] 40 U.S.C. § 276a-2(a) (1970).
[62] 40 U.S.C. § 330(a) (1970).
[63] 41 U.S.C. § 36 (1970).
[64] 41 U.S.C. §§ 352(a) and 354(b) (1970).
[65] *Cf.* 40 U.S.C. § 333(d), 41 U.S.C. § 37, 41 U.S.C. § 354(a), 40 U.S.C. § 276a-2(a) (1970).

WITHHOLDING

The acts also differ as to whether funds may be withheld from collateral contracts or just from the contract violated.[66]

LIQUIDATED DAMAGES

Only the CWHSSA and Walsh-Healey acts have provisions for liquidated damages,[67] and these are not the same.

CONTRACT CANCELLATION

The Davis-Bacon, Walsh-Healey, and Service Contract acts provide for contract cancellation for violation of any provisions of the respective acts,[68] but the CWHSSA provides only for contract cancellation for violations of its health and safety standard provisions.[69]

OTHER INCONSISTENCIES IN REMEDIES

Under the CWHSSA,[70] the contractor has the right to appeal determinations to withhold liquidated damages to the agency head and to appeal final orders of the agency head to the Court of Claims. Although the Walsh-Healey Act also provides for liquidated damages, no statutory right of appeal is given the contractor concerning the determination of liquidated damages. The Davis-Bacon Act and the CWHSSA give an underpaid employee a right of action against the contractor.[71] No similar employee right of action exists under the Walsh-Healey or Service Contract acts, although the Government is given such a right of action with recoveries being held for the benefit of the underpaid employee.[72] However, the Walsh-Healey Act provides a statute of limitation of one year from the date of notification to the contractor of a withholding on claims made by underpaid employees for their share of the withholdings.[73] The Service Contract Act has a three-year period in which payment must be made but no period of limitation as such on the submission of claims.[74]

JUDICIAL REVIEW

The Administrative Procedures Act (APA) is specifically made applicable to the administration of the Walsh-Healey Act, including judicial review of wage determinations and other legal questions.[75] This right is given to any interested person. The Davis-Bacon and other acts do not expressly require adherence to APA standards.

CRIMINAL PENALTIES

The CWHSSA provides criminal penalties for intentional violations of any of the provisions of the act (hours, overtime, and safety and health).[76] The Fair Labor Standards Act also contains criminal penalties, but the other acts do not.

SAFETY AND HEALTH STANDARDS

The Occupational Safety and Health Act of 1970,[77] a recently enacted national safety and health law, recognizes the duplication between its provisions and those of the CWHSSA, Walsh-Healey, and Service Contract acts. It provides that standards promulgated under it will supersede Walsh-Healey, CWHSSA, and Service Contract act standards.[78] It also requires the Secretary of Labor to report to Congress, within three years, his recommendations for legislation to avoid unnecessary duplication and achieve coordination between the Occupation Safety and Health Act and other Federal law.

[66] 40 U.S.C. § 276a(a) (1970) and 40 U.S.C. § 328, 41 U.S.C. §§ 36, 354(a) (1970).
[67] 40 U.S.C. § 328(b) (2), 41 U.S.C. § 37 (1970).
[68] 40 U.S.C. § 276a–1, 41 U.S.C. § 36, and 41 U.S.C. § 352(c) (1970), respectively.
[69] 40 U.S.C. § 333(b) (1970).
[70] 40 U.S.C. § 330(c) (1970).
[71] 40 U.S.C. § 276a–2(b) and 40 U.S.C. § 350(b), respectively.
[72] 41 U.S.C. § 36 and 41 U.S.C. § 354(b) (1970), respectively.
[73] 41 U.S.C. § 36 (1970).
[74] 41 U.S.C. § 354(b) (1970).
[75] 41 U.S.C. § 43a (1970).
[76] 40 U.S.C. § 332 (1970).
[77] Pub. L. 91–596, 84 Stat. 1590.
[78] 29 U.S.C. § 653(b)(2) (1970).

Child Labor

The Walsh-Healey Act is the only Government contract labor statute which prohibits the employment of child labor (males under 16, females under 18).[79] The Fair Labor Standards Act generally defines "oppressive child labor" as the employment of persons under the age of 16.[80] No sex distinction is made. The age differences for males and females under the Walsh-Healey child labor provisions appear to be inconsistent with the civil rights laws which prohibit sex discrimination.[81]

Statutory Suspensions and Exceptions

The President has the power to suspend the provisions of the Davis-Bacon and Walsh-Healey acts.[82] Similar authority is not contained in CWHSSA or the Service Contract Act.

The Secretary of Labor has authority to allow reasonable variances, tolerances, and exemptions from the requirement of the CWHSSA, Walsh-Healey, and Service Contract acts,[83] but there is no parallel authority under the Davis-Bacon Act.

Summary

There are numerous gaps and inconsistencies in coverage in the labor acts in essentially analogous areas. We have cataloged many of these. But our listing is by no means complete. It seems clear that there is considerable room for improvement in these acts.

EXPERTS AND CONSULTANTS

The conditions under which expert and consultant services can be obtained by contract are generally governed by 5 U.S.C. § 3109. The thrust of the statute is to allow contracting for experts and consultants when "authorized by appropriation or other statute." The statute also limits the pay of experts and consultants to the GS–18 level except where higher rates are specifically authorized.

Because of the wording of 5 U.S.C. § 3109, it has proved necessary to either include in the "organic acts" of various agencies, commissions, and the like, provisions authorizing contracting "as authorized by 5 U.S.C. § 3109," or provide such authority as part of the annual appropriation acts. A study of all the appropriation acts passed by the 91st Congress, 1st Session (1969), revealed approximately 90 separate places in which various agencies or elements of an agency were given authority to contract for experts and consultants.

Although most agencies are granted authority to contract for experts and consultants, in some cases limitations beyond those stated in 5 U.S.C. § 3109 are imposed. Sometimes a per diem rate on compensation for experts and consultants below that authorized by 5 U.S.C. § 3109 is included.[84] Sometimes, an appropriation act will place a total dollar limit on the amount of the appropriations which may be used for such contracting in the given fiscal year. A third type of limitation, rarely found, is a limit on the number of days any one individual may be retained in any year as an expert or consultant.

ACCESS TO RECORDS

A number of separate laws require those holding negotiated Government contracts, and their subcontractors, to afford the Government access to their books and records for the purposes of inspection and audit.

The Basic Statutes

ASPA and FPASA, which together govern procurement by most departments, agencies,

[79] 41 U.S.C. § 35(d) (1970).
[80] 29 U.S.C. § 203(l) (1970).
[81] *See* 42 U.S.C. § 2000e–2(a)(1) (1970).
[82] 40 U.S.C. § 276a–5 and 41 U.S.C. § 40 (1970), respectively.
[83] 40 U.S.C. § 331, 41 U.S.C. § 40, and 41 U.S.C. § 353 (1970), respectively.

[84] In some cases it may be that the limit when enacted was higher than 5 U.S.C. § 3109 then allowed, but is now lower because of later pay raises in the civil service.

and establishments of the Government, were both amended by the Act of October 31, 1951,[85] to provide for the right of audit by GAO of all contracts negotiated under either of these statutes.[86] As thus amended, each act provides that the Comptroller General and his representatives, for a period expiring three years after final payment under the contract, shall have the right to examine the books, documents, papers, and records of the contractor and those of his subcontractors that directly pertain to or involve transactions relating to the contract or subcontract. The 1951 language used to amend ASPA and FPASA was identical, but different language entered ASPA when it was codified in 1956.[87]

The foregoing provisions were further modified by Pub. L. 89–607[88] which exempted certain foreign contractors from their access-to-records provisions. In some cases, a determination must be made by the head of the agency concerned that such omission would be in the best interest of the United States. That determination is made expressly nondelegable by 41 U.S.C. § 254(c) (last sentence); but there is no similar requirement in 10 U.S.C. § 2313(c), and such determination is delegable under 10 U.S.C. § 2311.[89]

There is no corresponding statute providing similar general access-to-records rights to the contracting agencies concerned in the case of fixed-price contracts.

The contracting agencies, however, are given the right to inspect the plants and audit the books and records of cost or cost-plus-a-fixed-fee contractors and their subcontractors by 10 U.S.C. § 2313(a) and 41 U.S.C. § 254(b). These latter provisions grant a direct statutory right of inspection of plant and premises in such cases, whereas the GAO provision requires a contract clause to grant GAO audit rights.

It is doubtful that Congress intended any difference in the scope of 10 U.S.C. § 2313(a) and 41 U.S.C. § 254(b), but a literal reading of them leads to a difference in their coverage of subcontracts. Under 10 U.S.C. § 2313(a), inspection and audit rights must be inserted in *all* subcontracts under a cost or cost-plus-a-fixed-fee prime contract, regardless of whether the subcontract was let on a fixed price or cost reimbursable basis. On the other hand, under 41 U.S.C. § 254(b), inspection and audit rights need be inserted only into subcontracts let on a cost or cost-plus-a-fixed-fee basis. Literally, under 41 U.S.C. § 254(b), such inspection and audit rights may be required in any cost-reimbursable subcontract even if the prime contract is on a fixed-price basis.

The access-to-records provisions of Pub. L. 85–804 in 50 U.S.C. § 1433(b) are the same as those in FPASA at 41 U.S.C. § 254(c). A similar amendment to 50 U.S.C. § 1433(b) was enacted by Pub. L. 89–607, cited above, with respect to the exemption of certain foreign contractors from such access-to-records provisions.

Several other statutes of more limited scope are essentially like Pub. L. 85–804 in that they allow contractual actions without regard to the normal legal safeguards and requirements. These include 42 U.S.C. § 2202, which applies to the AEC; 50 U.S.C. App. § 2293, which deals with civil defense matters; 22 U.S.C. § 2509(d), which applies to ACTION; 22 U.S.C. § 2583, which applies to the United States Arms Control and Disarmament Agency; and 36 U.S.C. § 138b, which applies to the American Battle Monuments Commission. None of these provisions includes a requirement similar to that of Pub. L. 85–804 for access to contractors' records by agency representatives, though the AEC statutes provide for access by GAO.[90]

Originally the Truth in Negotiations Act did not provide a right of access to records for the purpose of evaluating cost or pricing data.[91] But it was amended to add a provision that any authorized representative of the head of the contracting agency concerned, who was also an employee of the Government, should have the right to examine all books, records, documents, and other data of the contractor

[85] Act of Oct. 31, 1951, ch. 652, 65 Stat. 700.

[86] 10 U.S.C. § 2313(b) and 41 U.S.C. § 254(c) (1970).

[87] Act of Aug. 10, 1956, ch. 1041; 70A Stat. 132.

[88] Act of Sept. 27, 1966; Pub. L. 89–607; 80 Stat. 850.

[89] H.R. Rep. No. 693, 89th Cong., 2d Sess., at p. 3, indicates that it was intended to make such determinations nondelegable in the case of DOD contracts as well. It stated that, "This section amends chapter 137 of Title 10, United States Code, so as to permit the omission . . . if the agency head determines . . . The authority to make such a determination is not delegable below the head of the agency and is subject to the concurrence of the Comptroller General . . ."

[90] 42 U.S.C. § 2206 (1970).

[91] Act of Sept. 10, 1962, 76 Stat. 528, Pub. L. 87–653.

or subcontractor involved that was related to the negotiation, pricing, or performance of the contract or subcontract for the purpose of evaluating the accuracy, completeness, and currency of cost or pricing data required to be submitted, for a period expiring three years after final payment under the contract or subcontract.[92] This statutory provision applies only to agencies subject to ASPA. However, similar requirements have been established by the Federal Procurement Regulations (FPR) for agencies subject to FPASA.[93]

Under 41 U.S.C. § 53, GAO is given the right to inspect the plant and audit the books and records of any contractor engaged in the performance of a negotiated Government contract, whether fixed-price or cost-reimbursable, and of any subcontractor engaged in the performance of any subcontract thereunder, for the purpose of determining if any payments have been made or granted by any subcontractor as a gratuity or inducement for award of the contract or subcontract.

Under 50 U.S.C. § 2168(j), representatives of the Cost Accounting Standards Board, the contracting officer, and GAO have the right to examine and make copies of any documents, papers, or records of such contractors relating to compliance with cost-accounting principles and standards.[94]

Because of differences in the wording of their statutes, intensive efforts by GAO and DOD to draft a single contract audit clause fell short of that goal in 1971. Instead two clauses were drafted, one for audits by GAO and the other for audits by the Defense Contract Audit Agency, combining to that extent at least the numerous special audit clauses for different kinds of contracts that had previously been prescribed.[95]

[92] Act of Sept. 25, 1968, Pub. L. 90-512, 82 Stat. 863.
[93] FPR 1-3.814-2(c).
[94] 50 U.S.C. App. § 2168(j) (1970).
[95] *See* ASPR 7-104.15 and 7-104.41.

CONTRACTING IN ADVANCE OF APPROPRIATIONS

At present, four separate, interrelated, and overlapping provisions generally prohibit contracting officers from contracting in advance of or in excess of appropriations, except as otherwise specifically authorized by law.

As provided in 31 U.S.C. § 627, no act of Congress may be construed to authorize the execution of a contract involving the payment of money in excess of appropriations made by law, unless the act shall in specific terms declare that such a contract may be executed.

Under 31 U.S.C. § 665(a), no officer or employee of the United States may make or authorize an expenditure from or create or authorize an obligation under any appropriation or fund in excess of the amount available therein; nor may any such officer or employee involve the Government in any contract or other obligation, for the payment of money for any purpose, in advance of appropriations made for such purpose, unless such contract or obligation is authorized by law (popularly known as the Anti-Deficiency Act).

It is also provided in 41 U.S.C. § 11 that no contract or purchase on behalf of the United States shall be made, unless the same is authorized by law or is under an appropriation adequate to its fulfillment. Certain exceptions are made for DOD; for example, subsistence, medical, and hospital supplies.

Finally, 41 U.S.C. § 12 provides that no contract shall be entered into for the erection, repair, or furnishing of any public building or for any public improvement which shall bind the Government to pay a larger sum of money than the amount in the Treasury appropriated for the specific purpose.[96]

[96] In 42 Comp. Gen. 226 (1962), 41 U.S.C. § 12 was cited as authority for the proposition that the construction of a public building or public work may not be implied from the overall scope of the appropriation but must be specifically mentioned.

CHAPTER 4

Statutes of Limited Application

Our examination of existing statutes affecting procurement disclosed a number of laws pertaining to only one or a few agencies. In general, they either grant special procurement authority or impose restrictions or controls which do not pertain Government-wide. For example, DOD annual appropriation acts regularly have contained a provision limiting the types of advertising costs which can be charged to DOD contracts. In a few cases we recommend making these restricted statutes applicable to all agencies. In other cases we did not attempt to assess the desirability or necessity of the authorities or limitations prescribed by special statutes, and, therefore, make no recommendations for either their repeal or extension to procurement actions of all agencies. However, the continued existence of such special provisions obviously will impact on efforts to develop and obtain greater Government-wide consistency in procurement policies and regulations.

STATUTES RECOMMENDED FOR EXTENSION

Truth in Negotiations Act

Recommendation 2. Extend the Truth in Negotiations Act to all Government procurement agencies and develop coordinated regulations for interpretation and application of its provisions.

THE ACT SUMMARIZED

The Truth in Negotiations Act [1] requires DOD, NASA, and Coast Guard contractors and subcontractors to submit cost or pricing data prior to entering into negotiated contracts, subcontracts, or price adjustments thereof, involving $100,000 or more. The data must be certified accurate, current, and complete as of a date as close as practicable to the date of agreement on the price. Contractors in effect must guarantee the data by agreeing to a price reduction for any increase due to defective data. At the option of any agency head, certified cost or pricing data may be required on price changes under $100,000. Exemptions are authorized from the requirements of the act in three cases where the price is based on:

Adequate price competition,

Established catalog or market price of commercial items sold in substantial quantities to the general public, or

Price set by law or regulation.

Also the agency head may grant a waiver in exceptional cases for reasons stated in writing.

CONTINUED NEED FOR THE ACT

When the Truth in Negotiations Act was passed, some contractors were reluctant to reveal their cost or pricing data to the Government.[2] By now, however, whether due to experience under the law or to the independent evolution of pricing understanding and techniques, contractors generally recognize that when contracts must be priced by cost analysis,

[1] 10 U.S.C. § 2306(f) (1970).

[2] For a comprehensive summary of the legislative history of this act, see Herbert Roback, *Truth in Negotiating: The Legislative Background of P.L. 87-653*, 1 Pub. Contract L.J., 3-28. (July 1968). For earlier background, *see* "The Evolving Art of Contract Pricing, 1942-1959" and "The Blue Books Speed the Evolution, 1957-1962," Study Group 7 (Cost and Pricing Information), *Final Report*, Feb. 1972, pp. 180-212.

the Government needs the contractor's cost or pricing data to be in an estimating and bargaining position equal to that of the contractor.[3]

In many cases the Government has resident auditors at a contractor's plant, but they cannot, with a small staff, be expected to do as thorough a job of cost accounting as that done by the contractor's staff. Even if they could, they would be duplicating work that the contractor must do in its own interests and for its own pricing and management. Some contractors say that one good result of the law has been a strengthening of their internal procedures for recording, collecting, and communicating data.

While outright refusal to disclose data is not widespread, a problem does exist in some industries for some classes of products. In these cases, arguments center on whether there is an acceptable alternative to cost as the basis for reaching agreement on price. A company may claim that the price it offers has been set by competition, that cost data is proprietary, or that disclosure of cost information is inimical to its competitive position. Some companies maintain that because of the nature of their product and the way it is produced, customary cost estimates and supporting accounting data are not meaningful in establishing price.

We have concluded that the Truth in Negotiations Act properly utilized is a valuable tool to assist contracting officers in establishing prices.

EXTENSION TO OTHER AGENCIES

The act does not apply to the civilian agencies other than NASA. It would seem obvious that if truth in negotiations is good for the military departments and NASA, it is equally good for other civilian agencies. The desirability of uniformity in this regard has been recognized and accommodated by incorporating truth in negotiations requirements in the Federal Procurement Regulations.[4] This makes them applicable to all the civilian agencies. However, extension of the act itself to the civilian agencies is appropriate as it would give the requirements statutory standing and permanence and greater legal force and effect. This is consistent with our Recommendation 2 in Part A, Chapter 3, to eliminate inconsistencies by consolidating ASPA and FPASA, the two basic procurement acts.

COORDINATED REGULATIONS

The regulations implementing the Truth in Negotiations Act should be coordinated to achieve uniform application and interpretation to the extent feasible. This would minimize variances in practices and eliminate differences in the procurement regulations of different agencies, for example, with respect to obtaining prospective contractor or subcontractor cost or pricing data[5] and the form and number of contract clauses used to give effect to the act.[6] In this connection, see our recommendations 1 and 10 in Part A for a central Office of Federal Procurement Policy and for a system of Government-wide procurement regulations.

Renegotiation Act

CONTINUATION AND EXTENSION OF THE RENEGOTIATION ACT

Recommendation 3. Extend the Renegotiation Act for periods of five years.[7]

Recommendation 4. Extend the Renegotiation Act to contracts of all Government agencies.

There is a widely held conviction that no contractor should be permitted to retain exces-

[3] After soliciting the views of 300 corporate and Government organizations, Study Group 7 reported that most Government people believe the law is a good law and most companies recognize the right of the Government to get cost or pricing data in noncompetitive situations, though many question the continued need of a law for this purpose or for enforcing it by a provision for price reduction for defective data. The main objections of industry are to overzealous administration of the law, its use of loose and uncertain terminology, and the one-sided operation of the law in favor of the Government. Study Group 7 (Cost and Pricing Information), *Final Report*, Feb. 1972, pp. 226, 227, 268, 309.

[4] FPR 1-3.807-3.

[5] *Cf.* ASPR 3-807.3(b), FPR 1-3.807-3(b), and NASA Procurement Directive No. 70-2, Feb. 3, 1970.

[6] *Cf.* ASPR 7-104.29, 7-104.41, 7-104.42, and NASA PR 3.807-4.

[7] While Commissioner Staats favors continuation of the Renegotiation Board and its extension for periods longer than two years, he is unable to take a position on the specific recommendations since an independent review of the Board by the General Accounting Office is now in process. However, he will be prepared to testify on the recommendations at a later time.

sive profits on defense contracts, and the Government has attempted by various means to regulate the amount of profit a contractor can earn on such work. Since World War II, the Government has relied primarily on renegotiation procedures to eliminate excess profits.

Advocates of the present Renegotiation Board believe that the Board's impressive total of determinations of excessive profits (more than $1 billion since 1951)[8] amply justifies its continued existence. On the other hand, critics point out that the growing professionalism of procurement personnel and more stringent laws requiring disclosure of price and cost information during negotiation of defense contracts tend to make the likelihood of excessive profits remote.

Industry asserts that there are disadvantages to renegotiation because after-the-fact examination of costs and related profits tends to penalize a producer whose low-cost, efficient operations yielded a comparatively larger profit. In this situation, there is little incentive for such a producer to continue to employ tight cost controls and to exercise strong management.

Renegotiation originated in the early days of World War II as a new method of guarding against excessive profits on war contracts [9] and the current act reflects the focus of its predecessors.[10] The act subjects to renegotiation profits from sales to the Government under contracts having a direct and immediate relation to the national defense. At present, only contracts made by DOD, NASA, GSA, FAA, AEC, and the Maritime Administration are subject to the act.[11]

Today, however, unique large-dollar contracts for sophisticated services or supplies are made by civilian as well as defense agencies. As a result, the act treats many Government contracts unequally, and this dual standard is no longer tenable. The retention of excessive profits under Government contracts is unacceptable regardless of the agency making the contract. Accordingly, we have concluded that the provisions of the Renegotiation Act should extend to sales made to all Federal agencies in order to afford equitable treatment to all contractors.

We have further concluded that the Renegotiation Board should be statutorily renewed for periods of five years. Shorter extensions of the Board's life demonstrate continuing congressional support for the Board, but an excessively short statutory lifespan has made its operations difficult. The present two year lifespan does not foster the efficient development of long-range plans, recruitment of people, or an atmosphere of continuity.

INCREASE IN JURISDICTIONAL AMOUNT

Recommendation 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.*

We have concluded that the thresholds for renegotiation should be raised to $2 million for company sales and to $50,000 for agent fees. This would permit renegotiation personnel to focus their attention on the most significant areas of potential recoupment. Board statistics for fiscal 1970 show that by raising the threshold to $2 million, the Board's work, measured by the number of excess profit determinations, would be decreased 36 percent but its recoveries of excess profits would be reduced by about $5.31 million or only 16 percent.[12] This does not reflect the savings to industry, particularly to small contractors, from being relieved of annual renegotiation filing and processing costs on sales between $1 million and $2 million.

We note that the Government Activities Subcommittee of the House Commmittee on Government Operations has recommended lowering the jurisdictional threshold for company sales to $100,000.[13] Their report stated:

> There is no logical basis for excluding contractors with renegotiable sales of less than

[8] *See* U.S. Congress, House, Committee on Government Operations, hearings on Renegotiation Board Operations before a subcommittee, 92d Cong., 1st Sess., table VI, p. 21, 1971.

[9] *See Navy Contract Law* § 6.9 (2d ed. 1959).

[10] 50 U.S.C. App. §§ 1211–1233 (1970).

[11] 50 U.S.C. App. §§ 1212(a), 1213(a) (1970).

*See dissenting position, *infra.*

[12] House Committee on Government Operations, *The Efficiency and Effectiveness of Renegotiation Board Operations*, sixth report by the Committee on Government Operations, H.R. Rept. 758, 92d Cong., 1st Sess., 7–8, 1971.

[13] *Ibid.* at 15.

$1 million, on either legal or moral grounds. The concept of excessive profit is repugnant to the interests of the public, irrespective of the size of the recipient.

However we believe that lowering the threshold to $100,000 would call for a substantial costly increase in the staff of the Renegotiation Board.

Dissenting Position

Some Commissioners* dissent from the recommendation to raise the jurisdictional amount under the Renegotiation Act.

CLARIFICATION OF CRITERIA

Recommendation 6. Expand and clarify the criteria used by the Renegotiation Board.**

The Renegotiation Board has operated for more than twenty years. While some statutory adjustments have been made in the Board's operations, there has not been any major revision of the Board's charter to reflect experience gained. We believe revisions should be made in a number of areas. For example, there exists no standard known outside the Renegotiation Board itself for a determination of excessive profits under the Renegotiation Act. A clear and precise definition of excessive profits is lacking, and the Board has contributed to this uncertainty by failing to establish and publish standards by which it determines profits to be excessive. Excessive profits are what the Renegotiation Board says they are. After having issued determinations of excessive profits exceeding one billion dollars, the Board should have accumulated sufficient experience to develop and publish standards.

Procuring agencies often negotiate contracts in which the contractor bears risks of performance that are significantly higher than normal and under which the contractor's success in meeting these risks is rewarded by special monetary awards, incentives, value engineering fees, or profits. However, these fees or profits are then subjected to renegotiation. The agencies assert they are fully justified in negotiating contracts to reward contractors who deliver goods and furnish services of more than target quality or at less than target cost to the Government. If the contractor achieves the desired objectives, the added value or savings to the Government far exceed the contractor's reward.

The Renegotiation Board has stated that meritorious performance of high-risk contracts is considered in determining excess profits and that no additional statutory directives are required for this purpose. Nevertheless, many contracting people in and out of Government believe that the Board should be instructed explicitly by statute to permit contractors under incentive contracts to retain fees and profits attributable to superior performance accruing to the direct benefit of the Government.

A persistent criticism by contractors of the renegotiation process is that in examining the profits earned in one fiscal year, the Board may not fully consider losses or low profits experienced in a prior year. The volume and nature of a contractor's sales and related profits and losses often vary widely from year to year. Income also may be affected significantly by research, development, design, and production engineering problems, delays in procurement of specialized equipment, labor learning and other startup costs, and by strikes, acts of God, supply breakdowns, or other production difficulties beyond a contractor's control. Factors such as these tend to produce peaks and valleys in a contractor's renegotiable income from year to year.

To some extent the Renegotiation Board may consider extraordinary costs and deficient profits in prior years. The act itself provides for a renegotiation loss carry-forward—that is, a deduction of losses from succeeding years' profits for a period of five years.[14] Under Renegotiation Board regulations, startup costs may be allocable over several years under a "differing accounting methods" agreement[15] or, even without such agreement the Board will give consideration to deficient profits in prior years resulting from nonrecurring costs in early stages of production, such as labor costs, excessive defective work, idle time, and poor

*Commissioners Holifield and Horton.

**See dissenting position, *infra*.

[14] 50 U.S.C. App. § 1213(m) (4) (1970).

[15] 32 CFR § 1459.1(b) (2).

production occasioned by changes in production methods, design, tooling, plant layout and rearrangement, and abnormal scrap losses.[16] These specifics, however, do not cover all causes of fluctuations from year to year in a contractor's renegotiable profits. In the opinion of contractors, it would be more equitable to average a contractor's good and bad years to determine excess profits.

Dissenting Position

Some Commissioners,* as an alternative to the foregoing Recommendation 6, recommend that it be supplemented to read as follows:

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.

The added language would exclude fixed-price contracts from the gross amount of a contractor's Government business subject to renegotiation. It is the view of the Commissioners supporting this alternative recommendation that the basic principles and objectives of Government procurement through fixed-price contracting, including contracts arrived at through advertised bids, are violated by the prospect of renegotiation of profits resulting from such procurements. The greater risks which contractors assume under fixed-price contracts warrant their retention of the full profits earned under these contracts. On the other hand, the risks under cost-type contracts are relatively minimal and there is therefore justification for recapture of excess profits accruing thereunder. Furthermore, adoption of a proposed limitation as recommended would have an additional therapeutic value in minimizing cost-type contracts by encouraging suppliers to seek fixed-priced contracts whenever they are appropriate. A change in the act would appear necessary to accomplish the proposed limitation.

[16] 32 CFR § 1460.10(b) (5).

*Commissioners Beamer, Gurney, Horner, and Joers.

OTHER STATUTES OF LIMITED APPLICATION

As noted below, our recommendations on the following statutes of limited application appear elsewhere in this report.

Independent Research and Development

Section 203 of Pub. L. 91–441, 84 Stat. 907, imposes restrictions on the payment of Independent Research and Development and Bid and Proposal costs from funds authorized for appropriation to the Department of Defense. See Recommendation 10 in Part B.

Architect-Engineer Statutes

Five statutes inconsistently regulate the fee payable to architect-engineers.[17] Three of these and two other statutes provide express authority for the Army, Navy, Air Force, GSA, and VA to contract for A–E services.[18] One statute requires 30-day advance notice to the congressional Committees on Armed Services before the Army, Navy, or Air Force may spend $150,000 or more for advance planning.[19] See Recommendation 4 in Part E.

Research Cost Sharing

Section 504, Pub. L. 92–78, which was preceded by Pub. L. 91–126, in effect requires cost sharing by a contractor on any research project not specifically solicited by the Government. It applies to HUD and certain other independent agencies. However, OMB Circ. A–100 extends these requirements to other agencies. See Recommendation 8 in Part B.

[17] 10 U.S.C. § 2306(d); 41 U.S.C. § 254(b); 10 U.S.C. §§ 4540, 7212, 9540 (1970). *See* 22 Comp. Gen. 464; 46 Comp. Gen. 183; 46 Comp. Gen. 573, 576; GAO Report B–152306, June 6, 1965.

[18] 10 U.S.C. §§ 4540, 7272, 9540; 40 U.S.C. § 609(a), (b); 38 U.S.C. § 5002. *See also* 5 U.S.C. § 3109 (1970).

[19] 31 U.S.C. § 723a (1970).

Although we have not made recommendations concerning them, the following additional statutes should be considered in efforts to achieve Government-wide consistency in procurement policies.

Restrictions on Advertising Costs

The annual defense appropriation acts regularly prohibit payments to defense contractors for any contractor advertising costs other than those incurred for recruitment, scarce materials, or surplus property.[20]

Cost Accounting Standards

In 1970 the Defense Production Act of 1950 was amended to establish the Cost Accounting Standards Board to promulgate cost accounting standards for use by defense contractors and subcontractors.[21] Currently, the Board is developing such cost accounting standards, and it published an initial installment effective July 1, 1972.[22]

Although under the statute the standards promulgated by the Board apply only to defense contracts and subcontracts, the Federal Procurement Regulations (FPR) prescribe the use of such standards for nondefense contracts.[23] A recent supplement to the FPR, which exempts competitively negotiated nondefense contracts,[24] is now being considered by the Cost Accounting Standards Board.

Although Study Group 7 (Cost and Pricing Information) examined a number of problems in this area and made several recommendations for change,[25] we believe that operational experience under the standards thus far promulgated is too limited for evaluation and it would be premature to make recommendations at this time as to extent of need for and best means of achieving greater uniformity in the application of cost accounting standards to defense and nondefense contracts.

Contracting Across Fiscal Years

As a rule, service contracts funded by annual appropriations must be for terms within the current fiscal year.[26] However, in a few cases, Congress has granted exceptions authorizing an agency to contract across fiscal years, for example:

- NASA contracts for support services and maintenance and operation of facilities [27]
- DOD contracts for tool and facility maintenance and leases for real and personal property [28]
- Army contracts for fuel.[29]

An Army provision, 31 U.S.C. § 668a, although not directly related to contracting across fiscal years, authorizes payment of metered services from fiscal year funds current at the end of the period of service, if the period of service extends across fiscal years.

Recrediting of Default Recoveries

In the absence of special authority, default collections must be deposited in a "Miscellaneous Receipts" account maintained by the Department of the Treasury.[30] As a consequence, a project on which a contractor has defaulted can be completed only at the expense of other projects or by the receipt of an additional appropriation.

However, in the case of reclamation projects [31] and bid bonds on military contracts,[32]

[20] *See*, for example, Defense Appropriations Act, 1971, Pub. L. 91-668, § 834; Pub. L. 91-171, § 634; and Pub. L. 90-580, § 533.
[21] 50 U.S.C.A. App. § 2168.
[22] *See* 4 CFR 331.1 et seq., 37 Fed. Reg. 4143 (1972).
[23] FPR Temp. Reg. 27, July 1972.
[24] FPR Temp. Reg. 27, Supp. 2, Nov. 4, 1972, 37 Fed. Reg. 23544 (1972).
[25] Study Group 7 (Cost and Pricing Information), *Final Report*, Feb. 1972, pp. 465, 466.
[26] *See*, for example, 16 Comp. Gen. 37, 20 Comp. Gen. 436, 21 Comp. Gen. 1159, 27 Comp. Gen. 25, and 33 Comp. Gen. 57. Note that the earlier decisions cited here refer to 31 U.S.C. § 712 and Revised Statute 3690. These were the predecessors of 31 U.S.C. § 712a (1970).
[27] 31 U.S.C. § 699 (1970).
[28] *See*, for example, Pub. L. 91-668, § 807(f), (j), and earlier DOI appropriation acts.
[29] 31 U.S.C. § 668 (1970).
[30] 31 U.S.C. § 484 (1970). *See* 46 Comp. Gen. 554 (1966), 44 Comp. Gen. 623 (1965), 34 Comp. Gen. 577 (1955); Comp. Gen. Dec. B-173735 (July 25, 1972).
[31] 43 U.S.C. § 401 (1970).
[32] 10 U.S.C. § 2381(b) (1970).

Congress has authorized agencies to credit amounts recovered from defaulting contractors or their sureties against the appropriation originally available for the contract.

Exemptions From Taxes on Sale of Firearms

Generally, Federal taxes are imposed on the manufacture, transfer, and sale of firearms, in addition to a special yearly occupational tax imposed on importers, manufacturers, and dealers in firearms.[33] However, limited exemptions from these taxes are provided when sales are to Government agencies.[34]

Allowability of Federal Income Taxes

Under 42 U.S.C. § 2205(b), direct reimbursement of a contractor's Federal income taxes under AEC contracts is prohibited.

CPIF Contracts in Certain Foreign Assistance Programs

Under 22 U.S.C. § 2351(b)(8), use of cost-plus-incentive-fee (CPIF) contracts are required in preference to any other types in connection with the conduct of certain foreign programs of the Agency for International Development. However, there are no laws which prohibit the use of CPIF contracts, and the Federal Procurement Regulations, which AID follows,[35] specifically set forth the CPIF contract as a legitimate type of contract form.[36]

Ailanthus Trees

Under 40 U.S.C. § 102, ailanthus trees may not be purchased for or planted in the public grounds.

Military Recruitment at Educational Institutions

Under § 510 of Pub. L. 91–441, 84 Stat. 914, Department of Defense funds may not be paid to any institution whose policies prohibit the recruitment of military personnel on the school's premises. This same prohibition relating to NASA funds is found in Pub. L. 90–373, 82 Stat. 280.

Berry Amendment

The Berry Amendment to the Defense Appropriation Act of 1972 [37] prohibits the procurement of any article of food, clothing, cotton, wool, and certain manufactured fabrics not grown, reprocessed, reused, or produced in the United States unless these items cannot be purchased at United States market prices.

Interdepartmental Orders

Under the "Economy Act," [38] only the Army, Navy, Treasury, FAA, and Maritime Commission are authorized to place orders on other agencies to be fulfilled by contracts. In individual cases, separate statutes give other agencies the same authority.[39] Under 10 U.S.C. § 2309, the military departments and NASA, in connection with interdepartmental orders, may directly obligate the ordering department's funds, while with other agencies the funds must first be transferred and credited to special working funds.[40] Under some special statutes, interdepartmental orders may be filled on a nonreimbursable basis.[41]

[33] 26 U.S.C. § 4181 (1970), tax on sale of firearms; 26 U.S.C. § 5801, special occupational tax for importers, manufacturers, and dealers in firearms; 26 U.S.C. § 5821, tax on the manufacture of a firearm. It is noted that the term firearm is defined differently for the purpose of 26 U.S.C. § 4181 than it is for the other three provisions, but this difference is not germane to this discussion.

[34] 10 U.S.C. § 2385, 14 U.S.C. § 655, 26 U.S.C. § 4182(b), 26 U.S.C. § 5851(a), 26 U.S.C. § 5852(a), and 26 U.S.C. § 5852(b) (1970).

[35] 41 CFR 7–1.103.

[36] FPR 1–3.405–4.

[37] Pub. L. 92–204, § 724, 85 Stat. 716.

[38] 31 U.S.C. § 686.

[39] For example, 23 U.S.C. § 308; 22 U.S.C. § 2509(f), (g); 31 U.S.C. § 660; 40 U.S.C. § 356; 40 U.S.C. § 759; 42 U.S.C. § 1870(j); 42 U.S.C. § 1873(g); 44 U.S.C. § 1121. *See also* 14 U.S.C. § 145; 23 U.S.C. § 308; 39 U.S.C. § 411; 40 U.S.C. § 481(d); 42 U.S.C. § 2473(b) (6) (1970).

[40] 31 U.S.C. § 686(b) (1970).

[41] For example, 14 U.S.C. § 145; 40 U.S.C. § 481(d); 42 U.S.C. § 2942 (1970).

CHAPTER 5

Redundant Statutes

This chapter discusses statutes that, for the most part, are redundant to and in some cases are inconsistent with other statutes.

STATUTES REDUNDANT TO ASPA AND FPASA

For many years, the basic statute governing the procedures for the award of Government contracts was R.S. § 3709.[1] This statute required (and still requires when applicable) [2] advertisement of contracts except in rather limited circumstances. As a result, many separate statutes were enacted over the years which granted exceptions to the requirements of R.S. § 3709 specifically, or to advertising requirements in general.

With the enactment in 1947 and 1949 of ASPA and FPASA with their built-in exceptions authorizing negotiation, the need for many of these special statutes vanished. Nevertheless, all of these were not repealed at the time ASPA and FPASA were passed. Indeed, as a safeguard, a provision was included in FPASA providing that such exceptions to R.S. § 3709 would also be exceptions to the advertising requirements of FPASA.[3] ASPA does not contain a similar provision.

A "clean-up" bill, eliminating many of the superseded special statutes other than those making exceptions to R.S. § 3709, was passed in 1951.[4] The discussion below identifies additional possibilities for "clean-up," including statutes making exceptions to R.S. § 3709, a few not repealed in 1951, and a few statutes enacted since then.

Most of these special statutes were referred to the agencies involved for comment concerning the effect that repeal or amendment would have. In all but one case, as noted below, they interposed no objection to elimination of these provisions as redundant. Subsequently, we added a few statutes on which we did not receive agency comments.

Exceptions to R.S. § 3709

12 U.S.C. § 1701c(b) (2), HUD national housing contracts
12 U.S.C. § 1701z–2(e), HUD research contracts
12 U.S.C. § 1747g(h), HUD moderate-income housing contracts under $1,000
12 U.S.C. § 1788(b), National Credit Union Administration insurance contracts under $1,000
15 U.S.C. § 634(b)(4), SBA insurance contracts under $1,000
16 U.S.C. § 580c, Agriculture contracts for Forest Service test materials and devices
16 U.S.C. § 1052(b)(1), Department of the Interior contracts for research vessels
20 U.S.C. § 331a(a)(1), HEW contracts for educational research
20 U.S.C. § 331a(b)(1), HEW contracts for educational research training
20 U.S.C. § 1034(a), HEW contracts for library improvement research and training

[1] 41 U.S.C. § 5 (1970).
[2] R.S. § 3709 still governs contracts of the legislative and judicial branches.
[3] 41 U.S.C. § 260 (1970).
[4] Act of Oct. 31, 1951, 65 Stat. 701.

20 U.S.C. § 1068(a), HEW contracts for implementing talent search program
22 U.S.C. § 287e, Department of State contracts of U.S. Mission to United Nations
22 U.S.C. § 1047, Department of State contracts for Foreign Service Institute
30 U.S.C. § 556(b), Department of the Interior contracts for work animals, vehicles, and equipment
41 U.S.C. § 6a(h), Department of State contracts for the packing of personal and household effects of U.S. diplomatic personnel for foreign shipment
42 U.S.C. § 263d(b)(3), HEW contracts for electronic product radiation control program
42 U.S.C. § 1480(a), Agriculture purchases of less than $300
42 U.S.C. § 1521(a) and (b), HUD construction contracts
42 U.S.C. § 1532, HUD contracts for defense public works
42 U.S.C. §§ 1592d and h, HUD contracts for defense housing
42 U.S.C. § 1857b–1(a)(2), Environmental Protection Agency research contracts to control air pollution
42 U.S.C. § 2051(c), AEC R&D and training contracts
42 U.S.C. § 2075, AEC special nuclear material contracts
42 U.S.C. 4081, HUD contracts for flood control insurance
42 U.S.C. § 4372(e), Council on Environmental Quality contracts
49 U.S.C. § 1638, DOT contracts for high-speed ground transportation

Other Statutes Redundant to ASPA and FPASA

7 U.S.C. § 416, Department of Agriculture contracts for seeds
7 U.S.C. § 430, Department of Agriculture contracts for animal serum test samples. The Department opposes repeal. *See also* 41 U.S.C. § 252(c)(3), (7), (10), (11).
7 U.S.C. § 432, Department of Agriculture contracts for cultures
10 U.S.C. § 4504, Army contracts for supplies for experimental and test purposes
10 U.S.C. § 4505, Army contracts for tooling
10 U.S.C. § 4535, Army contracts for subsistence supplies
10 U.S.C. § 7229, Navy fuel contracts
10 U.S.C. § 7522, Navy research contracts
10 U.S.C. § 9504, Air Force contracts for supplies for experimental and research purposes
10 U.S.C. § 9505, Air Force contracts for tooling
10 U.S.C. § 9535, Air Force contracts for subsistence supplies
16 U.S.C. § 833f, Department of the Interior contracts for Fort Peck Power Project
25 U.S.C. §§ 96, 97, Department of the Interior contracts for Indian Service
29 U.S.C. § 671(e)(7), HEW contracts for National Institute for Occupation Safety and Health
38 U.S.C. § 1820(b), Veterans Administration contracts under $1,000
41 U.S.C. § 6a–1, Architect of the Capitol contractual authority to make purchases below $2,500
41 U.S.C. § 24, Treasury and GSA contracts for transportation of moneys, bullion, coin, and other securities
42 U.S.C. § 263d(b)(4), HEW contracts for electronic products for research and testing
46 U.S.C. § 1193, Commerce contracts for ship construction authorized by 46 U.S.C. §§ 1191 and 1192
Military Construction Authorization Act. For a number of years now, the annual military construction authorization acts have contained a provision that construction contracts authorized by these acts " . . . shall be awarded, insofar as practicable, on a competitive basis to the lowest responsible bidder, if the national security will not be impaired and the award is consistent with Chapter 137 of Title 10, United States Code." [5] Similarly, the DOD appropriation acts since 1960 have contained a provision substantially as follows: " . . . Provided further, That none

[5] *See*, for example, Pub. L. 90–408, § 804; 82 Stat. 390.

of the funds appropriated in this Act shall be used except that, so far as practicable, all contracts shall be awarded on a formally advertised competitive bid basis to the lowest responsible bidder." [6]

Such provisions appear redundant, to the preference in the ASPA for formal advertising and competition.

[6] *See*, for example, Pub. L. 90–580, § 523; 82 Stat. 1134.

NAVY STOCK FUND

Under 31 U.S.C. §§ 644, 644a, and 645, provision is made for the establishment of a naval stock fund. These statutes, enacted in 1921 and 1929, would appear redundant to 10 U.S.C. § 2208, enacted subsequently, which centralizes the establishment of working capital funds for the military in the Department of Defense. We have been informally advised by Navy fiscal experts that these special Navy statutes are operationally obsolete.

CHAPTER 6

Obsolete Statutes

This chapter discusses statutes that agencies have identified as obsolete and some additional possibilities of obsolete statutes on which we have not received agency comments. When the statute grants a special authority to the agency, we see no reason to question the agency's view of the statute as obsolete. Some statutes, however, impose restrictions and, before repeal, should be evaluated to determine whether they are still needed as a control.

STATUTES IDENTIFIED BY DOD AS OBSOLETE

10 U.S.C. §§ 2271–2279, Development and procurement of military aircraft

10 U.S.C. § 2384, Marking of military supplies

10 U.S.C. § 2389, DOD amendment of contracts for procurement of milk

10 U.S.C. § 4340, Quartermaster for the Corps of Cadets

10 U.S.C. § 4533, Purchasing components of Army rations

10 U.S.C. §§ 4534, 4535, Army subsistence supplies

10 U.S.C. §§ 4776, 9776, DOD emergency construction of fortifications on private land in an emergency declared by the President

10 U.S.C. § 7294, Treaty suspension of authorized naval ship construction

10 U.S.C. § 7342, Certain percentage of aircraft and aircraft engines procured for naval service to be constructed or manufactured in United States plants

10 U.S.C. § 7344, Treaty suspension of authorized naval aircraft

10 U.S.C. §§ 9534, 9535, Air Force subsistence supplies

41 U.S.C. §§ 101–125 (Contract Settlement Act). This act applies to World War II contracts and it is doubtful that any such contracts are still open. With two exceptions, then, this act could be repealed without any substantive impact. The first exception is 41 U.S.C. § 114(b) which has to do with third-party practice in the Court of Claims. The Court of Claims has interpreted the broad language of this section as overcoming any assumption that it is meant to apply only in cases involving claims under the Contract Settlement Act,[1] and the substance of this section is now embodied in Rule 41 of the Court of Claims. The second exception is 41 U.S.C. § 119. This section provides for damages to be paid the United States in the case of fraudulent contract claims. Its language is broad enough to cover fraudulent claims in connection with contracts other than "war contracts."

STATUTES IDENTIFIED BY OTHER DEPARTMENTS AS OBSOLETE

31 U.S.C. § 423, Department of the Treasury contracts to install, maintain, and operate paper money laundering machines

40 U.S.C. § 34, Contracts for rent of build-

[1] *See Bowser, Inc. v. United States*, 420 F.2d 1057 (Ct. Cl. 1970), *reconsideration*, 427 F.2d 740 (Ct. Cl. 1970).

ings to be used by District of Columbia Government

40 U.S.C. § 474 (10), Farm Credit Administration contracts

6% CPFF fee on defense public works, 42 U.S.C. § 1533. Under 42 U.S.C. § 1533, a limitation of six percent is placed on the fixed fee for CPFF contracts for construction of public works necessary to the health, safety, or welfare of persons engaged in national defense as authorized by 42 U.S.C. §§ 1521, 1532, 1561, and 1562. These authorizations were terminated on July 1, 1953 [2] and hence the six percent fee limitation would appear to be meaningless.

45 U.S.C. §§ 90, 91, and 92, Department of the Treasury authority to settle transportation claims of railroads

49 U.S.C. § 1636, Department of Transportation protection for common carrier employees under high-speed ground transportation contracts

OTHER STATUTES PROBABLY OBSOLETE

10 U.S.C. § 2381(a)(1), (c). Under 10 U.S.C. § 2381(a)(1), authority is given to the military secretaries to prescribe regulations for the preparation, submission, and opening of bids. However, there is inherent authority to issue such regulations, and 5 U.S.C. § 301 authorizes the issuance of regulations generally. In addition, it may be in conflict with 10 U.S.C. § 2202 which requires the Secretary of Defense to issue regulations for procuring, producing, warehousing, or distributing supplies. Section 2381(c) provides: "Proceedings under this section are subject to regulations under section 486 of title 40, unless exempted therefrom under section 481(a) of that title." Since the exemption under 40 U.S.C. § 481(a) applies to actions taken pursuant to 40 U.S.C. § 481 by the Administrator of GSA and not pursuant to 40 U.S.C. § 486, it is not clear what the effect of this provision is.

31 U.S.C. § 635. The provison in 31 U.S.C. § 635 that appropriations made under the Bureau of Yards and Docks for public works shall remain available until expended appears redundant to general statutes 31 U.S.C. § 649c and 31 U.S.C. § 682, which provide respectively that money appropriated to the military departments for procurement of certain items, including construction, shall remain available until spent, and that moneys appropriated for the construction of public buildings shall remain available until completion of the work for which they were appropriated.

31 U.S.C. § 638. The provision in § 638 that no money appropriated for ordnance or ordnance material shall be used for any other purpose than that for which the appropriation was made appears redundant to the general statute, found in 31 U.S.C. § 628, which provides that except as otherwise provided by law sums appropriated shall be applied solely to the objects for which they are respectively made. Two other provisions contained in 31 U.S.C. § 638, authorizing the transfer of used or obsolete ordnance material, have effectively been superseded by title II of the FPASA,[3] dealing with property transfers and disposal.

41 U.S.C. § 13. This statute,[4] enacted in 1868, prohibits "executive departments" from entering into contracts for stationery and other supplies for a longer term than one year from the time the contract was entered into. It is inapplicable to agencies procuring under the ASPA [5] and title III of the FPASA.[6] Since most executive agencies procure under these two acts, this statute has a very limited application and significance today.

Navy World War II defense facilities authorization, 50 U.S.C. App. § 1201. This statute as originally enacted authorized the Secretary of the Navy, for the duration of World War II and for six months thereafter, in connection with the procurement of supplies and equipment necessary

[2] *See* note following 42 U.S.C. § 1541 (1970).

[3] *See* specifically 40 U.S.C. §§ 488 and 484 (1970).

[4] R.S. § 3735.

[5] *See* 10 U.S.C. § 2314 (1970).

[6] *See* 41 U.S.C. § 260 (1970).

for the prosecution of World War II and the maintenance of national defense, to procure necessary buildings, facilities, utilities, and appurtenances thereto on Government-owned land or elsewhere, and to provide for their operation by Government or private personnel. It was permitted to expire as of August 1, 1953.[7] It would therefore appear no longer meaningful. A similar provision for the Army was repealed. At a minimum the Navy statute could be removed from the *Code*.

Second War Powers Act, 50 U.S.C. App. §§ 643–643c, 645–645b, 1152(a). All but the above sections of the Second War Powers Act have expired and been deleted from the *Code*. A part of section 1152(a) dealing with the authority of the Navy to negotiate emergency contracts was extended to 1947 and expired then. The remaining portion, providing for a national priorities system, expired in 1951 with the establishment of a national priority system under the Defense Production Act.[8] Sections 643–643c, dealing with access to records on emergency contracts, are technically extant for the duration of the Korean emergency,[9] which has never been formally terminated. In any case, these access to records provisions are redundant to permanent ones.[10] The remaining sections 645a and b, providing expiration dates and a short title, have no independent significance once the other sections are deleted.

Renegotiation Acts of 1942 and 1948, 50 U.S.C. App. §§ 1191, 1193. The Renegotiation Acts of 1942 and 1948 have expired. In all likelihood all matters that arose thereunder have been finally disposed of by this time.

[7] *See Navy Contract Law* (2d ed., 1959), sec. 10.15.

[8] 50 U.S.C. App. § 2061 (1970).

[9] Declared by Presidential Proclamation No. 2914, Dec. 16, 1950.

[10] *See* p. 49 *supra*.

CHAPTER 7

Legislative Action Recommendations

The following list is a compilation of recommendations made throughout the report which call for legislative action. It also includes a few recommendations which could be accomplished by executive action, but where legislative action may be preferable, for example, because the recommendation is closely related to other recommendations requiring legislative action or because of the complexities involved in getting uniform implementation by the number of agencies involved. In such cases, the recommendation is designated as "legislative action preferred."

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 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

17. [Legislative action preferred.] Establish a better balance between employee tenure and promotion rights and long-range needs of the agencies.

20. [Legislative action preferred.] 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. [Legislative action preferred.] 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.

Chapter 7

Timely Financing of Procurement

27. (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.

Chapter 8

Selected Areas in the Acquisition Process

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.

Chapter 11

National Policies Implemented Through the Procurement Process

44. Raise to $10,000 the minimum level at which social and economic programs are applied to the procurement process.

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.

PART B

ACQUISITION OF RESEARCH AND DEVELOPMENT

Chapter 2

Federal Objectives and Organizations

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.

Chapter 4

Procurement Policy

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. [Legislative action preferred.] Eliminate recovery of R&D costs from Government contractors and grantees except under unusual circumstances approved by the agency head.

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.

PART D

ACQUISITION OF COMMERCIAL PRODUCTS

Chapter 3

Requirements

4. [Legislative action preferred.] Assign responsibility for policy regarding the development and coordination of Federal specifications to the Office of Federal Procurement Policy.

Chapter 4

Acquisition

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.

8. [Legislative action preferred.] 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.

Chapter 5

Special Products and Services

17. Establish by legislation a central coordinator to identify and assign individual agency responsibilities for management of the Federal food quality assurance program.

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.

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.

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.

PART G

LEGAL AND ADMINISTRATIVE REMEDIES

Chapter 2

Disputes Arising in Connection With Contract Performance

2. [Legislative action preferred.] Provide for an informal conference to review contracting officer decisions adverse to the contractor.

3. [Legislative action preferred.] 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.

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.

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 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.

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 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. [Legislative action preferred.] 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.

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.

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.

11. Authorize agencies to acquire information and data.

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.

[Drafts of legislation to carry out recommendations calling for legislative action in Part I are set forth at Appendixes A and B to Part I.]

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 de-

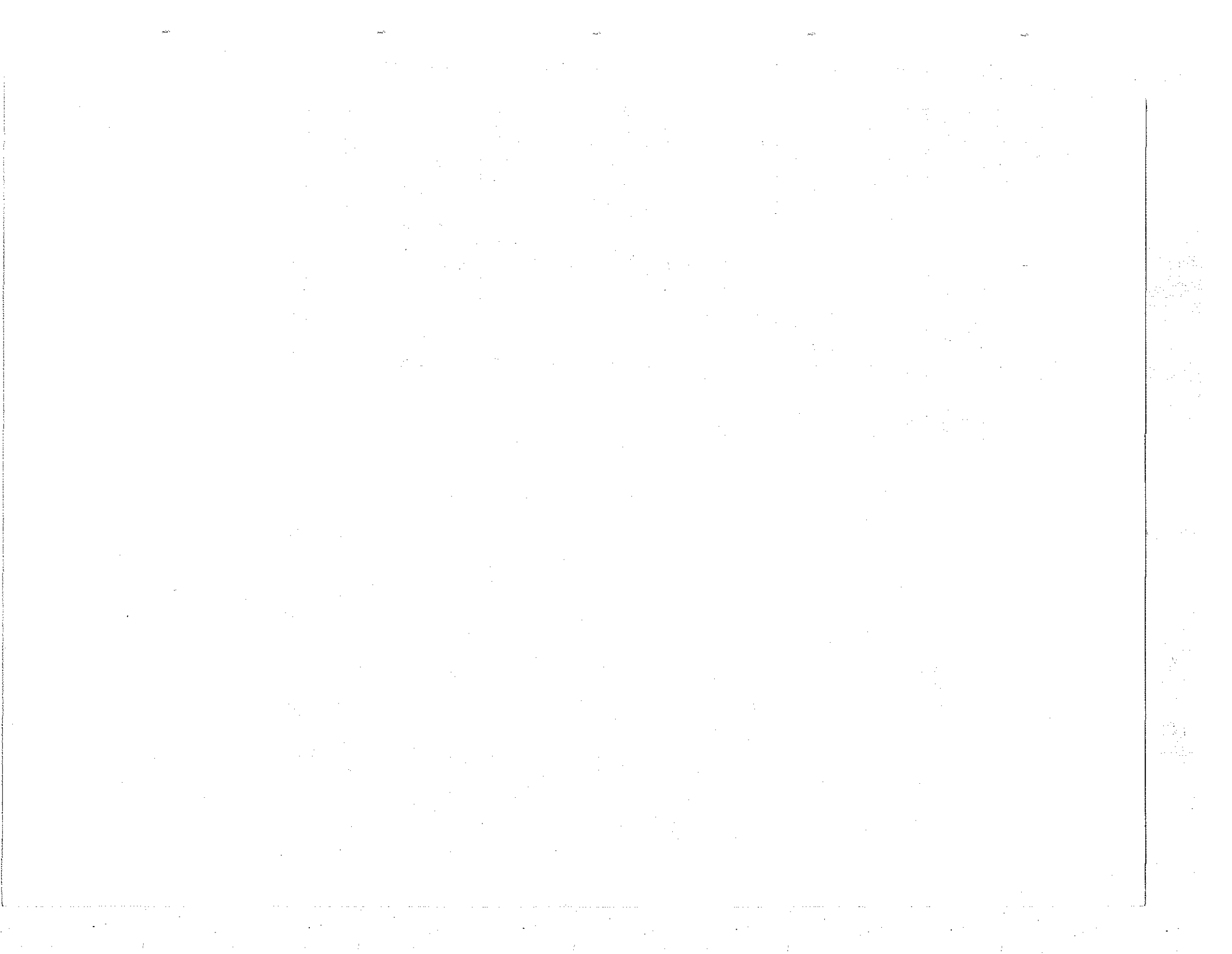
velop coordinated regulations for interpretation and application of its provisions.

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.

6. Expand and clarify the criteria used by the Renegotiation Board.



APPENDIX A

The Legal Framework of Government Procurement

INTRODUCTION

Like all Federal activities, Government procurement operates in a framework of law which derives from the Constitution, statutes, Executive orders, regulations, court decisions, and administrative rulings. However, in one respect, Government procurement is unique. A major part of the applicable law stems from the general law or common law of contracts. Thus, as its title signifies, Government contract law is a special blend of Government law and contract law.

The importance of this composite of law is threefold. First, it determines the authority of the contracting officer to enter into and administer a contract on behalf of the Government. He can bind the Government only within the scope of authority assigned to the United States by the Constitution under our Federal system,[1] and delegated to him by statutes and regulations.[2] Second, the law determines the validity of the contract in other respects and also defines the rights, obligations, and relations of the parties. Finally, the law provides remedies for enforcement and redress of contract rights.

This discussion traces the path of the law from its sources in the common law and the Constitution through the statutes to its working place in the regulations. Its purpose is informational—to provide general background on the legal structure, forces, and constraints which shape and animate, and sometimes hobble, the Government procurement process.

[1] *United States* v. *Tingey*, 39 U.S. (5 Pet.) 112 (1831).

[2] *The Floyd Acceptances*, 74 U.S. 666 (1868); *Federal Crop Insurance Corp.* v. *Merrill*, 332 U.S. 380 (1947).

THE CONSTITUTIONAL FRAMEWORK OF GOVERNMENT CONTRACTING

The authority of the Government to engage in procurement is not grounded in any specific provision of the Constitution, but is inherent in its sovereignty. The United States as "a body politic, may, within the sphere of the constitutional powers confided to it, and through the instrumentality of the proper departments to which those powers are confided, enter into contracts not prohibited by law, and appropriate to the just exercise of those powers." [3] "There is power to contract in every case where it is necessary to the execution of a public duty." [4]

Though the Constitution contains no provisions specifically addressed to procurement, a number of provisions are particularly significant. Section 3 of Article IV of the Constitution provides that Congress shall have the power to make all rules and regulations concerning property of the United States. Section 9 of Article I prohibits the withdrawal of moneys from the Treasury except in consequence of appropriations made by law. This section, however does not prohibit legislation authorizing the creation of contractual obligations.[5] Thus, if a statute authorizes the making of a contract, it is legal notwithstanding the absence of an appropriation; payment, however, must await an appropriation.[6]

Although relatively rare, constitutional questions sometimes arise in connection with

[3] *United States* v. *Tingey*, 39 U.S. (5 Pet.) 114 (1831).

[4] *United States* v. *Maurice*, 26 F. Cas. 1211 (No. 15, 747) (C.C.D. Va. 1823).

[5] *Reeside* v. *Walker*, 52 U.S. (11 How.) 271 (1850).

[6] *Mitchell* v. *United States*, 18 Ct. Cl. 281, *rev'd* 109 U.S. 146 (1883).

Government procurement. For example, in *Gonzales* v. *Freeman*,[7] a debarred contractor argued that his debarment violated the due process requirements of the Constitution. The court held that due process was required by statute and therefore never reached the question whether the Constitution specifically required this. In another case, it was held that the original Renegotiation Act was not an unconstitutional delegation of powers.[8] More recently, it was held that the current minority enterprise program under section 8(a) of the Small Business Act violates the Fifth Amendment.[9]

Occasionally, the constitutional doctrine of the separation of powers has generated controversy. One confrontation centered on executive reluctance to carry out a congressional authorization for the development of the RS–70 supersonic bomber.[10] The question arose whether Congress could require, not merely authorize, the President to act. The constitutional issue remained unresolved since agreement was reached to reconsider the project. A similar issue was raised in connection with 10 U.S.C. § 2662(a) which originally required the military departments to "come into an agreement with the Committees on Armed Services" before entering into certain real property transactions. As the result of constitutional and policy questions raised by President Eisenhower, this section was amended to provide merely for advance notification to the congressional committees.[11] Recently President Nixon, in signing into law Pub. L. 92–313, directed GSA not to comply with two provisions requiring congressional approval of construction prospectuses because the provisions were unconstitutional.[12]

In a 1971 confrontation, the Attorney General suggested that the authority given the Comptroller General under 31 U.S.C. §§ 41, 67 (a), and 71 to audit accounts of disbursing officers and settle claims against the Government and, as an incident thereof, handle bid protests and review Board of Contract Appeals decisions, is constitutionally questionable because as an agency of Congress, he cannot be delegated executive functions.[13]

The constitutional doctrine of dual sovereignty has also had an impact on Government procurement, particularly with respect to the extent to which Government contracts or contractors are subject to State taxation and regulation. This doctrine, stemming from *McCulloch* v. *Maryland*,[14] recognizes that the States and the Federal Government are separate and distinct sovereigns, each with its own sphere of authority, and neither may constitutionally interfere with the other. At one time, the Supreme Court was more prone to bar State action under this doctrine, but the modern trend is one of judicial restraint. In the field of taxation, a distinction has evolved between the so-called "incidence" and "burden" of a tax. Thus where a State tax is levied expressly against the Government, its property, or a Government contract, it will still be held unconstitutional.[15] On the other hand, where it falls directly on the person of the contractor, it will generally be held constitutional even though the burden is passed on to the Government,[16] as under a cost-reimbursement contract,[17] unless Congress has expressly given the contractor immunity from State taxation [18] or the State tax discriminates against Government contractors.[19]

In the regulatory field, State actions which directly apply to the Government, or conflict with its established policy under statute or regulation, have been held unconstitutional. For example, the Secretary of the Interior was under no obligation to submit his plans and specifications for the construction of a dam on the Colorado River to the State engineer for

[7] 334 F.2d 570 (D.C. Cir. 1964).

[8] *Lichter* v. *United States*, 334 U.S. 742 (1948).

[9] *Ray Baille Trash Hauling, Inc.*, v. *Kleppe* (D.C. Fla., Oct. 29, 1971). *But see Kleen-Rite Janitorial Services* v. *Laird* (D.C. Mass., Sept. 21, 1971).

[10] *See* Davis, *Congressional Power to Require Defense Expenditures*, 33 Ford. L. Rev. 39 (1964).

[11] *See* Harris, *Congressional Control of Administration*, 219–225 (1964).

[12] *See* 437 FCR, Federal Contracts Report, C–1.

[13] *See* letter, Attorney General to Comptroller General, June 14, 1971 (GAO File B–158766); Cibinic and Lasken, *The Comptroller General and Government Contracts*, 38 Geo. Wash. L. Rev. 349, 375–384, 393–5.

[14] 17 U.S. (4 Wheat.) 316 (1819).

[15] *See United States* v. *County of Allegheny*, 322 U.S. 174 (1944); *Clallam County* v. *United States*, 263 U.S. 341 (1923); *Kern-Limerick, Inc.* v. *Scurlock*, 374 U.S. 110 (1954).

[16] *Esso Standard Oil Co.* v. *Evans*, 345 U.S. 495 (1953); *United States* v. *City of Detroit*, 355 U.S. 484 (1958); *United States* v. *Town of Muskegon*, 355 U.S. 484 (1958); *United States* v. *Boyd*, 378 U.S. 39 (1949).

[17] *Alabama* v. *King and Boozer*, 314 U.S. 1 (1941).

[18] *See Carson* v. *Roane-Anderson Co.*, 342 U.S. 232 (1952).

[19] *Phillips Chemical Co.* v. *Dumas Independent School District*, 361 U.S. 376 (1960); *Moses Lake Homes, Inc.* v. *Grant County*, 365 U.S. 744 (1961).

approval.[20] Under their general police powers, States have enacted many kinds of restraints on freedom of contracting which are generally binding with regard to private contracts but were found unconstitutional with regard to Government contracts because they conflicted with the established Federal policy of award to the low offeror. For example, State laws regulating milk prices,[21] rates for the transportation of household goods,[22] or public utility rates [23] were held unconstitutional as conflicting with a Federal policy of award to the low offeror. Similarly, State requirements for licensing construction contractors have been held inapplicable to Government contractors as contrary to Government policy for determining the "responsible" contractor.[24]

The constitutional doctrine of exclusive Federal jurisdiction over land purchased by the Government with the unconditional consent of a State [25] also plays a role in the procurement process. In such enclaves, State laws are generally inoperative. Thus, a State cannot enforce minimum price regulations [26] or levy sales [27] or property [28] taxes in such enclaves. State regulations, however, in effect at the time of the transfer of sovereignty remain enforceable until abrogated by Congress.[29] In addition, Congress may waive Federal immunity, as it has done, for example, under the Buck Act, 4 U.S.C. § 105.

In sum, though there are no specific constitutional provisions for Government procurement and constitutional questions rarely arise, the Constitution is controlling in this area as in other areas of Government operations and Congress and the executive agencies must be ever mindful of constitutional limitations in developing Government procurement policies and practices.

[20] *Arizona* v. *California*, 283 U.S. 423 (1931). *See also Johnson* v. *Maryland*, 254 U.S. 51 (1920). *Cf. Commonwealth* v. *Closson*, 229 Mass. 329 (1918).

[21] *Paul* v. *United States*, 371 U.S. 245 (1963).

[22] *United States* v. *Georgia Public Service Comm'n*, 371 U.S. 285 (1963).

[23] *Public Utilities Comm'n* v. *United States*, 355 U.S. 534 (1958).

[24] *Leslie Miller, Inc.* v. *Arkansas*, 352 U.S. 187 (1956).

[25] U.S. Const., art. I, § 8, cl. 17.

[26] *Paul* v. *United States*, 371 U.S. 245 (1963).

[27] *See Standard Oil Co.* v. *California*, 291 U.S. 242 (1934).

[28] *Surplus Trading Co.* v. *Cook*, 281 U.S. 647 (1930); *Humble Pipe Line Co.* v. *Waggonner*, 376 U.S. 369 (1964).

[29] *James Stewart & Co.* v. *Sadrakula*, 309 U.S. 94 (1940).

THE COMMON LAW

It is often said that when the Government "comes down from its position of sovereignty, and enters the domain of commerce, it submits itself to the same laws that govern individuals there." [30] This is generally true, but some reservations must be noted. For one thing, as pointed out in detail below, the courts have found a few of the rules of the common law incompatible with the special needs and nature of the Government, and therefore inapplicable to its contracts. Also, the Government is still the controlling authority, and it could, within constitutional limits, subordinate and supersede the common law of contracts. This it has sometimes done. For example, under the common law, one party is not entitled to recover any profit earned by the other nor can one party cancel a contract without compensating the other for his loss of anticipated profits. Nevertheless Congress has authorized the Government to recapture excess profits under the Renegotiation Acts and to terminate Government contracts without liability for anticipated profits under the contract settlement statutes.[31] For the most part, the Government has not chosen to assert its sovereign prerogative; hence the common law remains a significant part of the law of Government contracts.

Thus, Government contracts like other contracts are generally subject to the common law rules of offer and acceptance,[32] mutual consideration,[33] agency,[34] mistake,[35] misrepresentation,[36] nondisclosure of material facts,[37] fraud,[38] unconscionability,[39] impossibility,[40]

[30] *Cooke* v. *United States*, 91 U.S. 389, 398 (1875).

[31] Note 8 *supra*. *See also Russell Motor Car Co.* v. *United States*, 261 U.S. 514 (1923); *DeLaval Steam Turbine Co.* v. *United States*, 284 U.S. 61 (1931).

[32] *United States* v. *Purcell Envelope Co.*, 249 U.S. 313 (1919); *cf.* U.C.C. § 2–205.

[33] *Savage Arms Co.* v. *United States*, 266 U.S. 217 (1924).

[34] *American Anchor & Chain Corp.* v. *United States*, 166 Ct. Cl. 1, 331 F.2d 860 (1964).

[35] *National Presto Industries, Inc.* v. *United States*, 167 Ct. Cl. 749, 338 F.2d 99 (1964), *cert. denied*, 380 U.S. 962 (1965).

[36] *Womack* v. *United States*, 182 Ct. Cl. 399, 389 F.2d 793 (1968); *Morrison-Knudsen Co.* v. *United States*, 170 Ct. Cl. 712, 345 F.2d 535 (1965).

[37] *Helene Curtis Industries, Inc.* v. *United States*, 160 Ct. Cl. 437, 312 F.2d 774 (1963).

[38] *Lalone* v. *United States*, 164 U.S. 255 (1896).

[39] *Hume* v. *United States*, 132 U.S. 406 (1889).

[40] *Columbus Ry. Power & Light Co.* v. *City of Columbus*, 249 U.S. 399 (1919).

illegality,[41] privity of contract,[42] third-party beneficiaries,[43] liquidated damages,[44] implied warranty of mutual cooperation,[45] implied warranty of fitness for use,[46] implied warranty of merchantability,[47] suitability of specifications,[48] bailee's liability,[49] risk of loss,[50] waiver,[51] estoppel,[52] ratification,[53] interpretation and construction,[54] contra proferentum,[55] set-off,[56] breach,[57] and measure of damages.[58] In these respects the Government generally fares no better than private contractors under the common law.

But in a few respects it does. Unlike private contractors, the Government is not bound by the common law rule of apparent authority, which makes a principal responsible for the contracts entered into by an agent in excess of his authority when the principal surrounds the agent with all the indicia of unrestricted authority.[59] Under the special conditions of formal advertising, the Government is not subject to the general rule that an offer may be withdrawn at any time before acceptance.[60] In some circumstances the Government may assert the special defense of sovereign acts to avoid liability for breach of contract when it disrupts or frustrates performance by a contractor.[61] Nor is it generally subject to interest on delayed payments in the event the contractor recovers a judgment against it.[62] Moreover, in case of conflict, it is the *Federal* common law that applies to Government contracts.[63]

With these few exceptions, the common law generally governs the contract side of Government contract law. It should be noted that the common law is not static. It continues to undergo growth, change, and evolution. Thus, in lieu of allocating to one party or the other the total risk of loss by reason of mutual ignorance of a material matter, the courts may fashion a new rule for sharing the loss by both parties.[64] In view of the fact that the Uniform Commercial Code has been adopted by all the States as the basis for governing private business transactions, Federal tribunals, absent a settled Federal rule, may look to it for guidance as to the rule to be applied to Government contracts.[65]

In short, though subject to displacement by statutes and regulations, the common law remains a latent but pervasive part of Government contract law, supplementing and construing contract provisions and delineating the rights and relations of the parties.

STATUTES

In Part A of this report, there is a summary of the "Historical Development of the Procurement Process" which includes a discussion of the evolution of procurement statutes from the Revolutionary War period to the present. It points out that "Between 1829 and the Civil War, no major procurement legislation was introduced."

Today, however, "[a] careful study of the Congressional enactments with reference to Government contracting presents a picture of Congress periodically limiting, granting, cir-

[41] *United States* v. *Goltra*, 312 U.S. 203 (1941).
[42] *Merritt* v. *United States*, 267 U.S. 338 (1925).
[43] *United States* v. *Hutt*, 165 F.2d 720 (5th Cir. 1948).
[44] *Priebe & Sons* v. *United States*, 332 U.S. 407 (1947).
[45] *George A. Fuller Co.* v. *United States*, 108 Ct. Cl. 70 (1947).
[46] *United States* v. *Hamden Cooperative Creamery*, 185 F. Supp. 541 (E.D.N.Y. 1960), *aff'd*, 297 F.2d 130 (2d Cir. 1961).
[47] *Whitin Machine Works* v. *United States*, 175 F.2d 504 (1st Cir. 1949).
[48] *Nichols & Co.* v. *United States*, 156 Ct. Cl. 358 (1962), *cert. denied*, 371 U.S. 959 (1963).
[49] *Sun Printing & Publishing Ass'n* v. *Moore*, 183 U.S. 642 (1902).
[50] *Halvorson* v. *United States*, 126 F. Supp. 898 (E.D. Wash. 1954).
[51] *United States* v. *Chichester*, 312 F.2d 275 (9th Cir. 1963).
[52] *Hatchitt* v. *United States*, 158 F.2d 754 (9th Cir. 1946); *Manloading & Management Associates* v. *United States*, 461 F. 2d 1299 (Ct. Cl. 1972).
[53] *United States v. Beebe*, 180 U.S. 343 (1901). *See* Poirier, *Ratification Under Public Contracts Involving the National Defense*, 23 Fed. B.J. 37 (1963).
[54] *Priebe & Sons* v. *United States*, 332 U.S. 407 (1947).
[55] *United States* v. *Lennox Metal Mfg. Co.*, 225 F.2d 302 (2d Cir. 1955). Under this rule of interpretation, contract ambiguities are resolved against the party drafting the language, provided there is no better indication of the intent of the parties.
[56] *United States* v. *Munsey Trust Co.*, 332 U.S. 234, 239 (1947).
[57] *United States* v. *Behan*, 110 U.S. 338 (1884); *United States* v. *Spearin*, 248 U.S. 132 (1918).
[58] *United States* v. *Behan*, 110 U.S. 338 (1884); *United States* v. *Speed*, 75 U.S. 77 (1869).
[59] *Federal Crop Ins.* v. *Merrill*, 332 U.S. 380 (1947). Whelan & Dunningan, *Government Contracts; Apparent Authority and Estoppel*, 55 Geo. L.J. 830 (1967). *But see* Comp. Gen. Dec. B-176393 (Oct. 13, 1972).
[60] *Scott* v. *United States*, 44 Ct. Cl. 524, 527 (1909); *Refining Associates, Inc.* v. *United States*, 124 Ct. Cl. 115 (1953).
[61] *Horowitz* v. *United States*, 267 U.S. 458 (1925).
[62] *Ramsey* v. *United States*, 121 Ct. Cl. 426, 101 F. Supp. 353 (1951).
[63] *Clearfield Trust Co.* v. *United States*, 318 U.S. 363 (1943).
[64] *National Presto Industries, Inc.* v. *United States*, 167 Ct. Cl. 749, 338 F.2d 99 (1964).
[65] *See Federal Pacific Electric Company*, IBCA, 1964 BCA ¶ 4494 and cases cited.

cumscribing, defining and redefining contract authority . . . It is an unusual session of Congress, today, which does not enact at least one piece of legislatien with reference to Government contracts." [66] In fact, there has been no such session since World War II.

Also, throughout this report, specific statutory problems and recommendations are covered. In this appendix, no effort is made to point out what is good or bad or how it can be made better. The only purpose is descriptive—to convey a sense of the scope, number, and kinds of procurement statutes and identify the most important.

The procurement statutes go back to the "Acts of the first Congress of the United States." During the first session, they established the executive departments of Foreign Affairs, War, and Treasury, and the Post Office; [67] authorized a program for the establishment and support of lighthouses, beacons, buoys, and public piers; [68] made appropriations for 1789, including $137,000 for "defraying the expenses of the Department of War," [69] and for 1790, including "a provision for building a lighthouse on Cape Henry." [70] Thus with the very first Congress, the basic pattern of procurement statutes—chartering an agency, authorizing a program, and appropriating funds—was beginning to take shape.

Shortly thereafter on May 8, 1792, Congress enacted the first law focusing specifically on procurement operations. It directed the Treasury to make all purchases for the Army. However, this initial effort at centralizing procurement did not last long.

In 1798, as a first step toward accounting for all outstanding contracts, Congress required copies to be deposited in the Treasury.[71] In 1808, it passed an "Officials-Not-to-Benefit" law.[72] In 1809, it prescribed competitive advertising for all contracts. This requirement eventually evolved into the famous R.S. § 3709, 41 U.S.C. § 5, which is still on the books and, for over 80 years, governed all Federal procurement until it was generally superseded by the Armed Services Procurement Act and the Federal Property and Administrative Services Act.

Thus, within the first 20 years, Congress developed the main root forms of procurement statutes covering organization, program authorization, funding, award procedures, accounting, and conflicts of interest. Today, about 4,000 procurement-related statutory provisions have been identified. Most follow the early forms, but new ones have been added for such things as remedies, national emergencies, and price and profit controls. The most striking development has come from the recognition that procurement can buy more than goods and services; it can directly promote the general welfare. Accordingly, it has been loaded with a broad range of collateral Government objectives in socioeconomic areas such as labor, Buy-American, small business, nondiscrimination, etc.

Organization and Charter Acts

The need for organization and charter acts is aptly described in *The Floyd Acceptances* as follows:

> But the Government is an abstract entity, which has no hand to write or mouth to speak, and has no signature which can be recognized, as in the case of an individual. It speaks and acts only through agents, or more properly, officers. . . . And while some of these, as the President, the Legislature, and the Judiciary, exercise powers in some sense left to more general definitions necessarily incident to fundamental law found in the Constitution, the larger portion of them are the creation of statutory law, with duties and powers prescribed and limited by that law.[73]

Since the establishment of the departments of Foreign Affairs, Treasury, War, and Justice in 1789, Government agencies have proliferated. Today there are more than 150 departments, independent agencies, boards, committees, and commissions, ranging from giants like the Department of Defense [74] to

[66] Moss, *Government Contracts: Nature, Scope and Type*, 5 Bost. Coll. L. Rev. 21, 24 (1963).
[67] 1 Stat. 28, 49, 65, 70.
[68] 1 Stat. 53.
[69] 1 Stat. 95.
[70] 1 Stat. 105.
[71] 1 Stat. 610, 41 U.S.C. § 20 (1970).
[72] 2 Stat. 484, 41 U.S.C. § 20 (1970).
[73] 74 U.S. 666, 675 (1868).
[74] 5 U.S.C. § 101.

diminutives like the Committee on Purchases of Blind-Made Products.[75] Most are the creatures of statute; some of Executive order.

All are *operational* in the sense that all procure at least office supplies and equipment. But with many, buying is negligible, and they have no further participation in procurement; for example, the National Mediation Board.[76] Some agencies, such as the Small Business Administration, Department of Labor, and General Services Administration, are also *regulatory* in the sense that they shape the procurement of other agencies. The Committee on Purchases of Blind-Made Products is unique in that its only mission is regulatory; it fixes the price and suitability of certain products purchased by other agencies.[77]

Contract Authority

The statutes include numerous provisions dealing with the continuing authority of an agency or agencies to contract. These may be *general* or *specific, grants* or *limitations,* and the authority thereunder may be *express* or *implied.*

Some statutory provisions are *general* in that they apply to all agencies; for example, 5 U.S.C. § 3109 which provides the underlying authority for agencies to procure expert and consultant services by contract; 31 U.S.C. § 686 which authorizes agencies to place purchase orders on other agencies.

Other statutes are *specific* in that they apply only to one agency; for example, AEC may "acquire," "purchase," or "enter into contracts" for various things such as material, facilities, buildings, real and personal property, and services.[78] The Army may "procure" tools, materials, and facilities.[79] The military departments may "acquire" patents, copyrights, and designs.[80] They may "contract" for research,[81] and they may enter into research "contracts" for five years.[82] The Army, Navy, or Air Force may contract for architect-engineer services.[83]

Statutes such as those cited above take the form of *grants* of contract authority. Authority may be express or implied. As a matter of general law, there is no need for Congress to authorize contracts in so many words. The authority to contract may be implied from a general congressional authorization to accomplish a project or program.[84] For example, authority "to construct fortifications" implies authority for "execution by means of a contract." [85]

The doctrine of implied powers has broad ramifications. Thus the authority to contract includes the power to decide with whom and upon what terms and conditions.[86] It also includes general authority to administer the contract and, as an incident thereof, to terminate or breach the contract and enter into a settlement agreement.[87]

The doctrine of implied powers is, of course, essential. No government could run on the basis that the legislature has to provide specifically for every contingency and alternative which might arise in the course of carrying out an authorized program. As the court said in *United States* v. *McDaniel:*

> A practical knowledge of the action of any one of the great departments of the Government, must convince every person that the head of a department, in the distribution of its duties and responsibilities, is often compelled to exercise his discretion. He is limited in the exercise of his powers by the law; but it does not follow that he must show a statutory provision for everything he does. No government could be administered on such principles. To attempt to regulate, by

[75] 41 U.S.C. § 46.
[76] 45 U.S.C. §§ 151–158 (1970).
[77] 41 U.S.C. § 46 (1970).
[78] 42 U.S.C. § 2201(e), (g), (t), (u), and (v) (1970).
[79] 10 U.S.C. §§ 4505 and 4531 (1970).
[80] 10 U.S.C. § 2386 (1970).
[81] 10 U.S.C. § 2358 (1970).
[82] 10 U.S.C. § 2352 (1970).
[83] 10 U.S.C. §§ 4540, 7212, and 9540 (1970).
[84] *United States* v. *Tingey,* 39 U.S. 114. (1831); *Floyd Acceptances,* 74 U.S. 666 (1868); *Neilson* v. *Lagow,* 53 U.S. 98 (1851); *United States* v. *Bradley,* 35 U.S. 343 (1836); *United States* v. *Butler,* 297 U.S. 1 (1936).
[85] *United States* v. *Maurice,* 26 F. Cas. 1211 (C.C.D. Va. 1823) where Mr. Justice Marshall said, "[T]here is a power to contract in every case where it is necessary to the execution of a public duty."
[86] *Arizona* v. *California,* 373 U.S. 546 (1962); *Mail Divisor Cases,* 251 U.S. 326, 329 (1915).
[87] *United States* v. *Corliss Steam Engine Co.,* 91 U.S. 321, 323 (1875). Whether existing statutes limit the breach settlement authority of an agency to termination breaches rather than interim performance breaches is a matter of sharp controversy. Cibinic and Lasken, *The Comptroller General and Government Contracts,* 38 Geo. Wash. L. Rev. 349, 362 (1970).

law, the minute movements of every part of the complicated machinery of government would evince a most unpardonable ignorance on the subject. Whilst the great outlines of its movements may be marked out, and limitations imposed on the exercise of its powers, there are numberless things which must be done that can neither be anticipated nor defined, and which are essential to the proper action of the government. Hence, of necessity, usages have been established in every department of the government, which have become a kind of common law, and regulate the rights and duties of those who act within their respective limits.[88]

Nevertheless, the doctrine of implied powers was judge-made law, and did not altogether reflect the congressional ideal of a proper distribution of legislative and executive authority. To curb what it regarded as administrative excess, guard against a misreading of its intent, and assert stronger control, Congress enacted a series of laws in the form of *limitations* on contract authority. These include provisions generally:

Against contracting without an appropriation, or in excess of appropriations, 41 U.S.C. § 11a
Against contracting in excess of one year, 41 U.S.C. § 13
Against contracting for construction in excess of specific appropriations, 41 U.S.C. § 12
Against the purchase of land without an authorizing law, 41 U.S.C. § 14, or an express law, 10 U.S.C. § 2676
Against construing a law to authorize, or appropriate funds for, contracting unless specific, 31 U.S.C. § 627
Against an advance of money, 31 U.S.C. § 529
Against expending or obligating in excess or advance of appropriations or apportionment, 31 U.S.C. § 665
Against contracts under annual appropriations other than those made within the applicable fiscal year, 31 U.S.C. §§ 712a, 718
Against the use of appropriations for objects other than for which made, 31 U.S.C. § 628
Against the use of proceeds of sale or other moneys received, 31 U.S.C. §§ 484, 487
Against the purchase of automobiles or aircraft unless specifically authorized or appropriated for, 3 U.S.C. § 638a.

The legal effect of these express limitations of contract authority is to circumscribe the doctrine of implied authority and require a showing of express authority.[89] The practical significance is that, regardless of the extent to which a contracting officer may think it clearly in the best interests of the Government, he simply cannot go beyond the express limitations on his authority.[90] He cannot, for example, enter into a contract in excess of an appropriation,[91] or a contract under an annual appropriation for more than the current fiscal year.[92] It is these statutory limitations which give rise to specific problems in connection with multi-year procurement, incremental funding, contingent obligations, catastrophic risks, etc. It is also these statutory limitations which make it necessary to go through the annual budget process to provide express authorizations and express appropriations.

Program Budgeting, Authorizations, and Appropriations

Budgeting

The Budget and Accounting Act of 1921[93] establishes the National Budget System. Under this act the President is required at the opening of each session of Congress to transmit a budget recommending appropriations with 12 categories of supporting information.[94] The budget identifies the substantive legislative authority for each program being funded. This is necessary because, in the absence of prior or concurrent legislative authorization, an appropriation is subject to a point of order on the floor of the House and must be stricken

[88] 32 U.S. 1, 14 (1833).

[89] *United States* v. *Tingey*, 39 U.S. 114 (1841); *Moses* v. *United States*, 166 U.S. 571 (1897); *Floyd Acceptances*, 74 U.S. 666 (1868).
[90] 37 Comp. Gen. 60 (1957).
[91] *Sutton* v. *United States*, 256 U.S. 575 (1921).
[92] *Lieter* v. *United States*, 271 U.S. 204 (1926).
[93] 31 U.S.C. § 1 (1970).
[94] 31 U.S.C. § 11 (1970).

from the pending bill.[95] The reason for this rule is organizational and jurisdictional—to assure that the cognizant legislative committees have first had the opportunity to review and approve or reject the program. However, if no point of order is raised, the appropriation act itself becomes the authority to enter into contracts as well as make payments thereunder.

Authorizations

Program authorizations may be *permanent* or *recurring*, and the latter in turn may be *annual* or *multi-year* authorizations depending on whether they cover one or more years. Annual authorizations and, less frequently, multi-year authorizations are provided by annual authorization acts. Permanent authorizations are found in an agency's organic legislation or other specific legislation of a continuing nature. Permanent authorizations generally are for personnel, maintenance, operations, housekeeping, repair, and minor improvement programs, as contrasted with capital improvement or other major programs. For example, the President's budget cites permanent *United States Code* provisions in support of appropriations for "operations and maintenance" for the Army, Navy, Marine Corps, and Air Force and for "operating expenses" of the Atomic Energy Commission. There is also permanent authorization to appropriate for experts and consultants;[96] for advance planning of public works;[97] and for fish research.[98] On the other hand, annual military construction appropriation acts are generally preceded by annual military construction authorization acts.

There has been a growing trend in recent years for Congress to require separate authorization acts as a prerequisite to appropriations. Thus, specific authorization acts now are prescribed for the procurement of military aircraft, missiles, vessels, research and development, combat vehicles, torpedoes, and other weapons.[99] Similar requirements have been extended to certain programs of NASA, AEC, the Coast Guard, and the National Science Foundation.[1] In practice, this has led to annual authorization acts such as Pub. L. 92–84 for AEC, Pub. L. 92–86 for NSF, Pub. L. 92–118 for the Coast Guard, Pub. L. 92–145 for military construction, Pub. L. 91–441 for military procurement, and Pub. L. 92–69 for NASA.

Occasionally, authorization acts may provide *multi-year* authorizations. Pub. L. 91–515 authorizes appropriations for education and health research for fiscal years 1971, 1972, and 1973.

Annual authorization acts often include *general provisions* which have significant impact on procurement. The Armed Forces Appropriation Authorization Act of 1970[2] has provisions restricting independent research and development (IR&D) payments and salaries at Federal contract research centers; directs a GAO defense contracts profit study; and requires registration of former DOD officers and employees employed by defense contractors.[3]

Appropriations

Many programs are authorized but not all are funded, and until they are funded, they remain in limbo. Some are deferred, some reduced, some abandoned. In addition to the intrinsic merits of each program, Congress has to consider the relation of total expenditures to total receipts, with an eye to achieving an overall balance between national needs and resources. It therefore has to make a choice of priorities among competing programs.

Programs can be funded by *annual* appropriations, *multi-year* appropriations, *continuing* appropriations, *interim* appropriations, or *incremental* appropriations. Most normal repetitive programs—operations, maintenance, repair, minor improvements—are funded by *annual* appropriations. This means that a contract must be limited to the bona fide needs of the current fiscal year,[4] though deliveries and payments may be made later.[5] It also means that a contract must be entered into before

[95] See Rule XXI, 2., Rules of the House of Representatives, 92d Cong., 1st Sess.
[96] 5 U.S.C. § 3109 (1970).
[97] 31 U.S.C. § 723 (1970).
[98] 16 U.S.C. § 778c (1970).
[99] *See* 10 U.S.C. § 133 note (1970).

[1] 42 U.S.C. §§ 2460, 2017(a), 1875; 14 U.S.C. § 92 note (1970).
[2] Pub. L. 91–121.
[3] *See* also Pub. L. 91–441.
[4] 35 Comp. Gen. 319 (1955); 31 U.S.C. § 712a (1970).
[5] 20 Comp. Gen. 436 (1941).

the June 30 close of the fiscal year.[6] It is this latter requirement which gives rise to the so-called "contract crunch" at the end of each fiscal year when contracting agencies scurry to spend their remaining funds. Any annual appropriation not committed by that time is forever lost to the contracting agency.

Programs involving capital expenditures, such as for military construction, aircraft, missiles, ships, and research and development, generally are funded by *continuing* appropriations, that is, appropriations expressly made "available until expended." This may be done by a permanent *United States Code* provision,[7] or it may be and usually is done in the appropriation act itself.[8]

In some cases appropriations take the intermediate form of a *multi-year* appropriation, that is, expressly made available, not annually or indefinitely, but for a specified number of years. The DOD Appropriation Act of 1972 [9] makes the research and development appropriation "available for obligation until June 30, 1973." In fact, there is a growing trend to restrict the use of continuing or indefinite appropriations. Thus, some current appropriation acts include provisions against the funds remaining "available for obligation beyond the current fiscal year unless expressly so provided herein." [10] The DOD Appropriation Act makes its title IV procurement appropriations "available for obligation until June 30, 1974" generally, but until June 1, 1976, for shipbuilding. The specific legal effect of such provisions is to overcome the permanent *United States Code* provisions, noted above, making certain appropriations available until expended.

In recent years, Congress has failed to enact most annual appropriations before July 1, the start of each new fiscal year. For example, the DOD Appropriation Act for Fiscal Year 1972 was not approved until December 18, 1971. *Interim* or continuing appropriations, effected by joint resolution, are necessary to tide an agency over the period of delay. A recent example is Pub. L. 92–38, approved July 1, 1971. In effect, these authorize appropriations to continue agency program operations at substantially the same level of activity as under the expired appropriation act, except for modifications reflecting proposed budget requests or action by either house of Congress during the current session.

Appropriations occasionally may be in the form of *incremental* appropriations under which a project is only partially funded, but express contract authorization is given to contract for the entire project. This is particularly relevant to water development [11] or other major projects which take years to accomplish.[12] Annual appropriations sometimes may be used as incremental appropriations in support of programs under which long-term contracts are authorized. Thus "contracts for utility services may be made for periods not exceeding ten years;" [13] contracts for overseas maintenance services for the military may be for five years; [14] and GSA contracts for services on equipment in public buildings may be for three years.[15] DOD research contracts may be for five to ten years though the authority thereunder is a mixed and uncertain blessing because it is granted "subject to availability of appropriations." [16]

One further aspect of appropriation acts should be noted. They contain numerous *general provisions*, many repeated from year to year, which affect procurement either by enhancing, restricting, or shaping contract authority. For example, the DOD Appropriation Act of 1972 contains some 18 general provisions regarding such things as contracting across fiscal years for equipment maintenance and leases, assistance to small business, the "Berry Amendment" requirement for food, cloth, wool, etc., advertising costs of contractors, etc.

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[6] 31 U.S.C. §§ 712a, 718 (1970).

[7] For example, 31 U.S.C. § 649c for military equipment, research and development, and construction and 31 U.S.C. § 682 for public building construction. *See also* 31 U.S.C. § 699 (1970).

[8] For example, under Pub. L. 92–134, the AEC appropriation for plant and capital equipment is specifically "to remain available until expended."

[9] Pub. L. 92–204.

[10] *See* DOD Appropriation Act of 1972, Pub. L. 92–204, § 711; Pub. L. 92–134, § 501.

[11] For example, 43 U.S.C. § 388 (1970).

[12] For example, 40 U.S.C. § 261 (1970) provides that where public buildings are authorized but only partially appropriated for, a contract may nevertheless be entered into for the full cost of the building as authorized by Congress.

[13] 40 U.S.C. § 481(a)(3); *see* 42 U.S.C. § 2204, 50 U.S.C. § 167a and 42 U.S.C. §§ 2201(u), 2204a (1970).

[14] 10 U.S.C. § 2306(g) (1970).

[15] 40 U.S.C. § 490(a) (14) (1970).

[16] 10 U.S.C. § 2352 (1970).

Sources

Statutory provisions may control the source of procurement. They may be general in nature, such as those requiring award to a "responsible bidder" [17] or a regular dealer; [18] preference or a fair share for small business; [19] or preference for Buy American,[20] Federal Prison Industries,[21] or workshops for the blind and handicapped.[22] They may authorize placing orders with other agencies.[23] One is directed toward vessel construction at shipyards on the Pacific Coast.[24] A number of them directly pertain to the in-house *versus* contracting-out problem; for example, provisions directing use of commercial air transport; [25] restricting bakery and laundry facilities; [26] authorizing Government or contractor operation of Government-owned plants; [27] preferring private sources if cheaper; [28] prohibiting operation of Government-owned laboratories by the National Science Foundation; [29] requiring Government printing to be done by the Government Printing Office; [30] requiring 50 percent use of privately owned United States registered vessels for shipment of Government property or purchases.[31]

Accountability and Controls

Statutes in this area include the Budget and Accounting Act of 1921 establishing the General Accounting Office with authority to audit accounts of disbursing officers and settle claims against the Government; [32] provisions requiring binding contracts or agreements, orders placed on other Government agencies, or other documentary evidence of obligations; [33] provisions for apportionment of appropriations; [34] provisions for disciplining employees violating fund controls; [35] provisions limiting advance payments; [36] and provisions requiring various reports to Congress.[37]

Award Procedures

Award procedures are covered primarily by the Armed Services Procurement Act, particularly 10 U.S.C. §§ 2304–6, for DOD, NASA, and the Coast Guard; by title III of the Federal Property and Administrative Services Act, 41 U.S.C. §§ 252–253, for the other executive agencies; and by R.S. § 3709, 41 U.S.C. § 5, for the remaining Government agencies. These laws prescribe award by formal advertising with 17 negotiation exceptions under the Armed Services Procurement Act, 15 under the Federal Property and Administrative Services Act, and four under R.S. § 3709. Procedures for formal advertising are set forth in 10 U.S.C. § 2305 and 41 U.S.C. § 253, and requirements for negotiation solicitations and discussions in 10 U.S.C. § 2304(g).

Contract Forms

The statutes include provisions relating to the form of contracts. Contracting agencies generally may use any form of contract.[38] However, the cost-plus-a-percentage-of-cost contract is prohibited.[39] Cost-plus-fixed-fee and incentive contracts are authorized but discouraged by requirements for a determination and findings,[40] or, in the case of military construction, approval by the Secretary of Defense.[41] Agencies are authorized to use grants

[17] 10 U.S.C. § 2305(b) (1970); *cf.* §2304(g).
[18] Walsh-Healey Act, 41 U.S.C. § 35 (1970).
[19] 15 U.S.C. §§ 631, 637; 10 U.S.C. § 2301 (1970).
[20] 41 U.S.C. § 10a (1970).
[21] 18 U.S.C. § 4124 (1970).
[22] 41 U.S.C. § 48 (1970), Pub. L. 92–28.
[23] 31 U.S.C. § 686 (1970); 42 U.S.C. § 2201 (f) (1970).
[24] 10 U.S.C. § 7302 (1970).
[25] Pub. L. 92–204, § 731.
[26] *Ibid.*, § 721.
[27] 7 U.S.C. § 439; 42 U.S.C. § 2201; 10 U.S.C. §§ 4532, 7343; 50 U.S.C. § 167b (1970).
[28] 31 U.S.C. § 686 (1970).
[29] 42 U.S.C. § 1873(c) (1970).
[30] 44 U.S.C. § 501 (1970).
[31] 46 U.S.C. § 1241(b) (1970).
[32] 31 U.S.C. § § 41, 67(a), 71 (1970).
[33] 31 U.S.C. § 200 (1970).
[34] 31 U.S.C. § 665(c) (1970).
[35] 31 U.S.C. § 665(i) (1970).
[36] 31 U.S.C. § 529; 10 U.S.C. § 2307; 41 U.S.C. § 255 (1970).
[37] 10 U.S.C. §§ 2304, 2357, 2455, and 2662(a) (1970).
[38] 10 U.S.C. § 2306(a); 41 U.S.C. § 254(a) (1970).
[39] 10 U.S.C. § 2306(a); 31 U.S.C. § 254(b); 10 U.S.C. § 7522; 42 U.S.C. §§ 1533, 1592h, and 2205(a); 50 U.S.C. § 1432 (1970).
[40] 10 U.S.C. § 2306(c); 41 U.S.C. § 254(b) (1970).
[41] *See* Pub. L. 91–544.

instead of contracts for basic research with nonprofit institutions.[42] One statute authorizes option contracts for fuel storage.[43] Another requires cost-plus-incentive-fee contracts for foreign assistance contracts.[44]

Contract Pricing and Costs

In 1897 Congress, provoked by the high prices the Navy was paying for armor plate, decreed that it should be $300 a ton.[45] The companies simply refused to do business on this basis and Congress soon gave up.[46] Congress was merely repeating history. Some 1600 years before, the *Edict of Diocletian* had fixed the price of military boots at 100 denarii, but "the reaction to these 4th century regulations according to the historian Lactantius was the same as today—merchants withheld goods from the market." [47]

Nevertheless, there are a few statutes which impose price controls in limited areas of Government procurement. Thus, rates for transportation of military supplies and for advertising cannot exceed commercial rates.[48] Rental rates for buildings cannot exceed 15 percent of their fair value.[49] Under some statutes prices have to be based on Government production costs of like items.[50]

Statutes also limit fees on CPFF research contracts to 15 percent of the estimated cost; on other CPFF contracts to ten percent; and on architect-engineer contracts to six percent of the estimated cost of the construction project.[51] Probably the most significant step in the direction of fair pricing is the Truth in Negotiations Act, under which cost or pricing data must be submitted before entering into negotiated contracts and subcontracts.[52]

Statutes also limit certain costs payable under Government contracts. DOD appropriations may not be used to pay certain advertising costs of contractors.[53] Restrictions are imposed on reimbursement of independent research and development and bid and proposal costs under military contracts.[54] The AEC may not reimburse contractors for Federal income tax payments.[55] Finally, to assure uniformity in the identification and allocation of cost factors under Government contracts, Pub. L. 91–379, § 103, established the Cost Accounting Standards Board and authorized it to promulgate cost accounting standards which must be used by defense contractors and subcontractors.

Profit Controls

"Profiteering and waste has accompanied every American war from the Revolution to date." [56] General Washington violently condemned war profiteering and wanted to hang the "man who can 'build his greatness upon his country's ruin.' " [57] From time to time Congress reacted, investigated, found fault, and took action; for example, to require competition, impose price ceilings, and minimize bribery, corruption, collusion, and conflicts of interest.

But not until World War I did Congress do anything specifically directed at profits as such. Its first effort was in the form of an *excess-profit tax*.[58] However, this did not prove effective.[59]

Accordingly, with the revival of shipbuilding in the 1930's, Congress took a new tack in the form of a 10-percent *profit limitation* on naval aircraft and shipbuilding contracts.[60] Later, this was extended to Army aircraft and Maritime Commission shipbuilding.[61] This operated much like a cost-plus-percentage-of-cost contract in eliminating any incentive to reduce

[42] 42 U.S.C. § 1891 (1970).
[43] 10 U.S.C. § 2388 (1970).
[44] 22 U.S.C. § 2351(b) (8) (1970).
[45] 29 Stat. 648 (1898).
[46] 31 Stat. 684, 707 (1900).
[47] Caine, *War Contracts Negotiation and Termination*, p. 7 (1945).
[48] 10 U.S.C. § 2631; 44 U.S.C. § 3703 (1970).
[49] 40 U.S.C. §§ 278a-c (1970).
[50] 33 U.S.C. §§ 624, 630; 42 U.S.C. § 2295 (1970).
[51] 10 U.S.C. § 2306(d); 41 U.S.C. § 254(b). *See also* 10 U.S.C. §§ 4540, 7212, and 9540 (1970).
[52] 10 U.S.C. § 2306(f) (1970).
[53] For example, Pub. L. 91-668, § 834.
[54] For example, Pub. L. 91-444, § 203.
[55] 42 U.S.C. § 2205(b) (1970).
[56] Note 47, *supra*, at 12.
[57] *Ibid.*, at 13.
[58] 39 Stat. 1000 (1917); 40 Stat. 300 (1917); 40 Stat. 1057 (1919).
[59] *Nye Committee Report*, S. Rep. No. 944, 74th Cong., 2d Sess., Parts 4, 5, and 7 (1935, 1936).
[60] Vinson-Trammell Act of 1934, 10 U.S.C. §§ 2382, 7300 (1970).
[61] Merchant Marine Act of 1936, 46 U.S.C. § 1155 (1970).

costs. With World War II imminent, the excess profits tax was reinstated and contracts subject to the tax were exempted from Vinson-Trammell.[62]

During the early 1940's, Congress considered various alternatives, including one that the services had begun to use in the form of contract *renegotiation.* This led to the Renegotiation Act of 1942,[63] the Renegotiation Act of 1943,[64] the Renegotiation Act of 1948,[65] and finally, after a brief revival of the excess profits tax,[66] the current Renegotiation Act of 1951.[67] Although originally short-term, the Act of 1951 has been repeatedly extended, the last time to June 30, 1973, by Pub. L. 92–41. Under the current act the Renegotiation Board makes a determination of excess profits in the light of a contractor's individual performance and circumstances and on the basis of his total renegotiable business for each year. Pub. L. 92–41 substituted the Court of Claims for the tax court as the forum for appeal from determinations of excess profits by the Renegotiation Board.

Contract Administration

Numerous statutes govern such miscellaneous matters pertaining to contract administration as the following:

Contract bid and performance bonds—Miller Act, 40 U.S.C. § 270a, 10 U.S.C. § 2381

Contract financing, 10 U.S.C. § 2307, 41 U.S.C. § 255, 10 U.S.C. § 7364, 10 U.S.C. § 7521, 31 U.S.C. § 203, 31 U.S.C. § 529, 41 U.S.C. § 15, 42 U.S.C. §§ 1961c–2, 42 U.S.C. § 3764

Access to records, 10 U.S.C. § 2306(f), 10 U.S.C. § 2313(a)(b), 41 U.S.C. § 254(b)-(c), 41 U.S.C. § 53, 42 U.S.C. § 2206, 50 U.S.C. § 1433, 50 App. U.S.C. § 1215(e), 50 App. U.S.C. § 2168(j)

Subcontracts, 10 U.S.C. § 2306(e),(f), 41 U.S.C. § 254(b), 41 U.S.C. § 10b, 41 U.S.C. § 51

Catastrophic accidents—Price-Anderson Act, 42 U.S.C. § 2210, 10 U.S.C. § 2354, 50 U.S.C. § 1431

Relief from liquidated damages, 10 U.S.C. § 2312, 41 U.S.C. § 256a

Patent policy, authorization and consent, 28 U.S.C. § 1498(a), 10 U.S.C. § 2386, 42 U.S.C. § 2182, 42 U.S.C. § 2457, 42 U.S.C. § 2473(b)(3)

Government property and facilities, 10 U.S.C. § 2353, 10 U.S.C. § 4505, 10 U.S.C. § 9505, 40 U.S.C. § 484, 42 U.S.C. § 241(h), 42 U.S.C. §§ 1857b–1(a)(2), 42 U.S.C. § 2061(b), 42 U.S.C. § 2201(v)(A), 42 U.S.C. § 3253(b)(3)

Amendments without consideration, 50 U.S.C. § 1431

Contract settlement, 41 U.S.C. § 101.

Remedies: Suits, Disputes Clauses, Bid Protests

One of the traditions carried over from England was the immunity of the sovereign from suit.[68] Accordingly, in the early days, contractors had no access to the courts and their only recourse to enforce their contract rights was by private bill in Congress. To relieve itself of this burden and to assure due process to contractors, Congress established the Court of Claims in 1855,[69] and later, under what eventually became the Tucker Act of 1887,[70] authorized suit by contractors.[71] It has also authorized suit in the District Court for claims for up to $10,000.[72]

About the same time, contract disputes clauses evolved and these proved generally acceptable until the Supreme Court gave them a literal interpretation in *United States* v. *Moorman,*[73] and *United States* v. *Wunderlich.*[74] Congress then passed the Wunderlich Act [75] which

[62] 54 Stat. 974 (1940).
[63] § 403, 56 Stat. 245 (1942).
[64] § 701, 58 Stat. 21, 78 (1944).
[65] §3, 62 Stat. 259 (1948).
[66] 64 Stat. 1137 (1951).
[67] 50 App. U.S.C. § 1211 (1970).
[68] *United States* v. *Shaw,* 309 U.S. 495 (1940); *Kawananakoa* v. *Polyblank,* 205 U.S. 349 (1907).
[69] 10 Stat. 612 (1855).
[70] 24 Stat. 505 (1887).
[71] 28 U.S.C. § 1491 (1970).
[72] 28 U.S.C. § 1346 (1970).
[73] 338 U.S. 457 (1950).
[74] 342 U.S. 98 (1951).

barred finality of administrative determinations of law and provided exceptions to the finality of administrative determinations of fact. Another statute provided authority to subpoena witnesses where necessary for the hearing of an appeal under the disputes clause.[76]

Under the provisions of 31 U.S.C. §§ 67 and 71, the Comptroller General has authority to settle the accounts of disbursing officers, and by virtue of this authority he has exercised jurisdiction over bid protests. This was generally the only avenue of relief available. Under the rationale of *Perkins* v. *Lukens Steel Co.*,[77] it was the general rule for a long time that companies without a contract had no standing to sue, though some exceptions were recognized, for example, debarment.[78] However, the Administrative Procedure Act provides for judicial review of adverse agency actions.[79] Under this statute and for other reasons, it was held in 1970 that bidders have standing to sue.[80]

Socioeconomic Objectives

As noted in the beginning of this part, probably the most significant development in the statutory law of Government contracts has been the use of contracts to achieve socioeconomic goals collateral and, in a sense, irrelevant to the hardware or other end items being procured. In this respect, Government contracts carry a burden which puts them in a class by themselves. They have no counterpart in commercial business.

One of the reasons for this use of Government contracts was that during the Great Depression they provided a more certain legal vehicle for regulation by the Government of areas of the general welfare that once were thought to be the exclusive domain of the States. At first, the Government had tried to provide some form of economic relief in reliance on its taxation and interstate commerce powers, but the Supreme Court ruled these efforts unconstitutional.[81] Today, following the Roosevelt constitutional revolution of the 1930's, a more expansive view of Federal authority prevails, and the Government can pursue these goals directly.[82] There still remains the prevailing belief, based on practical considerations, that a Government contract is a powerful motivator, partaking more of the carrot than the stick, and therefore better calculated to win acceptance of social change.

At any rate, beginning in 1844,[83] Government contracts have been used to serve many interests and beneficiaries other than the contractor, to wit, big business, small business, materialmen, laborers, consumers, every race, color, creed, origin, sex, the old, the young, apprentices, prisoners, the blind, animals, safety, health, distressed areas, hardcore areas, disadvantaged enterprises, gold flow, the environment, the technological base, the production base, and geographical distribution. For example:

- Buy American, 41 U.S.C. § 10a–d, 46 U.S.C. § 1213, 22 U.S.C. § 2354; the Berry Amendment, Pub. L. 92–204, § 724
- Cargo preference, 10 U.S.C. § 2631, 46 U.S.C. § 1241(b)
- Small business, 15 U.S.C. § 631, 10 U.S.C. § 2301, 23 U.S.C. § 304, 41 U.S.C. § 252(b)
- Distressed areas, 42 U.S.C. § 2642, 73 Stat. 382
- Sec. 8a contracts for disadvantaged enterprises, 15 U.S.C. § 637(a)
- Blind-made products, 41 U.S.C. § 48
- Payment bonds, Miller Act, 40 U.S.C. § 270a
- Prison-made products, 18 U.S.C. § 4124
- Convict labor, 18 U.S.C. § 436
- Child labor, 41 U.S.C. § 35(d)
- Wages and hours, Davis-Bacon Act, 40 U.S.C. § 276a; Walsh-Healey Act, 41 U.S.C. § 35; Contract Work Hours Act,

[76] 41 U.S.C. §§ 321, 322 (1970).
[76] 5 U.S.C. § 304 (1970).
[77] 310 U.S. 113 (1940).
[78] *Gonzalez* v. *Freeman*, 334 F.2d 570 (D.C. Cir. 1964).
[79] 5 U.S.C. §§ 702, 704 (1970).
[80] *Scanwell Laboratories, Inc.* v. *Thomas*, 424 F.2d 859 (D.C. Cir. 1970).

[81] *United States* v. *Butler*, 297 U.S. 1 (1936); *A.L.A. Schechter Poultry Corp.* v. *United States*, 295 U.S. 495 (1935); *Carter* v. *Carter Coal Co.*, 298 U.S. 238 (1936). *Cf. Perkins* v. *Lukens Steel Co.*, 310 U.S. 113 (1940), where the court said that "the Government enjoys unrestricted power . . . to fix the terms and conditions upon which it will make needed purchases."
[82] *See Steward Machine Co.* v. *Davis*, 301 U.S. 548 (1937), *Labor Board* v. *Jones & Laughlin*, 301 U.S. 1 (1937), and *United States* v. *Darby*, 312 U.S. 100 (1941), upholding the Social Security Act, National Labor Relations Act, and Fair Labor Standards Act.
[83] *See* Van Cleve, *The Use of Federal Procurement to Achieve National Goals*, Wisc. L. Rev. (1961) 566, 578.

40 U.S.C. § 327; Service Contract Act, 41 U.S.C. § 351; Copeland Anti-Kickback Act, 18 U.S.C. § 874, 40 U.S.C. § 276c; Fair Labor Standards Act, 29 U.S.C. § 206(e)

Equal employment opportunity, Executive Order No. 11246 (1965)

Price and wage controls, Economic Stabilization Act of 1970, 12 U.S.C. § 1904 note

Environmental protection, 42 U.S.C. § 1857f; Pub. L. 92–500; Pub. L. 92–574.

Safety standards, 40 U.S.C. § 327, 40 U.S.C. § 701; Occupational Safety and Health Act of 1970, 5 U.S.C. § 5108

Humane slaughter of livestock, 7 U.S.C. 1901

Gold flow, 7 U.S.C. §§ 1704, 1705; 22 U.S.C. §§ 295, 2362

Geographic dispersion, 49 U.S.C. § 1638; Pub. L. 90–119, § 4; 50 U.S.C. App. § 2062.

In the absence of statutes such as the above and in the face of competitive bid and other statutory requirements, the Comptroller General held in the 1930's that contracting agencies were not authorized to encumber Government contracts with socioeconomic objectives restricting competition and increasing contract costs, no matter how worthy the purpose and desperate the need.[84] Currently a more tolerant view of executive authority by the Comptroller General is indicated by his acquiescence in programs, such as for Equal Employment Opportunity, Labor Surplus Areas, and Minority Enterprise, which originated in executive action without express statutory authorization.[85]

Conflicts of Interest

In 1809, Congress enacted an "Officials-Not-To-Benefit" law which completely barred members of Congress from sharing in Government contracts.[86] Since then, it has adopted other measures—criminal penalties, debarment, contract forfeiture, contract penalties, double damages, restrictions—directed at Government contractors, employees, and others and designed to ensure honesty and public confidence in Government contracting. Some of the ways and means adopted are indicated below:

Competitive Advertising

For example, R.S. § 3709. The statutes favor a wide-open, publicly conducted, mechanical process for the making of awards based solely on an objective standard such as price.

Exclusion From Government Contracts

"Officials-Not-To-Benefit," 18 U.S.C. § 431, 41 U.S.C. § 22

Government employees barred from certain Government contracts, 18 U.S.C. §§ 437, 440, 442; 33 U.S.C. § 725. Even in the absence of an express statute, there is a general rule of policy against employees contracting with the Government which, however, is subject to exceptions (Comp. Gen. Dec. B–173988, Nov. 22, 1971).

Non-regular dealers, Walsh-Healey Act, 41 U.S.C. § 35

Brokerage of Contracts

No contingent fees, 10 U.S.C. § 2306(b), 41 U.S.C. § 254(a)

Assignment of contracts, 41 U.S.C. § 15

Bribery and Fraud

Generally, 18 U.S.C. § 201

Anti-gratuities, 10 U.S.C. § 2207

Dual compensation, 18 U.S.C. §§ 203, 209

Anti-kickback on subcontracts, 41 U.S.C. § 51

Anti-kickback of wages, 18 U.S.C. § 874

Defective defense material production, 18 U.S.C. §§ 2154, 2156

Antitrust and Collusion

10 U.S.C. § 2305(d), 41 U.S.C. § 252(d)
40 U.S.C. § 488, 46 U.S.C. § 1224

Special Civil Remedies

Debarment, Walsh-Healey Act, 41 U.S.C.

[84] *See* 18 Comp. Gen. 285 (1938), which invalidated contract clauses prescribing wages, hours, fair labor practices, Hire American, commodity price supports, etc.

[85] Executive Order No. 8802 (1941); Defense Manpower Policy No. 4; Presidential Memorandum, Dec. 5, 1969.

[86] 18 U.S.C. § 431 (1970).

§ 37; Buy American Act, 41 U.S.C. § 10b

Cancellation of contracts, 18 U.S.C. § 218, 10 U.S.C. § 2207

Double or special damages, the False Claims Act, 31 U.S.C. § 231; 18 U.S.C. § 287; 10 U.S.C. § 2207; 40 U.S.C. § 328; 41 U.S.C. § 36; 41 U.S.C. § 352 (c)

Conflicts of Interest

18 U.S.C. §§ 203, 205, 207, 208; 50 U.S.C. § 1436; 42 U.S.C. § 2462

Political Contribution by Contractors

18 U.S.C. § 611, as amended by Pub. L. 92–225.

Regulations

Although heads of agencies have implied authority to issue regulations for the governance of programs committed to their administration, Congress generally has conferred such authority by express statute. Thus, the provisions of 5 U.S.C. § 301 generally grant to the head of an executive department or military department authority to issue regulations for his department. There are also numerous other specific statutes. Charter acts of many agencies expressly confer authority to issue regulations.[87] Under 10 U.S.C. § 2202, the Secretary of Defense is required to issue regulations as a prerequisite to obligation of funds for procuring supplies.[88] In the main, this requirement is satisfied by the Armed Services Procurement Regulation. Under the Federal Property and Administrative Services Act, the President, the General Services Administrator, and the heads of agencies are authorized to issue regulations covering different aspects of Government procurement.[89] The Federal Procurement Regulations are issued under this authority and are controlling on other agencies with certain exceptions.[90] Also agencies having socio-economic responsibilities may be authorized to issue regulations affecting the operating agencies.[91]

Under the Administrative Procedure Act, procurement regulations, with certain exceptions, must be published in the *Federal Register* before they become legally binding on the public,[92] though it is arguable that contractors would get the equivalent of binding notice when regulatory requirements prescribing contract clauses or award procedures are incorporated in procurement solicitations. On the other hand, by virtue of a specific exception for "grants" and "contracts," procurement regulations are not subject to the rulemaking requirements of the Administrative Procedure Act.[93]

Defense Emergencies

A number of statutes are addressed to war and defense emergencies, the most important including the following:

Negotiation exceptions, 10 U.S.C. § 2304(a)(1), 41 U.S.C. § 252(c)(1), 10 U.S.C. § 2304(a)(16)

Defense Production Act, 50 U.S.C. App. § 2062, covering material priorities, guaranteed loans, strategic and critical materials, subsidies, etc.

Mandatory orders and industrial mobilization, 10 U.S.C. §§ 4501, 4502, 9501, 9502; 50 U.S.C. App. § 468

Strategic and critical materials, 50 U.S.C. §§ 98–98b; 50 U.S.C. App. § 2071; 50 U.S.C. App. § 2093(g)

Suspension of labor requirements, 40 U.S.C. § 276a–5; 41 U.S.C. § 40

[87] The AEC is an example. *See* 42 U.S.C. § 2201(p) (1970).

[88] *See also* 10 U.S.C. § 2381 (1970).

[89] 40 U.S.C. §§ 481, 486(a)(c) (1970).

[90] For example, 40 U.S.C. §§ 474, 481 and 41 U.S.C. § 252(a) (1970).

[91] For example, the Department of Labor under the Davis-Bacon Act, 40 U.S.C. § 276c, the Contract Work Hours and Safety Standards Act, 40 U.S.C. § 331, the Walsh-Healey Act, 41 U.S.C. § 38, the Contract Services Act, 41 U.S.C. § 353; and the President's Committee under the Blind-Made Products Act, 41 U.S.C. § 47 (1970).

[92] 5 U.S.C. § 552 (1970).

[93] 5 U.S.C. § 553 (1970).

Contract Settlement Act, 41 U.S.C. §§ 101–125.

Summary

In sum, Government procurements start with statutes and are attended by statutes every step of the way from programming and award through administration and performance to payment, enforcement, and profit renegotiation. Even so, they leave many details to be supplied by Executive orders, agency regulations, and agency action.

EXECUTIVE ORDERS AND DIRECTIVES

The President's authority under the Constitution is both direct and derivative. As Commander-in-Chief, and primate for foreign affairs, his authority comes straight from the Constitution, though checked and balanced by his need to go to Congress for appropriations and approval of treaties and war.[94] But as Chief Executive Officer, charged with the duty to "take care that the laws be faithfully executed," [95] his authority is generally "the creation of statutory law, with duties and powers prescribed and limited by that law." [96] His direct authority is also limited; "[I]t must be found in some provision of the Constitution." [97] However, in wartime the President's authority as Commander-in-Chief expands and he can "remove mountains," as Lincoln did with his Emancipation Proclamation, and Roosevelt with his Non-Discrimination Directive.[98]

Legislative delegation of authority to the President may be *express;* for example, where Congress wishes to give the President authority to suspend the normal operation of a law as President Nixon recently did under the Davis-Bacon Act; [99] where Congress wishes to allow the President to extend application of a law as under the Renegotiation Act of 1951; [1] or where Congress wishes to make a law operable only at the discretion and subject to regulation of the President, as under the extraordinary authority provisions of Pub. L. 85–804.[2]

However, the President does not need express statutory authority. As Chief Executive Officer under the Constitution, he has *inherent* authority to direct and control his subordinate agencies.[3] Thus, although the Buy American Act provides for exemption from its requirements upon findings of unreasonable prices, etc., by "the head of a department," the President may lay down guidelines for making such findings.[4]

Many executive controls impacting on procurement are *informal,* effected through meetings, discussions, budget reviews, legislative program reviews, and the network of policy dissemination provided by his Cabinet Officers, the Executive Office of the President, and the Office of Management and Budget. Other controls are *formal,* being promulgated as Executive orders, proclamations, reorganization plans, and Presidential memorandums. When so issued, they may directly affect the general public. For example, Executive orders are generally said to have the force and effect of statute.[5]

Executive actions like statutes serve many purposes in many ways, as indicated below.

Organizational

The President's powers have been used to establish new agencies such as the Department of Health, Education, and Welfare,[6] the Veterans Administration,[7] the Environmental

[94] U.S. Const., art. I, § 8, cl. 10, § 9; art. II, § 2.
[95] U.S. Const., art. II, §§ 1 and 3.
[96] *The Floyd Acceptances,* 74 U.S. 666, 675 (1868).
[97] *Youngstown Sheet & Tube Co.* v. *Sawyer,* 343 U.S. 579 (1952), where the court held that in peacetime President Truman could not take it upon himself to seize the steel mills during a strike, no matter what the prejudice to the country's national defense and general welfare.
[98] Exec. Order No. 8802 (1941).
[99] 40 U.S.C. § 276a–5 (1970).
[1] 50 U.S.C. App. § 1212(a) (1970).
[2] 50 U.S.C. § 1431 (1970).
[3] *See Congress Construction Corp.* v. *United States,* 161 Ct. Cl. 50 (1963) and cases cited.
[4] Exec. Order No. 10582 (1954).
[5] *Farkas* v. *Texas Instruments, Inc.,* 375 F.2d 629, 632 (5th Cir. 1967).
[6] Reorganization Plan No. 1, 1953.
[7] Exec. Order No. 5398 (1930).

Protection Agency,[8] the President's Committee on Equal Employment Opportunity,[9] the Defense Production Administration,[10] the War Production Board,[11] the War Industries Board,[12] and the Office of Emergency Preparedness.[13] They also have been used to reallocate functions and responsibilities. By Exec. Order No. 11246 (1965), the Department of Labor took over responsibilities for equal employment opportunity from the President's Committee, and by Reorganization Plan No. 14, it was given responsibility for labor standards enforcement.

Supply Procurement, Centralization, and Coordination

President Taft established the General Supply Committee and required Government-wide procurement under general supply schedules.[14] President Roosevelt transferred this to the Procurement Division of the Department of the Treasury and gave it broader responsibility.[15]

Implementation of Specific Statutes

As noted above, Executive orders often implement specific statutes; for example, authorization of departments under title II of the first War Powers Act, 1941, Exec. Order No. 10210 (1951), and under Pub. L. 85–804, Exec. Order No. 10789 (1958); requiring reporting of title II contracts, Exec. Order No. 9296 (1943); designating agencies under the Renegotiation Act of 1951, Exec. Order No. 10260 (1951), No. 10924 (1951), No. 10299 (1951), and No. 10567 (1954); guidelines under the Buy American Act, Exec. Order No. 10582, (1954); suspension of the Davis-Bacon Act, Presidential Proclamation, February 23, 1971; authorization of loan guarantees, Exec. Order No. 11062 (1962) and No. 10490 (1953); regulation of defense materials procurement and supply, Exec. Order No. 10281 (1951); and designating agencies to exercise no-setoff authority under the Assignment of Claims Act, Exec. Order No. 10824 and No. 10840 (1959).

Socioeconomic Objectives

Possibly the first exercise of Presidential authority to use the procurement process to achieve collateral national goals was in 1905 when President Taft issued Exec. Order No. 325–A prohibiting employment of convict labor under Government contracts. The one having the greatest social significance was Exec. Order No. 8802 (1941), prohibiting discrimination in employment on account of race, creed, color, or national origin. The goal of nondiscrimination has been a part of Government contracting ever since. Currently known as Equal Employment Opportunity under Exec. Order No. 11246 (1965), nondiscrimination has been extended to include age, Exec. Order No. 11141 (1964), and sex, Exec. Order No. 11246 as amended October 1968.

Executive actions also have been taken to use Government contracts to promote environmental protection; [16] promote wage and price stabilization; [17] foster minority enterprise by section 8A contracting under the Small Business Act; [18] relieve depressed areas of high unemployment; [19] and promote employment of veterans.[20]

Patent Policy

The Presidential Memorandum of October 10, 1963, was promulgated to establish a uniform patent policy under Government contracts except as otherwise required by express statutes such as 42 U.S.C. §§ 2457, 2182, and 1954b.

[8] Reorganization Plan No. 3, 1970.
[9] Exec. Order No. 10925 (1961).
[10] Exec. Order No. 10200 (1951).
[11] Exec. Order No. 9024 (1942).
[12] Exec. Order No. 2868 (1918).
[13] Reorganization Plan No. 1, 1958.
[14] Exec. Order No. 1070 (1909).
[15] Exec. Order No. 6166 (1933).
[16] Exec. Order No. 11514 (1970).
[17] Exec. Order No. 11615 (1971), No. 11627 (1971), and No. 11640 (1972).
[18] Exec. Order No. 11518 (1970).
[19] Defense Manpower Policy 4, Oct. 16, 1967.
[20] Exec. Order No. 11598, (June 1971).

Summary

As indicated, Presidential actions in the form of Executive orders, proclamations, reorganization plans, etc., supplement Government procurement statutes by adding details of policy or procedure in areas left open by statutes or areas specifically authorized by statute to be changed by executive action. They thus become a part of the composite of law governing Government procurement.

PROCUREMENT REGULATIONS

While the Constitution, statutes, Executive orders, and the common law set the basic legal framework for Government procurement, Government procurement regulations have the greatest day-to-day impact on procurement operations. The regulations not only carry out express mandates of statutes,[21] but also set forth a great many policies and procedures not expressly dictated by Congress.[22] The regulations also specify contract forms and contract clauses, thereby predetermining many of the terms and conditions of individual Government contracts. Procurement regulations, however, must always derive from express or implied authority conferred by Congress and cannot exceed constitutional or statutory limitations.

The authority to issue regulations, and the relationship of the publication and rulemaking requirements of the Administrative Procedure Act to procurement regulations, are discussed at pages 49–51 of this appendix. Publication of adopted regulations in the *Federal Register* is constructive notice to those subject to or affected by them.[23]

When issued in accordance with the statutes, procurement regulations have been held by the courts to have the force and effect of law and as such may be binding on contractors as well as the Government.[24]

A general description of the outstanding procurement regulations is set forth in Part A, Chapter 4, of this report.

[21] *See*, for example, the Officials-Not-To-Benefit clause, ASPR 7–103.19, which sets forth the express requirement of 41 U.S.C. § 22 (1970).

[22] *See*, for example, the Inspection and Title and Risk of Loss clauses, ASPR 7–103.5 and 7–103.6, which have no express statutory basis.

[23] 5 U.S.C. § 552(a)(1) and 44 U.S.C. § 1507 (1970).

[24] *G. L. Christian & Associates* v. *United States*, 160 Ct. Cl. 1, 320 F.2d 418, *reh. denied*, 160 Ct. Cl. 58, 320 F.2d 345, *cert. denied*, 375 U.S. 954 (1963), *reh. denied*, 376 U.S. 929, 377 U.S. 1010 (1964). For an analysis of the law as it has developed since the Christian case, see Braude and Lane, *Modern Insights on Validity and Force and Effect of Procurement Regulation—A New Slant on Standing and the Christian Doctrine*, 31 Fed. B.J. 99.

APPENDIX B

RECOMMENDATIONS

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.

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 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.

APPENDIX C

Acronyms

A–E	Architect-Engineer
AEC	Atomic Energy Commission
APA	Administrative Procedure Act
ASBCA	Armed Services Board of Contract Appeals
ASPA	Armed Services Procurement Act
ASPR	Armed Services Procurement Regulation
BCA	Board of Contract Appeals
CFR	Code of Federal Regulations
CPFF	Cost-plus-a-fixed-fee
CPIF	Cost-plus-incentive-fee
CWHSSA	Contract Work Hours and Safety Standards Act
DOD	Department of Defense
DOT	Department of Transportation
F.Cas.	Federal Cases
FPASA	Federal Property and Administrative Services Act
FPR	Federal Procurement Regulations
GAO	General Accounting Office
GSA	General Services Administration
HEW	Department of Health, Education, and Welfare
HUD	Department of Housing and Urban Development
NASA	National Aeronautics and Space Administration
NASA PR	National Aeronautics and Space Administration Procurement Regulations
OMB	Office of Management and Budget
Pet.	Peters
Pub. L.	Public Law
R&D	Research and Development
R.S.	U.S. Revised Statutes
SBA	Small Business Administration
U.C.C.	Uniform Commercial Code
U.S.	United States Supreme Court Reports
U.S.C.	United States Code
U.S.C.A.	United States Code Annotated
VA	Veterans Administration